KEITH BRADFORD, *et al*.,	*	IN THE
	*	
Plaintiffs/Appellees,	*	COURT OF SPECIAL APPEALS
v.	*	
	*	OF
MARYLAND STATE BOARD OF EDUCATION,	*	MARYLAND
	*	
Defendant/Appellant.	*	CSA-REG-0201-2022
	*	

* *

PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S NOTICE OF APPEAL AND REQUEST FOR A HEARING

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

On March 7, 2019, Plaintiffs-Appellees Baltimore City School children and their parents brought a Petition for Further Relief in the Circuit Court for Baltimore City alleging that the State of Maryland has underfunded Baltimore City schools, robbing students of an adequate education in violation of Article VIII of the Maryland State Constitution. The Petition is brought under a 1996 Consent Decree, which Defendant continues to violate, and the Circuit Court's declarations in 1996, 2000, 2002, and 2004, that the State is providing insufficient funding to Baltimore City public schools. Defendant-Appellant Maryland State Board of Education has repeatedly sought to dismiss Plaintiffs' claims without success, most recently in November of 2021. Following the Circuit Court's denial of its second Motion to Dismiss in as many years, Defendant noticed this appeal, recycling the same meritless arguments that the Court of Appeals has already rejected in prior proceedings in this case. Pursuant to Maryland Rule 8-602(b)(1), Plaintiffs-Appellees move to dismiss Defendant-Appellant's appeal as an improper attempt to forestall Plaintiffs' right to relief from the State's decades-old constitutional violation.

On November 10, 2021, after fact discovery was completed and expert reports exchanged, and right as the Parties entered the final stages of expert discovery, Defendant filed a Motion to Dismiss Plaintiffs' Petition for Further Relief and Motion to Dissolve November 26, 1996 Consent Decree ("2021 Motion to Dismiss"), asserting—for the second time since 2019—that the Circuit Court lacks subject-matter jurisdiction over the 1996 Consent Decree. *Compare* Exhibit A,[1] 2021 Mot. to Dismiss (Dkt. 183/0) (Nov. 10, 2021), at 2 ("Not only does the enactment of the Blueprint and the Built to Learn Act render the petition moot, their enactment also renders the Consent Decree moot."), *with* Exhibit B, Mot. to Dismiss Pls.' Pet. for Further Relief (Dkt. 105/0) (June 19, 2019), at 40-51 (arguing the Consent Decree is a final judgment and that the Court does not

[1] All exhibits are attached to the Affidavit of Cara McClellan, filed along with this motion.

have continuing jurisdiction over the Petition). On both occasions, Chief Judge Audrey Carrion denied the Defendant's motions. *See* Exhibit C, Mem. Op. & Order (Dkt. 105/8) (Jan. 16, 2020) (denying First Motion to Dismiss); Exhibit D, Order (Dkt. 183/3) (Mar. 7, 2022) (denying Second Motion to dismiss). Defendant's motions asked the Circuit Court to accept as fact that newly-enacted and not-yet-funded legislation mooted Plaintiffs' claim, deprived the Court of jurisdiction, and justified the dismissal of the action and the dissolution of the Consent Decree.

Defendant now seeks to appeal the Circuit Court's most recent order denying its 2021 motion to dismiss, arguing that this denial constituted an appealable order under § 12-303 because, in the process of refusing to dismiss the case, the Circuit Court refused to dissolve the 1996 Consent Decree. Md. Code Ann., Cts. & Jud. Pro. § 12-303(3)(ii). But, however styled, Defendant is in fact simply seeking to appeal the Circuit Court's order that it retains jurisdiction over the case. As the Court of Appeals has repeatedly made clear, "a trial court's order denying a challenge to its jurisdiction is a nonappealable interlocutory order." *Gruber v. Gruber,* 369 Md. 540, 547, 801 A.2d 1013, 1017 (2002). Defendant's attempt to manufacture a basis for appeal by styling its motion to dismiss for lack of subject matter jurisdiction as a request to dissolve the Consent Decree should be rejected as "nothing but an attempt to relitigate an interlocutory ruling" and "avoid the non-appealable status of an unfavorable ruling." *Sec. Admin. Servs. v. Balt. Gas & Elec. Co.*, 62 Md. App. 50, 53, 488 A.2d 208, 210 (1985) (dismissing the defendant's attempt to appeal a motion for summary judgment where defendant asserted that the order was an appealable denial of injunctive relief). Indeed, Defendant's recent motion to stay proceedings (filed the day the response was due to its similar motion in the trial court) makes plain that the "subject matter … of the appeal" is "whether the circuit court has authority to continue adjudicating this case." Def. Mot. to Stay at 16. *Accord* Exhibit P (motion to stay in Circuit Court).

Section 12-203 is not designed to allow serial appeals by a party under a Consent Decree on the theory that retaining jurisdiction to enforce the decree constitutes a refusal to dissolve the decree. *Liddell v. Bd. of Educ. of City of St. Louis*, 693 F.2d 721, 727 (8th Cir. 1981) (admonishing against "filing premature and piecemeal interlocutory appeals" where the court retained jurisdiction to enforce a consent decree). The Maryland Court of Appeals has recognized that "[t]he rule that there is no right to appeal from a consent decree is a subset of the broader principles underlying the right to appeal." *Suter v. Stuckey,* 402 Md. 211, 224, 935 A.2d 731, 739 (2007). The nature of a consent judgment precludes appeal because "[c]onsent judgments 'are essentially agreements entered into by the parties which must be endorsed by the court.'" *Id.* at 225, A.2d at 739 (quoting *Chernick v. Chernick,* 327 Md. 470, 478, 610 A.2d 770, 774 (1992) (citing *Local Number 93 v. City of Cleveland,* 478 U.S. 501, 519 (1986)).

Finally, Defendant's argument is foreclosed by the law of the case. In this very same lawsuit, this Court already explained that a mere allegation that an interlocutory order exceeded the subject matter jurisdiction of the court is not an exception to the final judgment rule and therefore not an appealable order. *Md. State Bd. of Educ. v. Bradford*, 387 Md. 353, 384, 875 A.2d 703, 721 (2005). ("The mere allegation that a clearly interlocutory order is jurisdictionally deficient should not serve to halt proceedings in the trial court while an appellate court considers whether the allegation has merit."). A contrary approach would be wholly inconsistent with the very purpose of the final judgment rule, which is to avoid piecemeal appeals that create inefficiencies in both the appellate and trial courts." *Id.* For these reasons, and as detailed further below, Defendant's appeal should be dismissed.

PROCEDURAL BACKGROUND

On November 26, 1996, the parties in this case entered into a consolidated Consent Decree. Exhibit E, Consent Decree (Dkt. 1-77) (Nov. 26, 1996) ("Consent Decree") that sought to bring the State in compliance with Article VIII of the Maryland Constitution through additional funding for educational programming and facilities. As relevant to this appeal, paragraph 68 provided that the decree would remain in effect through June 30, 2002, unless the court extended the term on timely motion of a party and a showing of good cause. *Id.* ¶ 68. Paragraph 69 provided that the court would retain continuing jurisdiction during the term of the decree to monitor and enforce compliance with it and that any party could seek to enforce its terms. *Id.* ¶ 69. That paragraph also stated that the court retained jurisdiction to resolve any disputes that arose under the decree. *Id.*

Despite the express terms of the Consent Decree, Defendant is now yet again arguing that the Consent Decree does not grant the Circuit Court jurisdiction over this case. That position has been repeatedly rejected by this Court and the Circuit Court on at least five occasions, as outlined below.

First, on June 30, 2000, after an extensive evidentiary hearing, the Circuit Court filed a Memorandum Opinion and accompanying Order declaring that the State still was not providing the children of Baltimore with a constitutionally adequate education when measured by contemporary educational standards and in violation of the terms of the 1996 Consent Decree. Exhibit F, Mem. Op. (June 30, 2000). The Court found Defendant noncompliant with the Consent Decree despite Defendant's argument that "§ 53 of the Consent Decree is not an appropriate vehicle for a declaration of the amounts necessary to render education constitutionally adequate in Baltimore City Public Schools." Exhibit G, Op. Br. (Dkt. 3/1) (June 23, 2000), at 2.

Second, in May 2002, BCPSS and Plaintiffs jointly moved to extend the term of the Consent Decree and to continue the Court's jurisdiction until such time as the State's continuing constitutional violations had been remedied. *See* Exhibit H, Mem. Op. (Dkt. 25/0) (June 25, 2002), at 3. They noted that the judicial supervision provided in the 1996 Consent Decree was due to terminate on June 30, 2002, and that the constitutional deficiency found in 1996 and 2000 still existed, thus justifying extension of the decree. After receiving substantial evidence from the parties, the Circuit Court determined that it would retain jurisdiction and continue judicial supervision "until such time as the State has complied with this Court's June 2000 order." *Id.* at 5. In so doing, the Circuit Court rejected Defendant's argument, recycled here again, that a recently-enacted statewide funding formula meant that the Consent Decree must be terminated and the Court's jurisdiction ended. *Id.*

Third, on August 20, 2004, the Circuit Court again ruled that the constitutional violation it had previously found in 1996 and in 2000 "is continuing," that Baltimore City children "still are not receiving an education that is adequate when measured by contemporary educational standards," and that they therefore were "still being denied their right to a 'thorough and efficient' education under Article VIII of the Maryland Constitution." *See* Exhibit I, 2004 Mem. & Op. (Dkt. 50/0) (Aug. 20, 2004), at 67 ¶ 1. The Circuit Court declared that it would continue to retain jurisdiction to ensure compliance with its orders and to monitor funding and management issues, and that it would revisit its continuing jurisdiction once full funding was achieved. *Id*. at 68 ¶ 6. And in so doing the Circuit Court once again rejected Defendant's argument that potential funding increases under a recently-enacted statewide funding formula were sufficient. *Id.* at 64-65.

Defendant attempted to appeal the Circuit Court's 2004 opinion retaining jurisdiction (as it does now) but the Court of Appeals found that the Circuit Court's opinion was largely not

appealable because it was not a final judgment. The Court of Appeals' 2005 decision—the ***fourth*** opinion finding that the Circuit Court retained jurisdiction and explained that the Circuit Court's decision retaining jurisdiction was not appealable because "[t]here *clearly has been no final judgment* in this case." *Bradford*, 387 Md. at 385–86, 875 A.2d at 722-23 (emphasis added). The Court of Appeals stated that "in its August 20, 2004 order, the [circuit] court has actually done very little of any immediate effect." *Id.* Rather, that order "declared that the school children in Baltimore City, as of August, 2004, were being deprived of their right to a thorough and efficient education. That determination is certainly subject to challenge *if and when a final judgment* is entered, if it is still relevant at that time." *Id.* (emphasis added). Additionally, this Court explained that the Circuit Court "declared that the Constitutional violation would exist until BCPS[S] receives at least $225 million in additional annual aid from the State. That, too, can be challenged, either when a final judgment is entered or at such time as the court attempts to implement that finding by an order that is properly appealable on an interlocutory basis." *Id.* Finally, the Court of Appeals stated that the Circuit Court "declared that 'it would be appropriate' for the State to accelerate the phase-in of additional funding provided in ch. 288. *That is hardly an appealable order.* The court decided to retain jurisdiction to continue monitoring funding and management issues." *Id.* The Court of Appeals concluded that "[u]ntil the [circuit] court does something in the exercise of that jurisdiction that is otherwise appealable, however, there is clearly nothing final about that provision." *Id.*

The Court of Appeals differentiated the State's attempt to appeal portions of the order related to the consent decree from those that were immediately appealable, explaining that the only aspects of the Circuit Court order that were directly appealable were those implementing directives taking immediate effect to require specific actions. First, the Circuit Court had declared a statute

enacted by the General Assembly to be unconstitutional and therefore unenforceable. *Id.* at at 386, A.2d at 723. Second, the Circuit Court determined that the contractual obligations were therefore null and void. *Id.* Third, the Circuit Court forbade BCPSS from taking action pursuant to that contract. *Id.* Those specific directives, which the Court of Appeals found to be appealable, are all clearly distinguishable from the Circuit Court's order with respect to the latest motion.

Finally, in a determination that relates directly to Defendant's current attempt to appeal, the Court of Appeals held that Defendant's claim that the Circuit Court lacked jurisdiction under the Consent Decree to make the decisions that it had made justified an interlocutory appeal. It explained that Defendant argued that "the Circuit Court's attempt to enforce the Consent Decree 'far exceeded its subject matter jurisdiction,'" *id.* at 383, A.2d at 721, but held that "[t]he mere allegation that a clearly interlocutory order is jurisdictionally deficient should not serve to halt proceedings in the trial court while an appellate court considers whether the allegation has merit," *id.* at 384, A.2d at 721.

On March 7, 2019, Plaintiffs filed the current Petition for Further Relief, alleging the State's violations of Article VIII of the Maryland Constitution, as set forth in the determinations issued under the Consent Decree, have continued into the present, in part because before the previously ordered funding could be fully implemented, Defendant capped the necessary inflation adjustments resulting in the adequacy gap facing BCPSS today. *See* Exhibit J, Pls.' Pet. for Further Relief (Dkt. 98/0), at 16-17. Plaintiffs noted in that Petition for Further Relief that Defendant's own "adequacy analysis" showed that Defendant was failing to pay Baltimore City schools hundreds of millions of dollars annually that had been found necessary for adequacy under the previous statewide funding formula. *Id.* at 18.

Defendant filed a Motion to Dismiss Plaintiffs' Petition for Further Relief on June 19, 2019, arguing yet again that the Consent Decree was a final judgment precluding Plaintiffs from litigating under its terms and seeking relief on the basis that the Decree had exceeded its prescribed term and Defendant had, allegedly, fully complied with it. Exhibit B at 38-50. Specifically, Defendant asked the Circuit Court to accept its word that, on the facts, it had "satisfied all of the requirements of the Consent Decree." *Id.* at 7–10*; see also id.* at 2 (arguing that State resources to BCPSS have increased significantly, supposedly far more than required by the Court's 2000 Order), and claimed further that it had demonstrated full compliance with the Decree in 2002 and extension of the Decree's term to permit Plaintiffs' Petition for Further Relief was not justified. *Id.* at 46-47 (arguing that the Decree was satisfied "seventeen years ago" and included no "enforceable obligation with respect to appropriations beyond FY 2002."). Defendant also raised the newly-enacted Blueprint legislation and further asked the Circuit Court to assume, as a factual matter, that *projected* amount of funding that would allegedly flow to Baltimore on a phased-in basis over several years as a result of the law's passage mooted Plaintiffs' claim and the Consent Decree. *Id.* at 30.

In a ***fifth*** decision finding the Circuit Court retains jurisdiction over this matter, following a hearing at which Judge Carrion heard oral arguments from both sides, Defendant's dismissal motion was denied on January 16, 2020. Exhibit C. The Circuit Court found that Plaintiffs' Petition for Further Relief was authorized by the Consent Decree entered November 26, 1996, and yet again rejected Defendant's argument that the Circuit Court lacked subject matter jurisdiction. Notably, the Circuit Court remarked:

> Defendant avers that the Consent Decree terminated in 2002. However, the terms of the Consent Decree include references to "amounts greater than" and "on or after." *See* Consent Decree at 16-17, 53. Additionally, the 2002 Memorandum Opinion and Order issued by Judge Joseph H.H. Kaplan, lengthens the timeframes

> of judicial supervision until such time as compliance with the 2000 Order. Mem. Op. at 5, June 2002. This Court retains jurisdiction under the terms of the Consent Decree.

Id. at 9.

Defendant waited nearly two years to file a duplicate Motion to Dismiss in November 2021, in which Defendant argued again that the Consent Decree had exceeded its prescribed term and asked that it be dissolved. Defendant further claimed, for the second time, that the General Assembly had fulfilled its responsibilities under Article VIII of the Maryland Constitution through the enactment of the Blueprint and the Build to Learn Act, making Plaintiffs' claims raised in the Petition moot. Exhibit A, at 1–15. And again Defendant asked the Circuit Court to assume that projected, phased-in amounts under newly-enacted legislation fully satisfied Plaintiffs' prayer for relief.

In response, Plaintiffs explained that the funding proposed by recent legislation is not currently in place, and there is no guarantee Defendant actually will provide these funds, and not reduce them as it has done numerous times since this litigation was first instituted in 1994. Furthermore, the FY15 $353 million annual "adequacy gap" shown in Defendant's own analysis would be met no sooner than FY 25. *See* Exhibit A at App. C (projecting that $356.4 million in additional state aid will supposedly be provided in FY 25). Finally, even if this adequacy gap were to be filled in the future, it would not remedy the cumulative effects of almost fifteen years of ongoing and increasing adequacy gaps. *See* Exhibit K, Pls. Mem. in Supp. of Opp'n to Def.'s Second Mot. to Dismiss (Dkt. 183/1) (Dec. 22, 2021), at 16-17.

Nor does the Built to Learn Act, addressing physical facilities, provide sufficient funding for BCPSS' inadequate facilities. Defendant concedes that the entire value of the Built to Learn Act—which is to be split among all school systems in Maryland—is $2.2 billion, barely over half

of the amount needed to address deficiencies in BCPSS alone. Exhibit A, at 14. Furthermore, as Defendant concedes, only $420 million, at most, would be directed towards BCPSS. *Id.* This amount is far below the amount necessary to make the necessary improvements Plaintiffs allege are needed. *See* Exhibit J, at 41–49, 52 (somewhere between $3.1 and $5 billion will be needed to make necessary repairs and improvements to BCPSS facilities).

On March 7, 2022, the Circuit Court denied Defendant's 2021 Motion to Dismiss, without directing or prohibiting any specific actions. Unlike the Circuit Court's 2004 decision, which included specific appealable directives, the order at issue here did not require any actions by either party; it simply permitted the litigation to continue its forward movement. On March 24, 2022, Defendant appealed to this Court.

Between the 2020 and 2021 Motions to Dismiss, the parties have engaged in significant and ongoing discovery. The parties have spent more than 16 months conducting depositions of multiple state and plaintiff representatives, and requesting, receiving, and reviewing thousands of pages of documents. The parties are currently in the middle of expert discovery, which will be critical to any final judgment in this case but is not yet a part of the court record, with discovery closing on May 20, 2022. *See* Exhibit L, Case Management Order No. 6 (Dkt. 194/1) (Mar. 8, 2022). However, Defendant has repeatedly delayed the scheduling and completion of expert discovery. Most recently, on April 6, 2022, Defendant's filed a Motion to Stay in the Circuit Court for the second time, despite the fact that its previous motion to stay was denied. Exhibit M, Def.'s Mot. to Defer Establishment of Litig. Schedule Pending Legislative Session (Dkt. 112/0) (Feb.14, 2020); Exhibit N, Order (Dkt. 112/2) (Mar. 6, 2020) (denying Defendant's Motion to Defer Establishment of Litigation Schedule Pending Legislative Session; and Exhibit O, Case

Management Order No. 2 (Dkt. 118/0) (June 11, 2020) (setting a timeline for discovery despite Defendant's request that the case be stayed pending completion of legislative session).

ARGUMENT

I. Defendant Actually Seeks to Appeal a Denial of Its Motion to Dismiss, But That is Not Appealable.

Defendant appeals the denial of its second motion to dismiss this case for lack of subject matter jurisdiction. However, the Circuit Court's order finding that it retains subject matter jurisdiction is not a final judgment giving rise to an appeal. "The general rule as to appeals is that, subject to a *few, limited exceptions*, a party may appeal only from a final judgment." *Nnoli v. Nnoli*, 389 Md. 315, 323, 884 A.2d 1215, 1219 (2005) (citations omitted) (emphasis added). "Two reasons exist for the rule, that until a final judgment is entered the proceedings are subject to revision by the trial court and in the interest of sound judicial administration to avoid piecemeal appeals." *Lewis v. Lewis*, 290 Md. 175, 180, 428 A.2d 454, 457 (1981).

It is well established that a trial court's denial of a challenge to its jurisdiction does not settle or conclude the rights of any party. *Gruber*, 369 Md. at 547–48, 801 A.2d at 1017-18. In *Doe v. Alternative Medicine Maryland LLC*, petitioner filed a motion to dismiss that was denied by the circuit court. 455 Md. 377, 434, 168 A.3d 21, 55 (2017). The Court of Appeals observed that, "the denial of a motion to dismiss filed by a party would not have been immediately appealable under any theory." *Id.* (*citing State v. Jett*, 316 Md. 248, 251, 558 A.2d 385, 386 (1989), a case involving the State's appeal from the denial of a motion to dismiss a tort claim asserted against it). Likewise, in *Eisel v. Howell,* the Court of Appeals recognized that the denial of a challenge to jurisdiction is not appealable because it does not settle or conclude the rights of any party. 220 Md. 584, 155 A.2d 509 (1959). In that case, builders of a dwelling sought to enforce a mechanic's lien, but the defendants, in a motion to dismiss the bill and for summary decree,

claimed that the builders' failure to seek arbitration divested the circuit court of jurisdiction. The circuit court held that it would retain jurisdiction. *Id.* at 586, A.2d at 510. The owners appealed the Circuit Court's holding. In dismissing the appeal, the Court of Appeals observed: "Whenever a court makes a disposition or order, it does so on the basis that it has jurisdiction, and if its express announcement of that fact constituted an appealable order, it would be impossible for a court to proceed with the trial of any case in which its jurisdiction was challenged." *Id.* at 586, A.2d at 511.

Likewise, in this case, the Circuit Court's order retaining jurisdiction has not settled anything with respect to the Petition for Further Relief. It has not granted further relief, determined that the Defendant will have further obligations under the Consent Decree, or what those obligations would be. The nature and scope of the ultimate judgment and remedy in this case remains unknown. As such, Defendant's appeal from Judge Carrion's denial of the 2021 Motion to Dismiss should be dismissed.

II. This Court Should Reject Defendant's Attempt to Manufacture an Appeal Under the Guise of a Request to Dissolve an Injunction.

Relying on language in § 12-303(3)(ii) permitting an appeal from an interlocutory order refusing to dissolve an injunction, Defendant has attempted to manufacture an interlocutory appeal by adding to its motion to dismiss a request to dissolve an injunction. Md. Code Ann., Cts. & Jud. Pro. § 12-303(3)(ii). While "[i]t is true . . . that an appeal will ordinarily lie from an interlocutory order refusing to grant an injunction, but that provision cannot be used, as it is attempted to be used in this case, as a transparent artifice for appealing that which is not appealable." *Sec. Admin. Servs.,* 62 Md. App. at 53, 488 A.2d at 209 (citing *Kahl v. Con. Gas., El. Lt. & Power Co.,* 189 Md. 655, 57 A.2d 331 (1948).

Maryland courts have long recognized that the "mere characterization of a petition as a request for an injunction is insufficient to render its denial immediately appealable." *Town of*

Chesapeake Beach v. Pessoa Const. Co., 330 Md. 744, 749, 625 A.2d 1014, 1017 (1993). Here, the fact that Defendant includes "Motion to Dissolve November 26, 1996 Consent Decree" in the title of the underlying motion to dismiss is likewise not dispositive. As detailed above, the underlying motion repeated arguments from the 2020 Motion to Dismiss. Adding the phrase "dissolve the injunction," to the 2021 Motion to Dismiss does not change the crux of Defendant's failed argument concerning the Circuit Court's subject matter jurisdiction over this Petition under the Consent Decree.

The Defendant's latest Motion to Stay, filed in the Circuit Court, further demonstrates that this appeal is about jurisdiction. *See* Exhibit P, Def.'s Mot. to Stay Proceedings Pending Appeal (Dck. 199/0) (Apr. 6, 2022), at 3 ¶ 5 (arguing the proceedings "pose[] the question whether this Court has authority to continue adjudicating this case."). Defendant made the same point in their Motion to Stay just filed in this Court (before the Circuit Court acted on the pending motion before it), contending that the "subject matter … of the appeal" is "whether the circuit court has authority to continue adjudicating this case." Def. Mot. to Stay at 16.

Security Administration Services v. Baltimore Gas & Electric is instructive. There, the defendant, Security Administration Services, Inc. ("SASI"), moved to dismiss the complaint, but the trial court rejected the motion and directed SASI to answer the complaint. 62 Md. App. at 52, 488 A.2d at 209. In its answer, SASI moved for declaratory judgment and for injunctive relief. *Id.* at 51-53, A.2d at 208-09. When the court again denied the motion, SASI appealed. Dismissing the appeal, this Court stated: "It is true that under, § 12-303(3)(iii), an appeal will ordinarily lie from an interlocutory order refusing to grant an injunction, but that provision cannot be used" as an "artifice for appealing that which is not appealable." *Id.* at 53, A.2d at 209. The Court characterized SASI's motion for injunctive relief as "nothing but an attempt to relitigate the interlocutory ruling

on its demurrer and avoid the nonappealable status of an unfavorable ruling on a motion for summary judgment." *Id*. at 53-54, A.2d at 209-10 (citations omitted). The Court further stated: "It's not hard to recognize the mischief that would result from allowing an appeal such as this to proceed under the guise of § 12-303." *Id.*

Similarly, in *Green v. Tillman*, a defendant attempted to appeal a motion to dismiss for lack of subject matter jurisdiction, among other matters. No. 160, Sept. Term, 2019, 2020 WL 4037636, (Md. Ct. Spec. App. July 17, 2020). This Court dismissed the appeal, holding that while § 12-303(3)(iii) allows an appeal from an interlocutory order refusing to grant an injunction, where "the contentions in the motion for relief did not add any new issues to the case, were intended to bolster the contentions made in the first motion to dismiss, and could easily have been proffered to the court through a motion for summary judgment," a party cannot use § 12-303(3)(iii) to appeal that which is not appealable. *Id.* at *1–3. While the appellants in *Security Administration* and *Green* appealed the refusal to grant an injunction, the same principles apply here: Defendant should not be allowed to exploit mere reference to dissolution of an injunction to relitigate the same issues raised and rejected in its motion to dismiss in order to justify a premature appeal. This is all the more true in this case where Defendant seeks to appeal an order refusing to dissolve a consent order because the Court of Appeals has recognized "[t]he rule that there is no right to appeal from a consent decree." *Suter,* 402 Md. at 224, 935 A.2d at 739.

Federal law further supports a motion to dismiss the appeal under these circumstances. The federal counterpart to Cts. & Jud. Proc. § 12–303 is 28 U.S.C. § 1292(a)(1), which like the Maryland rule grants appellate jurisdiction over orders of federal district courts refusing to dissolve or modify injunctions. *See Anne Arundel Cnty. v. Cambridge Commons L.P*., 167 Md. App. 219, 226, 892 A.2d 593, 597 (2005) (*citing Funger v. Mayor & Council of Town of Somerset*, 244 Md.

141, 150, 223 A.2d 168 (1966)). As such, "[i]nterpretations of the federal provision may be relevant to an analysis of Section 12-303." *Id.* In the federal context, courts have recognized that an opinion retaining a court's jurisdiction does not generally constitute an appealable order, even when it continues a district court's jurisdiction over ongoing consent orders. *See Liddell*, 693 F.2d at 723.

> Because § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly to ensure that appeal as of right under § 1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of 'permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.'

Carson v. Am. Brands, Inc., 450 U.S. 79, 80–86 (1981); *Holsey v. Herndon*, No. 89-7532, 1989 U.S. App. LEXIS 21071 (4th Cir. Apr. 10, 1989) (although an order may have had the practical effect of denying injunctive relief, where appellants have not made the requisite final order showing, an immediate appeal under 28 U.S.C. § 1292(a)(1) cannot be sustained).

Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal. *Balt. Contractors, Inc. v. Bodinger,* 348 U.S. 176, 181 (1955), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 U.S. 271 (1988); *see also Switzerland Cheese Assn., Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24-25 (1966) (district court's denial of a motion for summary judgment was not appealable under § 1292(a)(1) even where it denied a permanent injunction because petitioners did not show that the order might cause them irreparable consequences if not immediately reviewed).

Likewise, this Court should reject Defendant's attempt to recast the Circuit Court's denial of its renewed motion to dismiss for lack of subject matter jurisdiction, relying on the same

arguments it has made before, as an appealable order concerning an injunction. A requirement that the Defendant complete discovery and the parties proceed to a fully-supported determination after summary judgment or trial in order to provide the appellate court with a full record on which to rule certainly does not make this a case in which Defendant will face (a) serious or irreparable consequences or (b) render its appeal untenable. *Carson*, 450 U.S. at 84. To the contrary, completion of discovery will enhance the possibilities for the Circuit Court to rule fairly and afford the parties and the Court with a full record for any appeal. The harms to Defendant in having to hold its appeal until issuance of a final judgment are minimal. The Consent Decree at issue has been in place for twenty-six years, so it is hard to imagine any harm continuing the case will do to Defendant, besides the time and cost associated with litigation. This pales in comparison to the real harm Plaintiffs have suffered and continue to suffer by being deprived of a constitutionally-adequate education because of severe underfunding by the State over decades. Plainly, Defendant need not immediately appeal this issue in order to get the relief it seeks; rather, it can raise these arguments during summary judgment briefing. *See Green*, 2020 WL 4037636 at *1–3 (where arguments "could easily have been proffered to the court through a motion for summary judgment, a party cannot use § 12-303(3)(iii) to appeal that which is not appealable.").

III. The Appeal is Foreclosed Because The Court of Appeals Has Already Held That a Finding of Jurisdiction Under the Consent Order Is Not Immediately Appealable.

Defendant's appeal not only conflicts with Maryland case law interpreting Cts. & Jud. Proc. § 12–303, but also a prior decision from the Court of Appeal explicitly holding that the Circuit Court's determination that it has subject matter jurisdiction based on the Consent Decree is not, in and of itself, an appealable order because it is not a final judgment. *Bradford*, 387 Md. at 385–86, 875 A.2d at 722-23. "The law of the case doctrine generally provides that a 'legal rule of decision between the same parties in the same case' controls in subsequent proceedings between

them" and typically "'remains binding until an appellate court reverses or modifies it.'" *Ralkey v. Minn. Mining & Mfg. Co.*, 63 Md. App. 515, 520, 492 A.2d 1358, 1361 (1985) (quoting 21 C.J.S. § 195 at 330 (1940)); *Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 55 (2008) (determination by Court of Appeals is the law of the case going forward).

The 2005 holding by the Court of Appeals on this point controls this appeal. Just as that Court concluded then, "there clearly has been no final judgment in this case." *Bradford*, 387 Md. at 385, 875 A.2d at 722. Indeed, "the case is very much alive in the Circuit Court" and "the court has actually done very little of any immediate effect." *Id.* More specifically, the Court of Appeals holding that Circuit Court's decision "to retain jurisdiction to continue monitoring funding and management issues" was not appealable then and is not appealable now. *Id.* at 386, A.2d at 722. "Until the court does something in the exercise of that jurisdiction that is otherwise appealable . . . there is clearly nothing final about that provision." *Id.* Similarly, Defendant's argument that there can be no further litigation after the Consent Decree or that the Consent Decree has expired should be rejected. Now, as it did in 2002 and 2004, the Circuit Court has rejected arguments that the State has fully complied with the Consent Decree, so it should have no further effect, by passing legislation that provides for projected additional funding that will not be phased for many years in the future (and with respect to the Blueprint is in any event insufficient for constitutional adequacy).

The Court of Appeals' determination that two aspects of the 2004 Circuit Court order were "injunctive in nature" is inapposite. *Id.* at 387, A.2d at 723. There, the Court was considering specific aspects of the order that *were* clear implementing directives taking immediate effect to require or prohibit specific actions. It held that those two aspects were appealable even though most of the order was not, rejecting Defendant's argument that its claim that the Circuit Court

lacked jurisdiction made the entire order immediately appealable. In contrast, the Circuit Court's order at issue in this appeal does not require or prohibit any new actions. *See Lessans v. Lessans*, 184 Md. 549, 554, 42 A.2d 132 (1945) (denying a motion to dismiss where "[t]he injunction remains unaffected by the [lower court's] order."). Accordingly, there is no reason for a different result now than in the 2005 decision. The Defendant cannot be permitted to disrupt this litigation by repeating the same jurisdictional arguments based on the same Consent Decree, particularly when there has been no further injunctive action directed by the Circuit Court.

This is especially so because Defendant has already sought to dismiss the same Petition less than two years ago with largely the same arguments. Defendant initially raised the state legislation at issue in its First Motion to Dismiss. It emphasized that in the most recent session at the time, the legislature had "enacted the Blueprint for Maryland's Future . . . adopting the Kirwan Commission's policy recommendations as State policy for public education in Maryland." Mot. to Dismiss Pls.' Pet. for Further Relief (Dkt. 105/0) (June 19, 2019), at 30. Defendant cannot manufacture a second bite of the apple by repeatedly raising the same issues that have already been decided.

IV. This Court Should Not Take Up the Appeal on an Incomplete Record.

To the extent Defendant argues that the Consent Decree is moot because the State satisfied all of its obligations under the Consent Decree and because of new legislation, the Circuit Court will be in a better position to rule on Defendant's arguments with a complete record. *See Civil Appeal Info Report* (Apr. 1, 2022). Whether the State has fulfilled its obligations under the Consent Decree and the orders under it is the factual and legal question that lies at the very heart of the case. Defendant's motion presented a one-sided view of the facts, asking the Circuit Court to resolve this factual and legal question in its favor based on projected but uncertain future payments, and with no attempt to analyze whether even the projected funding was sufficient to satisfy the

State's constitutional duty to provide a "thorough and efficient" education, particularly in light of the undisputed almost $400 million "adequacy gap" that existed as of 2017. The expert discovery that is being interrupted by the Defendant's tactics is needed to provide necessary context to understand whether the Defendant has indeed complied with its funding obligations and if further relief is necessary. For example, Plaintiffs' experts Dr. Bruce Baker,[2] Dr. Lorraine Maxwell,[3] Dr. Michelle Fine,[4] Dr. Tara Brown,[5] Dr. Kirabo Jackson,[6] and Jerry Roseman, M.Sc. I.H.,[7] have provided expert reports analyzing how funding for student programs and facilities impact student performance. They have submitted initial reports, but they have yet to be deposed or provide rebuttal reports to address arguments from Defendant's experts. Defendant would deny Plaintiffs the opportunity to present this evidence to the Circuit Court so that it may decide Plaintiffs' Petition for Further Relief based on the complete record.

Both the Circuit Court and this Court will be much better served with a complete record on the status of programmatic funding in Baltimore City Public Schools upon which to base any decision as to whether the State has continuing unmet obligations under the Consent Decree. Regardless of the outcome of the Defendant's pending motion to stay proceedings pending appeal,

---

[2] Professor, Graduate School of Education at Rutgers, The State University of New Jersey in New Brunswick.

[3] Professor, College of Human Ecology, Cornell University.

[4] Professor, Department of Psychology and Department of Urban Education, The Graduate Center, City University of New York ("CUNY").

[5] Professor, Department of Teaching and Learning, Policy and Leadership, University of Maryland, College Park.

[6] Professor, Department of Human Development and Social Policy, Northwestern University.

[7] Occupational Safety & Health Consultant & Senior Occupational & Environmental Hygienist/Scientist.

this Court is being asked to decide an appeal on an incomplete record. Defendant has timed its appeal in the midst of expert discovery with a looming completion deadline of May 20, thus inhibiting Plaintiffs' ability to effectively develop the record in the Circuit Court. Defendant's gamesmanship to create this situation should not be permitted, but rather its appeal should be dismissed so that the parties can proceed with the case below and this Court can decide any appealable issues based on a fully developed record.

CONCLUSION

For the foregoing reasons, Defendant's appeal should be dismissed. Defendant filed its 2021 Motion to Dismiss based on nearly identical arguments that were rejected in 2020 by the Circuit Court in 2020 and Defendant is using this second motion to manufacture a way to appeal an order that is not appealable.

Pursuant to Rule 8-603, Plaintiffs respectfully request oral argument on a motion to dismiss in advance of argument on the merits.

Dated: April 26, 2022

/s/ Cara McClellan

Sherrilyn Ifill
Cara McClellan
Arielle Humphries*
NAACP Legal Defense Fund
40 Rector Street, 5th Floor
New York, NY 10006
Phone: (212) 965-2200
Sifill@naacpldf.org
Cmclellan@naacpldf.org
Ahumphries@naacpldf.org

*Admitted by Motion for Special Admission

Elizabeth B. McCallum
Jeffrey E. Liskov
Baker & Hostetler LLP

1050 Connecticut Ave., NW, Suite 1100
Washington, DC 20036
Phone: (202) 861-1522
Email: emccallum@bakerlaw.com
jliskov@bakerlaw.com

Deborah Jeon
Tierney Peprah
ACLU of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Phone: (410) 889-8550
Email: jeon@aclu-md.org
tpeprah@aclu-md.org

Counsel for Private Plaintiffs

Warren N. Weaver, Esq.
Ilana Subar, Esq.
Whiteford, Taylor & Preston, L.L.P.
Seven Saint Paul Street, Suite 1900
Baltimore, MD 21202
Phone: (800) 987-8705
Email: wweaver@wtplaw.com
isubar@wtplaw.com

Counsel for Plaintiff Baltimore City Board of School Commissioners

KEITH BRADFORD, *et al*.,	*	IN THE
	*	
Plaintiffs/Appellees,	*	COURT OF SPECIAL APPEALS
v.	*	
	*	OF
MARYLAND STATE BOARD OF EDUCATION,	*	MARYLAND
	*	
Defendant/Appellant.	*	CSA-REG-0201-2022
	*	

* *

[PROPOSED] ORDER GRANTING MOTION TO DISMISS

Upon consideration of Appellees' Motion to Dismiss Notice of Appeal, and after considering any opposition thereto, IT IS HEREBY ORDERED:

1. The Motion is GRANTED; and

2. Proceedings in this case shall be REMANDED to the Circuit Court for Baltimore City

_____
Maryland Court of Special Appeals

CERTIFICATE OF SERVICE

I, Jeffrey E. Liskov, certify that I have this day caused to be served a copy of this PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S NOTICE OF APPEAL AND REQUEST FOR A HEARING on the following counsel and parties by electronic mail and by U.S. mail with postage prepaid on April 26, 2022:

Steven M. Sullivan
Elliott L. Schoen
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, MD 21202
Email: ssullivan@oag.state.md.us
eschoen@oag.state.md.us

Charles O. Monk, II
Jason M. St. John
Mark A. Simanowith
Saul Ewing Arnstein & Lehr LLP
500 E. Pratt Street, Suite 800
Baltimore, MD 21202
Email: charles.monk@saul.com
jason.stjohn@saul.com
mark.simanowith@saul.com

Stephen Salsbury
Baltimore City Law Department
100 N. Holliday Street, Suite 101
Baltimore, MD 21202
Email: stephen.salsbury@baltimorecity.gov

Dated: April 26, 2022

/s/ Jeffrey E. Liskov

KEITH BRADFORD, *et al*.,	*	IN THE
	*	
Plaintiffs/Appellees,	*	COURT OF SPECIAL APPEALS
v.	*	
	*	OF
MARYLAND STATE BOARD OF	*	
EDUCATION,	*	MARYLAND
	*	
Defendant/Appellant.	*	CSA-REG-0201-2022
	*	

* *

AFFIDAVIT OF CARA MCCLELLAN

1. I, Cara McClellan, am over eighteen (18) years of age and am competent to testify to the matters set forth herein.

2. I am an attorney with the NAACP Legal Defense & Educational Fund, Inc., which represents Plaintiffs/Appellees with respect to the above-captioned litigation, and am counsel of record therein.

3. I am submitting this Affidavit in further support of Plaintiffs' Motion to Dismiss Defendant's Notice of Appeal and Request for a Hearing, filed on April 26, 2022.

4. Pursuant to Rule 8-603(d), the following documents not contained in the record or on file in this Court are attached as Exhibits hereto:

- Exhibit A is a true and correct copy of the 2021 Motion to Dismiss filed in the Circuit Court (Dkt. 183/0) (Nov. 10, 2021);
- Exhibit B is a true and correct copy of the Motion to Dismiss Plaintiffs' Pet. for Further Relief filed in the Circuit Court (Dkt. 105/0) (June 19, 2019);
- Exhibit C is a true and correct copy of the Memorandum Opinion & Order filed in the Circuit Court (Dkt. 105/8) (Jan. 16, 2020);

- Exhibit D is a true and correct copy of the March 7, 2022 Order filed in the Circuit Court (Dkt. 183/3) (Mar. 7, 2022);
- Exhibit E is a true and correct copy of the Consent Decree filed in the Circuit Court (Dkt. 1-77) (Nov. 26, 1996);
- Exhibit F is a true and correct copy of the Memorandum Opinion filed in the Circuit Court (June 30, 2000);
- Exhibit G is a true and correct copy of the Opposition Brief filed in the Circuit Court (Dkt. 3/1) (June 23, 2000);
- Exhibit H is a true and correct copy of the Memorandum Opinion filed in the Circuit Court (Dkt. 25/0) (June 25, 2002);
- Exhibit I is a true and correct copy of the 2004 Memorandum & Opinion filed in the Circuit Court (Dkt. 50/0) (Aug. 20, 2004);
- Exhibit J is a true and correct copy of Plaintiffs' Pet. for Further Relief filed in the Circuit Court (Dkt. 98/0);
- Exhibit K is a true and correct copy of Plaintiffs Memorandum in Supp. of Opposition to Defendant's Second Motion to Dismiss filed in the Circuit Court (Dkt. 183/1) (Dec. 22, 2021);
- Exhibit L is a true and correct copy of Case Management Order No. 6 filed in the Circuit Court (Dkt. 194/1) (Mar. 8, 2022);
- Exhibit M is a true and correct copy of Defendant's Motion to Defer Establishment of Litig. Schedule Pending Legislative Session filed in the Circuit Court (Dkt. 112/0) (Feb.14, 2020);

- Exhibit N is a true and correct copy of the March 6, 2020 Order filed in the Circuit Court (Dkt. 112/2) (Mar. 6, 2020);
- Exhibit O is a true and correct copy of the Case Management Order No. 2 filed in the Circuit Court (Dkt. 118/0) (June 11, 2020); and
- Exhibit P is a true and correct copy of the Defendant's Motion to Stay Proceedings Pending Appeal filed in the Circuit Court (Dck. 199/0) (Apr. 6, 2022).

I solemnly affirm under the penalties of perjury that the foregoing is true to the best of my knowledge, information, and belief.

Dated: April 25, 2022

/s/ Cara McClellan

Cara McClellan
NAACP Legal Defense Fund
40 Rector Street, 5th Floor
New York, NY 10006
Phone: (212) 965-2200
Cmclellan@naacpldf.org

11602615

EXHIBIT A

KEITH A. BRADFORD, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION,	*	BALTIMORE CITY
Defendant.	*	Case No.: 24-C-94340058

* * * * * * * * * * * *

MOTION TO DISMISS PLAINTIFFS' PETITION FOR FURTHER RELIEF AND MOTION TO DISSOLVE NOVEMBER 26, 1996 CONSENT DECREE

The defendant, the Maryland State Board of Education ("MSBE"), moves to dismiss plaintiffs' Petition for Further Relief and dissolve the November 26, 1996 Consent Decree in this case on the following grounds:

First, recent State enactments – known as the Blueprint and the Built to Learn Act – have rendered moot the petition's challenge to the prior statutory funding scheme that was in effect when the petition was filed. These two landmark pieces of legislation, along with significant federal legislation, have dramatically reshaped Maryland's system of public school funding and have earmarked significant funds for BCPSS in the coming years.

Second, despite the petition's allegations of "ongoing" violations of this Court's prior orders, discovery responses from both the individual plaintiffs and the Baltimore City Public School System ("BCPSS") confirm that each no longer contends that the relief sought by the petition is predicated upon any alleged failure by MSBE to comply with any order previously issued by this Court. The discovery responses further confirm that the relief sought by the petition is *not* based on any alleged failure to comply with the November 26, 1996 Consent Decree. Plaintiffs' and BCPSS's concessions that they no longer claim any violation of, or noncompliance

with, the Consent Decree or this Court's Orders confirms the absence of the "good cause" which the Court has previously relied upon in continuing to exercise jurisdiction over this matter under the Consent Decree.

Plaintiffs' concession that they are no longer seeking relief to ensure compliance with the Consent Decree or prior orders but, instead, are pursuing *new* claims under Article VIII, means they cannot obtain relief under Courts and Judicial Proceedings § 3-412, which authorizes only relief that is ancillary to a previously entered declaratory judgment; that is, § 3-412 does not provide a vehicle for pursuing new causes of action.

These fundamental changes that require dismissal of the petition also support the dissolution of the November 26, 1996 Consent Decree. Not only does the enactment of the Blueprint and the Built to Learn Act render the petition moot, their enactment also renders the Consent Decree moot. Dissolution of the Decree is also warranted because plaintiffs and BCPSS each concede that they are not claiming that MSBE violated, or otherwise failed to comply with, the Consent Decree or this Court's Orders.

Their concessions confirm the absence of the "good cause" upon which the Court has relied in extending its jurisdiction under the Consent Decree beyond the Decree's prescribed five-year term that ended in June 2002 and, therefore, the Consent Decree's term has expired. Finally, in light of the extensive legislative changes to education funding, continuation of the Decree would be unreasonable and inequitable.

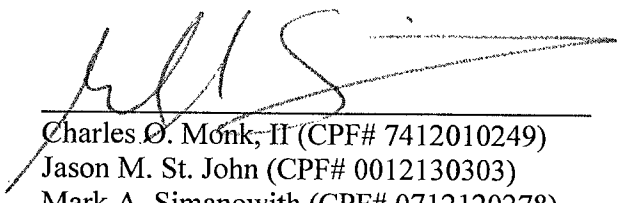
The grounds and authorities for this motion are more fully set forth in the accompanying memorandum. A proposed Order is submitted with this motion.

Dated: November 10, 2021

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

STEVEN M. SULLIVAN
ELLIOTT L. SCHOEN
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, MD 21202
(410) 576-6465
ssullivan@oag.state.md.us
eschoen@oag.state.md.us



Charles O. Monk, II (CPF# 7412010249)
Jason M. St. John (CPF# 0012130303)
Mark A. Simanowith (CPF# 0712120278)
SAUL EWING ARNSTEIN & LEHR LLP
500 E. Pratt Street, Suite 800
Baltimore, MD 21202
(410) 332-8600
charles.monk@saul.com
jason.stjohn@saul.com
mark.simanowith@saul.com

Attorneys for Defendant,
Maryland State Board of Education

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this tenth day of November 2021 a copy of the foregoing Motion to Dismiss Plaintiffs' Petition for Further Relief and Motion to Dissolve November 26, 1996 Consent Decree was sent by electronic mail and first-class mail, postage prepaid, to:

Ajmel Quereshi, Esquire
NAACP Legal Defense Fund
700 14th Street, NW, 6th Floor
Washington, DC 20005
Aquereshi@naacpldf.org
Counsel for Bradford Plaintiffs

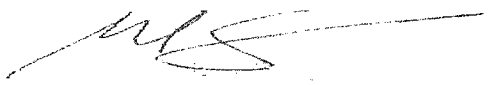
Elizabeth B. McCallum, Esquire
Baker & Hostetler, LLP
1050 Connecticut Ave., NW
Washington, DC 20036
emccallm@bakerlaw.com
Counsel for Bradford Plaintiffs

Sherrilyn Ifill, Esquire
Cara McClellan, Esquire
NAACP Legal Defense Fund
40 Rector Street, 5th Floor
New York, NY 10006
Sifill@naacpldf.org
Cmcclellan@naacpldf.org
Counsel for Bradford Plaintiffs

Deborah Jeon, Esquire
Tierney Peprah, Esquire
ACLU of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
jeon@aclu-md.org
tpeprah@aclu-md.org
Counsel for Bradford Plaintiffs

Warren N. Weaver, Esquire
Ilana Subar, Esquire
Whiteford, Taylor & Preston, L.L.P
Seven Saint Paul Street, Suite 1500
Baltimore, MD 21202
wweaver@wtplaw.com
isubar@wtplaw.com
Counsel for Board of School Commissioners Of Baltimore City

Stephen Salsbury, Chief of Staff
Lydie Glynn, Chief Solicitor
Baltimore City Law Department
100 N. Holliday Street, Suite 101
Baltimore, MD 21202
Stephen.Salsbury@baltimorecity.gov
Lydie.Glynn@baltimorecity.gov
Counsel for the Mayor & City Council of Baltimore



Mark. A. Simanowith

38961307.2

KEITH A. BRADFORD, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION,	*	BALTIMORE CITY
Defendant.	*	Case No.: 24-C-94340058

* * * * * * * * * * * *

DEFENDANT MARYLAND STATE BOARD OF EDUCATION'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PETITION FOR FURTHER RELIEF FOR LACK OF SUBJECT-MATTER JURISDICTION AND TO DISSOLVE CONSENT DECREE

BRIAN E. FROSH
Attorney General of Maryland

STEVEN M. SULLIVAN
ELLIOTT L. SCHOEN
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, Maryland 21202
(410) 576-6465
ssullivan@oag.state.md.us
eschoen@oag.state.md.us

Attorneys for Defendant
Maryland State Board of Education

CHARLES O. MONK, II (CPF# 7412010249)
JASON M. ST. JOHN (CPF# 0012130303)
MARK SIMANOWITH (CPF# 0712120278)
SAUL EWING ARNSTEIN & LEHR LLP
500 E. Pratt Street, Suite 800
Baltimore, Maryland 21202
(410) 332-8600
charles.monk@saul.com
jason.stjohn@saul.com
mark.simanowith@saul.com

Attorneys for Defendant
Maryland State Board of Education

Dated: November 10, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE CONSTITUTIONAL PROVISIONS

STATE STATUTES AND RULES

OTHER AUTHORITIES

The Maryland State Board of Education ("MSBE") requests dismissal of the petition for further relief and termination of this case due to the following two developments that fundamentally alter the circumstances pertinent to the plaintiffs' petition for further relief and this Court's authority to adjudicate this matter:

1. In the 2021 session, the General Assembly enacted the "Blueprint for Maryland's Future – Implementation," 2021 Md. Laws ch. 36, and complementary legislation, "Blueprint for Maryland's Future – Revisions," 2021 Md. Laws ch. 55, which together with earlier legislation, 2019 Md. Laws ch. 771, comprise the "Blueprint." According to the Maryland Association of Boards of Education, whose members include the Baltimore City Board of School Commissioners, this "landmark, generational" legislation is "unprecedented in thoroughness, ambition, and cost."[1] The legislation institutes extensive educational reforms, creates an entirely new system of oversight to be administered by the Accounting and Implementation Board, fundamentally changes the way the State and local governments determine annual financial support for public school boards, and significantly increases State funding for Maryland public schools, especially those in Baltimore City, in amounts substantially greater than State funding under the now-superseded Thornton formula that was in effect when the petition was filed. This increase in funding comes in addition to school construction funding newly made available by the Built to Learn Act, 2020 Md. Laws ch. 20, and significant new injections of federal funding BCPSS is receiving and will receive under legislation Congress has enacted since this Court's January 16, 2020 decision[2]; and

[1] Maryland Association of Boards of Education, "Priority Issue: The Kirwan Commission & The Blueprint For Maryland's Future," https://www.mabe.org/adequacy-funding/ (last visited Aug. 10, 2021); *see* "About MABE: Member Boards" at https://www.mabe.org/about/#members (last visited Aug. 10, 2021).

[2] *See* Liz Bowie, "Baltimore City Schools CEO Santelises introduces $1.18 billion budget

2. Contrary to the petition's allegations of ongoing violations of this Court's prior orders, discovery responses from both the individual plaintiffs and the Baltimore City Board of School Commissioners on behalf of the Baltimore City Public School System ("BCPSS") have confirmed that they are no longer contending that the relief sought by the petition is based on any failure to comply with orders previously issued by this Court. Their discovery responses have also acknowledged that the relief sought is not based on any failure to comply with the November 26, 1996 Consent Decree.

For reasons explained further in the Argument below, these changed circumstances necessitate denial of the petition as moot and dismissal of the case for lack of subject-matter jurisdiction. As to the first of these developments, the Blueprint and the related initiative, the Built to Learn Act, constitute the General Assembly's definitive determination of what is best for Maryland's public schools, based on recommendations produced after years of study by the body of experts the legislature created for that purpose, the Commission on Innovation and Excellence in Education, known as the "Kirwan Commission." By enacting this legislation, Maryland has committed to providing public education that is not merely a thorough and efficient system of free public schools, Md. Const. art. VIII, § 1, but "world-class," Md. Code Ann., Educ. § 1-303, with specific attention to the challenges confronted by the BCPSS. Because the statutory scheme challenged by the petition has been replaced by new legislation that provides for unprecedented increases in funding, among other profound changes, the controversy addressed by the petition is no longer live and the case should be dismissed.

---

for a 'normal' school year," Baltimore Sun (Apr. 29, 2021), available at http://www.baltimoresun.com/education/bs-md-city-school-budget-20210429-x5zamr44ifhghp6fmxszdnhpuu-story.html (noting "infusion of some $700 million in federal funds" to BCPSS "over the next four years").

Plaintiffs have represented to the Court that they filed the petition only after becoming frustrated with delays in enacting the Kirwan Commission's recommendations, which plaintiffs' counsel helped develop and for which plaintiffs advocated. Petition for Further Relief (Mar. 19, 2019) at 5 ¶ 11; Opp. to Motion to Dismiss (Aug. 23, 2019) at 38. Now, plaintiffs' lobbying efforts have met with success, the Blueprint is the law of Maryland, and the delay in enactment that prompted the petition's filing is in the past. If after dismissal there arises any question whether the Blueprint's "intended outcomes" are being achieved, in Baltimore City or elsewhere in the State, the General Assembly has given the newly-created Accountability and Implementation Board "plenary authority" to address such concerns. Md. Code Ann., Educ. § 5-402(h)(3)(i).

As to the second of the pertinent developments, just as enactment of the Blueprint and the Built to Learn Act has fundamentally altered the legal landscape of public education in Baltimore City and throughout Maryland, discovery responses in this case have materially changed the circumstances on which the Court relied in its January 2020 decision, and thus have undermined the basis of this Court's authority to hear this matter. Plaintiffs petitioned for further relief on the ground that Court intervention was necessary to enforce court orders granting declaratory relief that were allegedly being violated by MSBE, and plaintiffs framed their petition as a request under § 3-412 of the Courts and Judicial Proceedings Article, the "further relief" provision of the Maryland Uniform Declaratory Judgments Act. In support of this request for relief, plaintiffs quoted language indicating that such relief is available "if Defendants were to fail to comply with the declarations" previously made by the Court in its Orders. Plaintiffs' Mem. of Grounds (Mar. 7, 2019) at 68 (quoting *DeWolfe v. Richmond*, 434 Md. 403, 419-20 (2012)). Based upon those assertions and plaintiffs' arguments at the December 10, 2019 hearing, and citing Judge Kaplan's decision "pursuant to paragraph 68 of the Consent Decree, [to] retain jurisdiction and continue

judicial supervision of this matter until such time as the State has complied with this Court's June 2000 Order,'" June 25, 2002 Mem. Op. at 5, the Court found that it had jurisdiction to consider the petition for further relief and denied MSBE's motion to dismiss. Jan. 16, 2020 Mem. Op. at 9 ("[T]he 2002 Memorandum Opinion and Order issued by Judge Joseph H.H. Kaplan lengthens the timeframe of judicial supervision until such time as compliance with the 2000 Order.").

Thus, the petition for further relief's sweeping assertions of MSBE violations of this Court's prior orders led the Court to believe that it had jurisdiction to consider the petition to address those alleged violations. The Court expressly relied on Judge Kaplan's justification for continuing jurisdiction beyond the Consent Decree's five-year term under the "good cause" provision in ¶ 68 of the Consent Decree, based on the perceived need to ensure compliance with the Court's Orders. Plaintiffs have now conceded, in written discovery responses, that they do *not* seek relief for "the violation of specific terms of the Consent Decree or the Court's subsequent orders." Exh. A, Plaintiffs' Answers to Defendant's Interrogatories at 11-12; *see* Exh. B, BCPSS's Answers to Defendant's Interrogatories at 7-8 (same). Plaintiffs' and BCPSS's concession—that they are not seeking redress for a violation of the Consent Decree or a prior Order of Court and, therefore, not alleging noncompliance with any Order—leaves this Court without the "good cause" on which it has relied for its authority to extend judicial supervision under paragraph 68 of the Consent Decree. As the parties agreed when they entered the Consent Decree, absent that "good cause," the intended term of the Consent Decree has expired and, therefore, the Court no longer has jurisdiction over this matter.

Plaintiffs' and BCPSS's concessions in discovery also confirm that the Court lacks authority to grant further relief based on § 3-412 of the Maryland Uniform Declaratory Judgments Act, under which the petition purports to seek relief. Plaintiffs' Mem. of Grounds (Mar. 7, 2019)

at 68. Section 3-412 permits a court to grant "necessary or proper relief to *effectuate the declaratory judgment* entered by the court." *Nova Research, Inc. v. Penske Truck Leasing Co*., 405 Md. 435, 460 (2008) (emphasis added); *see Falls Road Community Ass'n, Inc. v. Baltimore County*, 437 Md. 115, 148 (2014) ("CJ § 3–412 contemplates the filing of a petition after the declaratory judgment in which a prevailing party identifies the *ancillary relief* believed necessary to *implement* a declaratory judgment.") (emphasis added). Here, plaintiffs and BCPSS effectively have conceded that the petition for further relief is not seeking to "effectuate" or "implement" any judgment of this Court, since they are no longer questioning MSBE's compliance with the Court's prior Orders. Instead, plaintiffs and BCPSS now insist that the relief requested is freestanding and untethered from any question of compliance with either the Consent Decree or other Court Orders.

It is now apparent through discovery that the petition seeks to pursue only new claims directly under Article VIII, involving current time periods, presently existing school conditions, and a now-superseded statutory scheme—circumstances that were not addressed, or even imagined, by the parties when they agreed to the Consent Decree or by Judge Kaplan when he entered post-Decree Orders. But § 3-412 does not authorize litigation of substantive matters beyond the specific rights already declared in the declaratory judgment, to which any further relief under § 3-412 must be "ancillary." *Falls Rd. Community Ass'n*, 437 Md. at 148; *see* "ancillary," Webster's New Universal Unabridged Dictionary (New York: Barnes & Noble 2003) ("1. subordinate; subsidiary. 2. auxiliary; assisting."). That is, § 3-412 does not authorize relief based on such claims that do not seek enforcement of any declaratory judgment the Court has entered.

These fundamental changes that require dismissal of the petition also support the dissolution of the November 26, 1996 Consent Decree. Not only does the enactment of the

Blueprint and the Built to Learn Act render the petition moot, their enactment also renders the Consent Decree moot. Dissolution of the Decree is also warranted because plaintiffs and BCPSS each concede that they are not claiming that MSBE violated, or otherwise failed to comply with, the Consent Decree or this Court's Orders. Their concessions confirm the absence of the "good cause" upon which the Court has relied in extending its jurisdiction under the Consent Decree beyond the Decree's prescribed five-year term that ended in June 2002 and, therefore, the Consent Decree's term has expired. Finally, in light of the extensive legislative changes to education funding, continuation of the Decree would be unreasonable and inequitable.

The dismissal of the petition and dissolution of the Consent Decree will not deprive plaintiffs of the ability to seek redress if in the future they believe that the Blueprint and Built to Learn Act are not achieving their intended outcomes. Any person claiming a legally cognizable injury based on an alleged violation of law can initiate a new suit. But a petition for further relief based on a decades-old Consent Decree and post-Decree orders is not the appropriate method when, as here, there has been no violation of the Decree or other orders. To require the parties and the Court to expend considerable resources continuing to litigate the petition would disserve the public interest, especially given the Court's lack of jurisdiction. Ensuring that this case does not proceed without a proper legal foundation is especially important given the Court of Appeals' final words the last time this case was appealed in 2005:

> Given the importance of this case and the fact that it has been pending already for nearly eleven years with no end in sight, at least until 2008, we caution the court to be careful in the kinds of declarations and orders it issues.

Maryland State Bd. of Educ. v. Bradford, 387 Md. 353, 388 n.12 (2005).

BACKGROUND

A. Enactment of the Blueprint for Maryland's Future and the Built to Learn Act

1. The Blueprint for Maryland's Future

The Blueprint, 2019 Md. Laws ch. 771; 2021 Md. Laws ch. 36; 2021 Md. Laws ch. 55, is a once-in-a-generation restructuring of Maryland education calculated to elevate Maryland's education system to world-class student-achievement standards. Md. Code Ann., Educ. §1-301. The Blueprint addresses education comprehensively to achieve student success in five policy areas: Policy Area 1 expands high-quality, full-day prekindergarten, which will be free for all low-income three- and four-year-olds and provided on a sliding scale for all other four-year-olds. Policy Area 2 raises the standards and status of the teaching profession. Policy Area 3 adopts an internationally benchmarked curriculum that enables most students to achieve college and career readiness by the end of 10th grade. Policy Area 4 provides additional support for schools serving high concentrations of students living in poverty, including community schools and wraparound services, and increased support for students learning English and students with disabilities. Policy Area 5 establishes an independent accountability board with the authority to ensure that the commission's recommendations are successfully implemented and produce the desired results. HB 1300 (2020 Session) Fiscal Note – Enrolled, Revised at 47-48, available at https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/ch0036 (last visited Aug. 10, 2021).

As part of the restructuring, the Blueprint concentrates additional resources, support, and services—both at schools and within their surrounding communities—to aid Maryland children living in communities with severe disadvantages, including high poverty rates, high crime rates, and lack of access to adequate health care and social services. Educ. §§ 1-301, 5-240, 7-438, 7-447, 7-1511. As shown by the tables attached as Exhibit C, Baltimore City Public Schools will be

a principal beneficiary of the Blueprint's funding provisions, second in total increased state funding only to Prince George's County Public Schools, which educates a student body that is more than 50,000 students larger than BCPSS's and has similar socioeconomic disadvantages.

The following table demonstrates the marked increase in direct State aid, year over year, to BCPSS from fiscal year ("FY") 2023 through FY 2034, when the Blueprint will be fully implemented.

See Exh. C.[3]

Blueprint for Maryland's Future – Chapters 36 and 55 of 2021
Updated Fiscal Note Appendices

Appendix C
Estimated Change in Direct State Aid
($ in Millions)

County	FY 23	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028	FY 2029	FY 2030	FY 2031	FY 2032	FY 2033	FY 2034
Allegany	$12.5	$15.7	$17.2	$21.5	$24.4	$28.5	$32.3	$37.8	$39.9	$41.8	$46.5	$49.2
Anne Arundel	56.6	72.6	75.1	89.9	106.2	122.0	138.7	158.2	168.0	180.0	200.3	210.3
Baltimore City	280.1	320.8	356.4	412.1	449.7	524.4	564.6	620.6	643.8	660.1	711.8	738.6
Baltimore	100.3	137.9	147.9	180.0	208.7	240.4	277.3	327.4	341.1	359.6	396.9	413.9
Calvert	12.1	14.0	14.0	17.3	20.6	23.7	26.9	31.0	32.7	35.4	39.0	40.6
Caroline	6.7	7.3	7.7	9.5	11.5	13.6	15.8	19.2	20.6	21.3	24.0	25.5
Carroll	18.4	20.3	19.8	23.8	29.4	34.2	40.4	47.7	50.5	55.2	61.0	63.8
Cecil	15.5	19.1	20.4	24.7	29.1	33.9	38.8	46.2	48.4	51.6	57.1	59.8
Charles	24.7	29.1	29.7	36.7	43.5	50.3	57.7	67.4	71.0	75.5	84.5	88.4
Dorchester	7.7	9.3	10.3	12.8	14.3	17.4	19.4	22.3	23.6	24.5	27.2	29.0
Frederick	35.6	39.6	40.7	50.2	60.7	71.3	82.5	96.3	102.0	109.7	120.5	124.8
Garrett	2.8	3.5	4.2	4.5	5.0	5.6	6.4	7.5	8.0	8.5	9.6	10.3
Harford	30.3	43.9	46.8	56.1	66.2	75.9	84.4	95.9	100.3	106.7	116.5	121.2
Howard	35.7	52.0	54.3	65.2	78.4	90.4	103.5	119.2	128.2	140.1	156.5	165.5
Kent	1.6	1.6	1.5	1.6	1.6	1.8	2.3	3.1	3.3	3.6	4.3	4.9
Montgomery	79.2	93.9	97.7	116.2	137.0	161.8	185.1	209.5	218.9	232.7	265.7	281.6
Prince George's	230.0	293.2	336.3	411.6	473.6	558.7	634.1	740.0	772.7	796.6	867.0	898.1
Queen Anne's	4.3	4.6	4.9	6.1	7.6	8.9	10.5	12.5	13.4	14.5	16.3	17.2
St. Mary's	16.3	21.5	22.2	26.3	30.5	34.7	39.4	44.6	47.4	50.8	56.9	59.9
Somerset	7.3	8.1	9.6	11.7	13.1	15.9	17.4	20.1	21.1	21.7	23.9	25.0
Talbot	1.6	1.7	1.8	2.2	2.5	3.0	3.6	4.5	4.6	4.8	5.6	6.0
Washington	25.6	30.2	32.8	40.5	46.8	55.5	63.8	77.4	82.0	86.4	96.2	101.6
Wicomico	21.8	25.7	27.8	34.6	39.9	48.3	55.4	65.5	69.0	71.7	79.6	84.6
Worcester	3.2	3.8	3.9	4.5	5.0	5.6	6.3	7.4	7.5	7.7	9.1	9.5
Unallocated	3.8	7.8	10.6	18.2	26.0	33.7	41.2	48.7	49.3	50.0	50.8	51.2
Total	**$1,034.0**	**$1,277.0**	**$1,393.8**	**$1,678.1**	**$1,931.2**	**$2,259.4**	**$2,547.7**	**$2,929.8**	**$3,067.5**	**$3,210.5**	**$3,526.8**	**$3,680.5**

Note: Unallocated includes SEED School and accounts for net change in categorical State aid, principally the expansion of Judy Centers.
Source: Department of Legislative Services, August 2021

[3] The foregoing projections were created by the Department of Legislative Services ("DLS"). This information is publicly available at DLS' website. *See* Dep't of Legislative Services, "Education", Blueprint for Maryland's Future. *Available at*: http://dls.maryland.gov/policy-areas/education#! (last accessed September 9, 2021).

As it relates to per pupil funding, the following table demonstrates that BCPSS will receive the most significant increase in direct State aid per pupil as a result of the Blueprint.[4]

Blueprint for Maryland's Future – Chapters 36 and 55 of 2021
Updated Fiscal Note Appendices

Appendix D-1
Estimated Direct State Aid per Pupil

County	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028	FY 2029	FY 2030	FY 2031	FY 2032	FY 2033	FY 2034
Allegany	$12,371	$13,019	$13,536	$14,346	$15,030	$15,880	$16,691	$17,737	$18,344	$18,927	$19,938	$20,695
Anne Arundel	5,613	5,910	6,058	6,345	6,652	6,954	7,269	7,605	7,840	8,100	8,448	8,680
Baltimore City	15,159	15,915	16,643	17,779	18,598	19,967	20,857	21,977	22,625	23,176	24,310	25,081
Baltimore	7,654	8,137	8,403	8,851	9,284	9,750	10,257	10,886	11,206	11,570	12,083	12,419
Calvert	6,548	6,789	6,905	7,237	7,586	7,933	8,297	8,715	8,965	9,280	9,670	9,931
Caroline	12,515	12,844	13,188	13,772	14,403	15,041	15,714	16,594	17,110	17,529	18,297	18,839
Carroll	6,264	6,406	6,488	6,763	7,119	7,469	7,890	8,344	8,594	8,920	9,291	9,541
Cecil	8,287	8,645	8,886	9,335	9,804	10,307	10,827	11,528	11,859	12,265	12,784	13,114
Charles	8,348	8,685	8,899	9,344	9,790	10,246	10,732	11,299	11,646	12,023	12,597	12,991
Dorchester	12,503	13,118	13,664	14,478	15,103	16,075	16,830	17,784	18,415	18,956	19,924	20,642
Frederick	7,162	7,358	7,521	7,867	8,262	8,665	9,094	9,581	9,870	10,204	10,539	10,722
Garrett	6,970	7,234	7,537	7,728	7,977	8,291	8,661	9,064	9,320	9,573	10,065	10,434
Harford	6,907	7,355	7,561	7,917	8,321	8,717	9,095	9,557	9,820	10,134	10,567	10,860
Howard	5,679	6,067	6,245	6,552	6,907	7,245	7,602	7,999	8,291	8,625	9,035	9,330
Kent	6,459	6,507	6,562	6,667	6,782	7,054	7,488	8,071	8,309	8,580	9,219	9,755
Montgomery	5,446	5,653	5,804	6,030	6,275	6,544	6,804	7,073	7,256	7,465	7,834	8,102
Prince George's	11,038	11,685	12,213	12,976	13,669	14,540	15,331	16,336	16,812	17,225	17,856	18,219
Queen Anne's	5,448	5,583	5,740	6,015	6,344	6,618	6,949	7,348	7,571	7,825	8,187	8,442
St. Mary's	7,626	8,065	8,277	8,659	9,055	9,465	9,899	10,364	10,690	11,056	11,590	11,958
Somerset	15,508	16,071	16,937	17,978	18,857	20,210	21,106	22,416	23,101	23,700	24,982	25,883
Talbot	4,150	4,239	4,335	4,503	4,658	4,845	5,051	5,321	5,446	5,560	5,825	5,994
Washington	9,822	10,191	10,518	11,101	11,610	12,256	12,900	13,798	14,265	14,715	15,435	15,960
Wicomico	12,500	13,038	13,477	14,246	14,899	15,771	16,574	17,585	18,161	18,691	19,506	20,120
Worcester	3,759	3,909	4,005	4,161	4,319	4,495	4,696	4,952	5,063	5,181	5,477	5,638
Unallocated	94	92	95	104	113	123	132	140	141	142	144	145
Statewide	**$8,245**	**$8,642**	**$8,929**	**$9,413**	**$9,864**	**$10,403**	**$10,903**	**$11,508**	**$11,838**	**$12,175**	**$12,695**	**$13,037**

Source: Department of Legislative Services, August 2021

See Exh. C.

Funding under the Blueprint expands upon the progress of the Bridge to Excellence legislation, 2002 Md. Laws ch. 288, but goes well beyond it. The Blueprint essentially alters and expands previous funding formulas, both to enable students to achieve the State's performance

[4] This table shows the highest amount of per pupil State aid going to Somerset County Public Schools, which are attended by only a small fraction of the number of students enrolled in Baltimore City Public Schools. Though the per pupil State aid amount for BCPSS is slightly lower than Somerset's, in absolute dollars BCPSS receives more than 38 times the amount of State aid Somerset receives in FY 2023 and nearly 30 times Somerset's estimated amount of State aid for FY 2034.

standards and to ensure equitable distribution of funding to school systems and schools across the State. The majority of the Blueprint's funding innovations employ wealth-equalized formulas, to provide more aid per pupil to school systems in the less wealthy jurisdictions and less aid per pupil to school systems in the wealthier jurisdictions.

These formulas are primarily based on three components. The first formula component is a uniform base cost per pupil that is necessary to provide general education services to students in every school system. *See* Educ. §§ 5-201(s)(1), 5-212. The second component adjusts additional resources associated with educating at-risk student populations, including special education students, students eligible for free and reduced-price meals, and English language learners. For example, Concentration of Poverty Schools Grants are allocated to public schools in which at least 80% of the students are eligible for free or reduced-price meals. Educ. §§ 5-223(a)(4)(i)(2), 5-222(a)(2)(i)(1). For those eligible schools, the State will distribute to the county board of education a "per pupil grant" amounting to the product of $3,374.48 times the number of students enrolled, plus a "personnel grant" equal to $248,833 for each eligible school; those same amounts must be distributed by the local board to each eligible school. Educ. §§ 5-222(b), 5-223(a)(9)(i), 5-223(d), 5-234, (a) and (b). The third component is an adjustment that accounts for differences in the local costs of educational resources. Educ. §§ 5-216, 5-219. The target per-pupil funding amount, Educ. § 5-201(s), includes minimum school funding and increased costs associated with implementing the Blueprint that are provided for all students, including salary increases, additional teachers to provide professional learning and collaborative time for teachers, career counseling, behavioral health, instructional opportunities for students to become college and career ready, and supplies and materials for teachers. Educ. §§ 5-212; 5-234. A Comparable Wage Index ("CWI") increases both State and local funding for public schools in 11 counties, including Baltimore City.

CWI is calculated by measuring variation in the wages of workers similar to teachers and examining costs outside a school district's control. Educ. § 5-216.

Enhanced support and interventions for young children and their families serve as a cornerstone of the Blueprint. These include coordinating and providing services for children and families with the greatest need through centers located in the neediest communities; and expanding access to high-quality, full-day prekindergarten programs for 3-year-olds and 4-year-olds. Educ. § 1-303(1)(i)-(ii). Expansion of full-day prekindergarten will be focused on making full-day prekindergarten available for all four-year-old children from low-income families. Educ. §§ 1-303, 5-206, 5-229 through 5-234, 7-101.1, 7-101.2, 7-1A-01 through 7-1A-09.

The Blueprint establishes a minimum educator salary, effective July 1, 2026, Educ. § 6-1009(e), and increases educator compensation to make it more suitable for a "high-status profession," Educ. § 6-1002(b)(2)(i), at compensation levels comparable to other professions that require a similar amount of education and credentialing. Teacher preparation programs in the State's postsecondary institutions will be more rigorous to prepare teacher candidates to have the knowledge, skills, and competencies needed to improve student performance and to teach all students successfully. Educ. §§ 1-303(2)(ii), 5-408(a)(3) (obligation to review and monitor teacher preparation programs), 5-413 (reporting requirements on progress made in increasing the preparation and diversity of teacher candidates and new teachers), 5-414 (evaluation of the efficacy of efforts to increase diversity), 6-120 (establishment of teacher training practicums), 6-121 (teacher preparation programs requirements), and 6-126 (qualification for an initial teaching certificate). The Blueprint requires each county board of education to establish a four-level career ladder to elevate the teaching profession and encourage the advancement of teachers and principals based on knowledge, skills, performance, and responsibilities. Educ. §§ 6-1001 - 6-1013.

Student instruction will be benchmarked to world-class standards and fully aligned, from prekindergarten through 12th grade, to a college and career ready ("CCR") standard. Educ. § 1-303(3). Students will have additional supports to allow them to achieve the CCR standard by the end of 10th grade, and not later than the end of 12th grade. Educ. § 1-303(5). The CCR standard meets the level of literacy in English and mathematics necessary to be successful in first-year, credit-bearing coursework at a Maryland community college or open enrollment postsecondary institution. Educ. § 1-303(3)(i). Pathways for those students who have not achieved the CCR standard by the end of 10th grade will provide support to enable them to achieve the standard by the end of 12th grade. Educ. § 1-303(3)(iii).

The goal for Career and Technology Education ("CTE") is for each county school system to reach the statewide goal of having 45% of public school students achieve an industry-recognized occupational credential before they graduate. Educ. § 21-204(a)(1). Apprenticeships or other workplace experience will be expanded to lead to an industry-recognized credential by the end of high school. Educ. § 1-303(3)(ii)(3)(C).

The Blueprint's implementation is subject to a strong system of accountability. By February 15, 2022, the Accountability and Implementation Board ("AIB") must develop a Comprehensive Implementation Plan to implement the Blueprint. Educ. § 5-404(a)(4)(i). By June 15, 2022, each unit of State and local government responsible for implementing parts of the Blueprint, including MSDE, the Maryland Higher Education Commission, the Maryland Department of Labor, and each county board of education, must also submit a plan to the AIB. Educ. § 5-404(c)(1)(i)(1). The General Assembly has vested the AIB with "plenary authority" to hold all the foregoing entities that are an integral part of the education system accountable for implementing Blueprint. Educ. § 5-402(h)(3)(i). To ensure that funds are being spent effectively

and that the Blueprint is implemented as intended with fidelity, the AIB automatically will withhold at least 25% of the annual increase in the state share of major education aid for each local school system. Educ. § 5-405. For Fiscal Years 2023 through 2025, the AIB's release of that 25% of annual state funding increase is contingent on the local school system having an implementation plan approved by the AIB. Educ. § 5-405(c). From Fiscal Year 2026 on, the AIB's release of withheld funds is contingent on *either* the AIB's receipt of a recommendation from MSDE, the Career and Technical Education Committee (*see* Educ. § 21-209), or an Expert Review Team (*see* Educ.§ 5-411), *or* the AIB's own determination that it is satisfied with how a local plan is being implemented. Educ. § 5-405(d). The AIB must also contract with an independent evaluator to assess the State's progress in implanting the Blueprint. Educ. § 5-410.

Two expert review teams are established to review and report on implementation of the Blueprint. The first, the Expert Review Team Program, is administered by MSDE. Educ. § 5-411. MSDE will deploy teams of teachers and other experts to schools to determine whether the Blueprint is being successfully implemented. Expert review teams must annually visit a minimum percentage of schools, and every public school must be visited by the 2031-2032 school year. Educ. §5-411. The second, the CTE Expert Review Team Program, is administered by the CTE Committee to determine if students in schools with career and technical education programs and pathways are making sufficient progress. Educ. §5-412.

2. The Built to Learn Act

The companion to the Blueprint is the Built to Learn Act. 2020 Md. Laws ch. 20; 2021 Md. Laws ch. 698. This legislation supports the promise of the Blueprint to improve school facilities. It expands upon an already successful collaboration that has enabled the Maryland Stadium Authority, the Interagency Commission on School Construction ("IAC"), Baltimore City

Schools, and Baltimore City to complete numerous facility projects in Baltimore City Schools with a $1 Billion bond program. 2013 Md. Laws ch. 647. Under the Built to Learn Act, the Maryland Stadium Authority will issue up to $2.2 billion in revenue bonds to fund statewide school facility projects backed by annual payments from the Education Trust Fund ("ETF"), with projects subject to IAC approval. Econ. Dev. § 10-628(c)(1)(viii). The Act increases mandated State funding for supplemental public school construction programs and establishes a new fund for the highest priority school facilities. Econ. Dev. § 10-650(f)(1)(ii)(5). The allocation for Baltimore City is 21% of the total amount allocated (estimated at $420 million). Econ. Dev. § 10-650(b)(1)(ii); Maryland Dep't of Legislative Services, *Fiscal and Policy Note – Built to Learn Act*, p. 4, available at: https://mgaleg.maryland.gov/2020RS/fnotes/bil_0001/hb0001.pdf. In addition, the General Assembly has provided under its Article VIII authority that money in the ETF in excess of the annual allocation to implement the Built to Learn Act, as specified in Econ. Dev. § 10-649(g)(2), shall be included in the Governor's annual budget submission as supplemental funding for public education, State Govt. § 9-1A-30(e)(1).[5]

B. Federal Legislation Significantly Increasing BCPSS's Funding

Recent federal legislation will also provide additional funding to BCPSS. The Coronavirus

[5] The ETF is used, in part, to carry out the Built to Learn Act—specifically, to pay debt service on the bonds issued by the Stadium Authority and to fund school construction projects in Prince George's County that are funded through a public-private partnership. The Comptroller must deposit "a portion of the money in the [ETF] each year into the Supplemental Public School Construction Financing Fund." Md. Code Ann., Econ. Dev. § 10-649(g). The required annual allocations are as follows: $30 million in fiscal year 2022, $60 million in fiscal 2023, and $125 million in each subsequent fiscal year. Econ. Dev. § 10-649(g)(2). Note that the $30 million fiscal year 2022 allocation was not included in the fiscal year 2022 State budget because the veto and subsequent override of the Blueprint for Maryland's Future – Implementation, 2021 Md. Laws, ch. 36, delayed the effective date of the Built to Learn Act. *See* 2020 Md. Laws, ch. 20, Section 13 (Built to Learn Act shall take effect contingent on the taking effect of the Blueprint for Maryland's Future – Implementation). Money in the Supplemental Public School Construction Financing Fund is used to finance the Prince George's County Public-Private Partnership Fund,

Aid, Relief, and Economic Security Act of 2020 ("CARES Act") became law on March 27, 2020. Pub. Law 116-136. The CARES Act includes significant funding for state educational agencies through the Elementary and Secondary School Emergency Relief ("ESSER") Fund, and similar federal programs. In December 2020, Congress enacted the Coronavirus Response and Relief Supplemental Appropriations Act of 2021 ("CRRSAA"). Pub. Law No. 116-260. CRRSAA included additional funding for state educational agencies under an ESSER II Fund and other federal programs. Thereafter, Congress enacted the American Rescue Plan Act of 2021 ("ARP"), which became law on March 11, 2021. Pub. Law 117-2. ARP includes billions of dollars in funding for state and local programs in response to the COVID-19 pandemic, to be distributed through an ESSER III fund and similar federal programs. Under the foregoing federal enactments, BCPSS will receive more than $700 million ($726,453,800) in additional funding that was not legislated when the petition was filed in 2019. *See* Exhibit D, MSBE Federal Funding Information.

C. The Court's Extension of the Consent Decree's Five-Year Term to Secure Compliance with Its June 30, 2000 Order

By agreeing to the Consent Decree entered November 26, 1996, the individual *Bradford* plaintiffs, BCPSS, the Mayor and City Council of Baltimore, and MSBE "resolve[d] their differing claims through an amicable settlement[.]" Consent Decree at 3. The parties further agreed that the Decree's term would end "June 30, 2002, unless the Court extends the term upon timely motion of one of the parties and upon a showing of good cause to extend the Decree." *Id.* ¶ 68. The Court granted such a motion, filed jointly by the *Bradford* plaintiffs and BCPSS, in a Memorandum

---

Econ. Dev. § 10-658(b)(3), and to pay debt service on Stadium Authority bonds, to maintain debt service reserves, and to pay charges and expenses related to the financing of public school construction under the Built to Learn Act.

Opinion and Order issued June 26, 2002. The Memorandum Opinion acknowledged that "unless this Court extend[ed] its supervision for 'good cause'" pursuant to ¶ 68 of the Decree, "[t]his Court's judicial supervision over the remedy established by the Consent Decree w[ould] terminate on June 30, 2002." June 26, 2002 Mem. Op. at 3. The Court found "good cause" existed due to a "lack of compliance" with its June 30, 2000 Order pertaining to BCPSS's request for additional funds under paragraph 53 of the Decree. *Id.* at 5. For that reason, the Court, "pursuant to paragraph 68 of the Consent Decree, retain[ed] jurisdiction and continue[d] judicial supervision of this matter until such time as the State has complied with this Court's June 2000 Order." *Id.*

The Court continued to rely on the same "good cause" it found in the June 26, 2002 Order, when it entered its August 20, 2004 Memorandum Opinion and Order, which contained the last of the substantive declarations issued by the Court in this case. *See* Aug. 20, 2004 Order at 2 ¶ 2 ("Full compliance with the Court's June 2000 declaration will not occur until the BCPSS receives at least $225 million in additional State funding under the Thornton Act by, at the latest, FY 2008."); *id.* ¶ 6 ("The Court will continue to retain jurisdiction to ensure compliance with its orders[.]"); *see also* Aug. 20, 2004 Mem. Op. at 4, 16 ¶ 60, 17 ¶ 61, 67 ¶ 2, 68 ¶ 6.

Then, after the case's thirteen-year dormancy that ended with the filing of the pending petition for further relief, the Court again expressly relied on the "good cause" found by Judge Kaplan in 2002. Jan. 16, 2020 Mem. Op. at 9-10 ("[T]he 2002 Memorandum Opinion and Order issued by Judge Joseph H.H. Kaplan, lengthens the time frame of judicial supervision until such time as compliance with the 2000 Order. Mem. Op. at 5, June 30, 2002. This Court retains jurisdiction under the terms of the Consent Decree.").

D. The Petition for Further Relief's Allegations of Noncompliance with Court Orders

As stated in the first sentence of the petition, "Plaintiffs . . . respectfully submit this Petition

for Further Relief in this longstanding school-finance case seeking *to enforce the Court's prior declarations* of Plaintiffs' constitutional rights to a 'thorough and efficient' education under Article VIII of the Maryland Constitution." (emphasis added.) The petition further asserts that "Defendants . . . have *failed to* provide sufficient funding *to comply with* the Maryland Constitution and *this Court's repeated declarations* in 1996, 2000, 2002, and 2004 regarding insufficient funding to the Baltimore City public schools." Pet. at 1 (emphasis added). The petition then elaborates: "The State's lack of funding for BCPSS violates Plaintiffs' constitutional rights *as determined by this Court in 2000, 2002, and 2004*. This Court expected Defendants to comply with its findings and to fund BCPSS at constitutionally required levels, but *the State has ignored those rulings* for more than a decade." *Id.* at 6 ¶ 18 (emphasis added). The petition's prayer for relief seeks, among other things, a declaration that "The State . . . *has never complied with the Court's prior declarations* as to its constitutional obligations under Article VIII, including the Court's declaration that, at a minimum, 'full Thornton funding' is constitutionally required." *Id.* at 7 ¶ 20(b) (emphasis added). The petition also requests injunctive relief "order[ing] Defendants *to comply immediately with the Court's prior rulings* that 'full Thornton funding,' at the very least, is constitutionally required," *id*. at 8 ¶ 21 (emphasis added), and "order[ing] Defendants to develop and submit a comprehensive *plan for full compliance with* Article VIII and *the Court's prior orders and declarations*," *id.* ¶ 22 (emphasis added). Plaintiffs' memorandum supporting the petition asserts that "[a] petition for further relief pursuant to Maryland Courts and Judicial Procedure [*sic*] Code Section 3-412(a) is the appropriate vehicle for this Court to address the State's decade-long *failure to comply with the Court's prior declaratory orders*[.]" Mem. of Grounds at 68. Their memorandum further suggests that § 3-412 relief is intended to address circumstances where defendants "*fail to comply with the declarations*" previously issued by a court. *Id.* (quoting

DeWolfe, 434 Md. at 420)(emphasis added).

E. Plaintiffs' and BCPSS's Discovery Responses Disclaiming Noncompliance With the Consent Decree or Court Orders as a Basis for the Relief They Seek

Asked in discovery to explain how the State allegedly violated the Consent Decree or any Order, plaintiffs declined to identify any such violation and, instead, conceded that they do not claim that MSBE has violated the Consent Decree or any of the Court's post-Consent Decree orders and they do not base their prayer for further relief on any such noncompliance:

> **INTERROGATORY NO. 6**: If you contend that the State violated the Consent Decree, the June 30, 2000 Order of the Circuit Court for Baltimore City ("2000 Order") issued in this case, the June 25, 2002 Order of the Circuit Court for Baltimore City ("2002 Order") issued in this case, the August 20, 2004 Order of the Circuit Court for Baltimore City ("2004 Order") issued in this case, identify the specific paragraph numbers that you believe have been violated by the State and, for each paragraph identified, specify each act or omission that you believe constituted a violation of that paragraph and identify all corresponding facts, communications, and documents.
>
> **RESPONSE:** Although the Court's jurisdiction over the case arises out of the Consent Decree and the Court's previous orders in 2000, 2002, and 2004, *Plaintiffs' Petition concerns Defendants' ongoing violations of Article VIII of the Constitution of Maryland, not the violation of specific terms of the Consent Decree or the Court's subsequent orders*. The Court's continuing jurisdiction is fully consistent with the terms of the Court's 2004 Order. Declaration Six of the 2004 Order stated that the Court would continue to ensure compliance with its Orders and constitutional mandates until necessary funding had been provided. As the Court concluded in its 2020 Order, this continuing jurisdiction is also consistent with paragraphs 53, 68, and 69 of the Consent Decree, as well as language on page 5 of the Court's 2002 Order. . . .

(Exh. A, at 11-12 (emphasis added).) Thus, despite the petition's repeated references to alleged violations of, and noncompliance with, the Court's orders, when asked to identify precisely how MSBE had allegedly violated the Consent Decree and related orders, plaintiffs reversed themselves and acknowledged that they are not pursuing any theory that MSBE has violated the Consent Decree or any order. (Exh. A, at 11-12.)

For its part, BCPSS also expressly disclaimed any theory that MSBE or the State violated the Consent Decree or related orders:

> **Document Request No. 8:** If you contend that the State has violated the Consent Decree, or is violating the Consent Decree on an ongoing basis, all documents that you believe support your contention.
>
> **Response:** Although the Court's jurisdiction over the case arises out of the Consent Decree and the Court's previous orders in 2000, 2002, and 2004, it is the School Board's understanding that *Plaintiff's Petition for Further Relief concerns Defendant's ongoing violations of Article VIII of the Maryland Constitution, not the violation of specific terms of the Consent Decree or the Court's subsequent orders*. The Court's continuing jurisdiction is fully consistent with the terms of the Court's 2004 Order. Declaration Six of the 2004 Order stated that the Court would continue to ensure compliance with its Orders and constitutional mandates until necessary funding had been provided. Once this had been done, the Court would revisit its jurisdiction, which the Court at no point did. As the Court concluded in its 2020 order, this continuing jurisdiction is also consistent with paragraphs 53, 68, and 69 of the Consent Decree, as well as language on page 5 of the Court's 2002 Order.

Exh. B, at 7-8 (emphasis added).

ARGUMENT

In light of the material change in circumstances since the Court rendered its January 16, 2020 decision, the Court should dismiss the petition and close this case due to lack of subject-matter jurisdiction, for three reasons. First, the petition's challenge to the statutory funding scheme that was in effect when the petition was filed has been rendered moot by the enactment of the Blueprint and the Built to Learn Act, which together transform the statutory scheme for public school funding and dramatically increase funding of BCPSS. This increase is significantly enhanced by federal COVID-relief legislation that provides BCPSS an additional and sizable one-time funding benefit. Second, the plaintiffs' and BCPSS's concession in discovery that they are not claiming any violation of, or noncompliance with, the Consent Decree or this Court's Orders confirms the absence of the "good cause" on which the Court has relied as the basis for extending

its jurisdiction under the Consent Decree. Third, their acknowledgment that the relief sought is not based on a need to secure compliance with prior orders, but instead rests on new claims under Article VIII, means that they cannot obtain relief under Courts and Judicial Proceedings § 3-412, which authorizes only relief that is ancillary to a previously entered declaratory judgment; that is, § 3-412 does not provide a vehicle for pursuing new causes of action.

Not only does the enactment of the Blueprint and the Built to Learn Act render the petition moot, its enactment also renders the Consent Decree moot. Dissolution of the Decree is also warranted in light of the plaintiffs' and BCPSS's concession in discovery that they are not claiming any violation of, or noncompliance with, the Consent Decree or this Court's Orders. This conceded lack of any violation means that there is no "good cause" under the Consent Decree for the Court to invoke its jurisdiction. Finally, in light of the legislative changes, continuation of the Decree would be unreasonable and inequitable.

I. LEGAL STANDARD GOVERNING MOTIONS TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION AND TO DISSOLVE A CONSENT DECREE

Maryland Rule 2-324(b) provides that "[*w*]*henever* it appears that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." Md. Rule 2-324(b) (emphases added). Thus, "a party can question the existence of subject matter jurisdiction at any time"; indeed, a party "cannot waive an objection to a court's subject matter jurisdiction" by, for example, failing to raise the issue at an earlier juncture in the litigation. *Green v. McClintock*, 218 Md. App. 336, 358 (2014) (citation omitted).

A party "is not barred by the consent decree . . . from challenging the court's jurisdiction to enforce it." *Johnson v. Johnson*, 202 Md. 547, 554 (1953). Though a consent decree '"is a judgment that a court enters at the request of the parties,'" it "is like any other judgment," *Pettiford v. Next Generation Tr. Serv.*, 467 Md. 624, 644 (2020) (quoting *Jones v. Hubbard*, 356 Md. 513,

528 (1999)), and, therefore, it '"is subject to the rules generally applicable to other judgments and decrees,'" *Long v. State*, 371 Md. 72, 82-83 (2002) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992)). In this case the Consent Decree "is like any other" injunction, as defined in Md. Rule 15-501(a), because it is "an order mandating or prohibiting" not just "a specified act," but multiple "specified acts." *See*, *e.g.*, *First Federated Commodity Tr. Corp. v. Comm'r of Sec. for Maryland*, 272 Md. 329, 332 (1974) ("[T]he parties consented to the entry of a decree on March 7 which provided for the requested permanent injunction at that time[.]"); *see also Birmingham Fire Fighters Ass'n 117 v. Jefferson County*, 290 F.3d 1250, 1253 (11th Cir. 2002) (recognizing that "consent decrees are injunctions" for purposes of 28 U.S.C. § 1292(a)(1)). Thus, as with other injunctions, a party "may move for . . . dissolution of" the Consent Decree under Md. Rule 15-502(f).

The Court has authority to dissolve the Consent Decree when, as here, its continuation beyond the Decree's prescribed term and long after the State's completed performance of its obligations under the Decree would cause the Decree to '"exceed[] the scope of consent,'" *Pettiford*, 467 Md. at 646 (citation omitted), and '"changes ha[ve] occurred in the conditions or the relations of the parties after the decree,'" which '"render its further operation unreasonable, unjust, oppressive or inequitable,'" *Burch v. United Cable Television of Baltimore Ltd. P'ship*, 391 Md. 687, 697 (2006) (quoting *Emergency Hospital v. Stevens*, 146 Md. 159, 166 (1924)). Vacating an injunction due to "statutory changes" is "ordinarily an appropriate exercise of a circuit court's authority," *Burch*, 391 Md. at 697, since "the General Assembly is entitled to change prospectively the underlying law upon which an earlier injunction was based, and such a change in the law may furnish an appropriate basis for a court to dissolve the injunction," *Id*. at 701.

II. ENACTMENT OF THE BLUEPRINT AND THE BUILT TO LEARN ACT REQUIRES DISMISSAL OF THE PETITION AND THIS CASE AS MOOT

Since, according to plaintiffs' and BCPSS's discovery responses, the petition is proceeding solely on a theory of "ongoing violations of Article VIII of the Constitution of Maryland," Exhibit A at 11-12; Exhibit B at 7-8, the claim the petition advances must be considered a challenge to the constitutionality of statutes, because the General Assembly fulfills its responsibilities under Article VIII through the enactment of legislation pertaining to public schools.[6] Due to the various and significant changes wrought by the enactment of the Blueprint and the Built to Learn Act, the pertinent statutory scheme in effect when the petition was filed in March 2019 and when this Court issued its January 16, 2020 decision, *no longer exists*, at least not in the form that was challenged by the petition. For this reason, the claims asserted by the petition are moot and the case should be dismissed.

In a case involving only requests for prospective injunctive or declaratory relief, '"[o]rdinarily, a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome,'" *Kranz v. State*, 459 Md. 456, 472 (2018) (citation omitted), or "if, as a result of time or circumstances, 'any judgment or decree the court might enter would be without effect,'" *Voters Organized for the Integrity of City Elections v. Baltimore City Elections Bd.*, 451 Md. 377, 392 (2017) (citation omitted). Just as "a change in the law may furnish an appropriate basis for a court to dissolve [an] injunction," *Burch*, 391 Md. at 701, "[a]mong the events that may moot a claim is the '[l]egislative repeal or amendment of a challenged statute,' which 'usually eliminates th[e] requisite case-or-controversy,'" *Hill v. Snyder*, 878 F.3d 193, 204 (6th Cir. 2017) (citations omitted). "It is well established that a case must be

[6] No one before the Court claims to be aggrieved by any failure to adhere to the provisions of applicable statutes or regulations.

dismissed as moot if new legislation addressing the matter in dispute is enacted while the case is still pending." *American Bar Ass'n v. F.T.C.*, 636 F.3d 641, 643 (D.C. Cir. 2011). That is, "when intervening legislation 'alters the posture' of a pending case, 'it is the duty of the . . . court' to . . . dismiss the case as moot." *Id.* at 644 (quoting *Dep't of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986)); *accord Hill*, 878 F.3d at 204 (A case becomes moot if "during the pendency of the litigation," a challenged statute "has been 'sufficiently altered so as to present a substantially different controversy.'")(citation omitted).

Whatever one may think of the Blueprint and the Built to Learn Act, these legislative Acts are undeniably "addressing the matter in dispute" here—specifically, the funding of public schools, including those in Baltimore City, *American Bar Ass'n*, 636 F.3d at 643; these Acts undeniably constitute "intervening legislation [that] 'alters the posture'" of this case, *id.* at 644; and just as undeniably they have "sufficiently altered" the statutory scheme governing the funding of public schools "so as to present a substantially different controversy" from the one the petition addressed when it was filed, *Hill*, 878 F.3d at 204. Unquestionably, the new legislation differs considerably from "the underlying law upon which [the Consent Decree] was based." *Burch*, 391 Md. at 701.

A look at specific relief requested in the petition reveals just how thoroughly it has been either eclipsed by legislative action or voluntarily withdrawn from contention via plaintiffs' and BCPSS's discovery responses. For example, Paragraph 20a seeks a declaration regarding adequacy as '"measured by contemporary educational standards,'" but the Blueprint includes multiple provisions designed to raise educational standards in Maryland substantially above those that were "contemporary" at the time the petition was filed. Paragraph 20b seeks a declaration regarding alleged lack of compliance with "the Court's prior declarations," but the discovery

responses quoted at pages 16 and 17 above disclaim any suggestion that relief is sought based on noncompliance with this Court's orders. Paragraph 20c seeks a declaration regarding "[t]he State's current funding level for educational services in BCPSS," but the funding level that was "current" when the petition was filed has been superseded by the Blueprint's establishment of considerably higher funding levels for BCPSS, which, pursuant to that legislation, will increase further and significantly with each year.

Paragraphs 20e and 20f seek declarations that alleged constitutional violations "will persist until the State of Maryland, including its legislative and executive branches act," but the Blueprint and the Built to Learn Act constitute State action of the most thoroughly considered and costly kind. Paragraph 21 is another prayer that has been effectively withdrawn via discovery responses, since it refers to alleged failure to comply with "the Court's prior rulings," but Paragraph 21 is also a superseded anachronism, because it seeks a declaration regarding "Thornton funding," referring to the former funding formula that has been replaced by the Blueprint. Paragraphs 22 and 23 seek the development and decree of "a comprehensive plan," but by adopting the Blueprint the General Assembly has already acted to require appropriate comprehensive implementation planning to be developed by the Accountability and Implementation Board, Educ. § 5-404(a), and by all other state and local government units responsible for implementing the Blueprint, § 5-404(b)(2). The required implementation plans, to be completed by June 15, 2022, § 5-404(c)(1)(i)(1), include "[p]lans from each local school system to implement each element of the Blueprint for Maryland's Future, including how to:

1. Adapt curriculum, instruction, and the organization of the school day to enable more students to achieve college and career readiness by the end of 10th grade, to provide students with needed services including community-partnered behavioral health services if appropriate, and to identify students who are falling behind and develop a plan to get them back on track;

2. Close student achievement gaps listed under § 5-408(a)(2)(i) of this subtitle within the local school system;

3. Avoid the disproportionate placement of students with particular racial, ethnic, linguistic, economic, or disability status characteristics with novice teachers or teachers providing instruction in fields in which they lack expertise; and

4. Use additional funds for teacher collaborative time in accordance with Title 6, Subtitle 10 of this article prioritized based on availability of a sufficient number of high-quality teachers.

Educ. § 5-404(c)(2)(i).

As shown by this comparison of the petition to the present state of affairs, the case is moot because the petition's "issues presented," regarding a constitutional challenge to a now superseded statutory scheme, "are no longer 'live.'" *Kranz*, 459 Md. at 472. "[A]s a result of time or circumstances," and specifically the passage of Maryland's most audaciously visionary and costly public education initiative ever, "any judgment or decree the court might enter would be without effect,'" *Voters Organized for the Integrity of City Elections*, 451 Md. at 392, because the legislature has already acted to address the concerns that animate the petition. Nowhere in the legislation's thorough and well-thought-out vision is there any language that would create an exception to permit BCPSS's funding and comprehensive planning to be determined through these court proceedings.

As plaintiffs have maintained, the filing of the petition was an outgrowth of plaintiffs' counsel's multiyear lobbying of the legislature that preceded the petition's filing and, they say, the petition was filed specifically due to their impatience with "repeated delays in the work of the State 'Commission on Innovation and Excellence in Education' (the 'Kirwan Commission')." Petition for Further Relief (Mar. 19, 2019) at 5 ¶ 11. As detailed in plaintiffs' prior briefing, "The ACLU remained intensely involved in providing feedback and advocating for legislation to adopt the Commission's recommendations in order to alleviate the ongoing constitutional harm identified in

Bradford." Opp. to Motion to Dismiss (Aug. 23, 2019) at 38. After December 2018, when "state legislators declined to take further action and, instead, recommended that the Kirwan Commission's final findings be delayed a second time," *id.*, the ACLU "[r]ecogniz[ed] that there [would] not be redress through the legislative process in the near future" and wrote to the Governor to remind him "of the State's duty to comply with the court's orders in *Bradford*," *id.* at 39. "When the State still declined to act, Plaintiffs moved for further relief in *Bradford* on March 7, 2019." *Id.* Plaintiffs further explained that, prior to filing the petition, they had been "seeking to avoid pulling the State into costly litigation when compliance seemed reasonably possible." *Id.*

Since the filing of the petition, the Kirwan Commission's labors—and those of the ACLU—have borne fruit in the form of the Blueprint's enactment. The ACLU and their clients have achieved what they claim to have been seeking prior to filing the petition: "redress through the legislative process." *Id.* at 38. Now that "compliance seem[s]," not only "reasonably possible," *id.* at 39, but an undisputed certainty (given plaintiffs' and BCPSS's discovery responses disclaiming noncompliance with court orders as a basis for the petition), it is time to fulfill what plaintiffs also profess to have wanted prior to filing the petition: "to avoid pulling the State into costly litigation," *id.*

If the Court were to proceed further with the case, the relatively limited resources the Court could devote to the task pale in comparison to what the General Assembly and the Kirwan Commission, with the ACLU's help and encouragement, already have brought to bear in the way of expertise, wherewithal, and considerable time (including more than 75 hearings and meetings of the Kirwan Commission and its working groups over a three-year period[7]). The Court's finite resources are better expended on other matters as to which adjudication is an unavoidable

[7] Exhibit E Affidavit of Rachel H. Hise (July 20, 2021) at 1 ¶ 5.

necessity. Therefore, the appropriate disposition is dismissal for mootness.

III. PLAINTIFFS' AND BCPSS'S ACKNOWLEDGMENT THAT THEY DO NOT ALLEGE ANY VIOLATION OF THE CONSENT DECREE OR THIS COURT'S ORDERS CONFIRMS THE LACK OF JURISDICTION UNDER THE CONSENT DECREE

By failing, when asked in discovery, to identify any alleged violation of the Consent Decree or this Court's orders and by, instead, conceding that the petition for further relief is not based on any alleged violation of or failure to comply with either the Consent Decree or any Court order, plaintiffs and BCPSS have now confirmed the nonexistence of the "good cause" on which the Court has relied in extending its supervision beyond the five-year term originally contemplated by the Consent Decree. The terms of the Consent Decree do not authorize extended court supervision for the purpose of entertaining litigation of claims based on neither alleged noncompliance with the Consent Decree nor alleged noncompliance with Court orders. Therefore, the petition should be dismissed and the case closed.

A. The Court Has Recognized That Its Authority to Continue Court Supervision Beyond the Consent Decree's Five-Year Term Depends on the Continued Presence of "Good Cause" in the Form of Noncompliance with the Court's Orders

As the Court understood when it granted the Bradford plaintiffs and BCPSS's joint motion for extension of judicial supervision in June 2002, whether the Court has jurisdiction over this settled case depends on the terms of the Consent Decree, and specifically on paragraph 68, the provision that establishes the decree's termination date as "June 30, 2002, unless the Court extends the term upon timely motion of one of the parties and upon a showing of good cause to extend the Decree." The Court's June 26, 2002 Order extending supervision expressly relied on the "good cause" provision of paragraph 68 and specified that "[t]he State's lack of compliance to date with the [Court's] June 2000 order" constituted "good cause" under paragraph 68 in light of the Court's "inherent power and jurisdiction to enforce its own orders." June 26, 2002 Mem. Op. at 4-5. The

Court's Order extending supervision stated that, "pursuant to paragraph 68 of the Consent Decree, . . . this Court will retain jurisdiction and continue judicial supervision of this matter until such time as the State has complied with this Court's June 2000 order." June 26, 2002 Order.

Thus, the Court expressly recognized that extension of court jurisdiction under paragraph 68 was not a permanent grant of license to continue litigating perpetually, but was instead temporary and contingent on whether there continued to be noncompliance with the June 2000 Order. The Court's subsequent August 20, 2004 Memorandum Opinion and Order continued to rely on this same "good cause" rationale for extended court supervision and framed its declarations in terms of the perceived ongoing failure to achieve "[f]ull compliance with the Court's June 2000 declaration," and, more specifically, what the Court considered to be underfunding "representing amounts owed under this Court's final 2000 order[.]" Aug. 20, 2004 Mem. Op. at 67 ¶¶ 2 and 4; Aug. 20, 2004 Order at 2 ¶¶ 2 and 4. The Court again stated that it would "continue to retain jurisdiction to ensure compliance with its orders[.]"[8] Aug. 20, 2004 Mem. Op. at 68 ¶ 6; Aug. 20, 2004 Order at 2 ¶ 6.

The Court once again expressly relied on Judge Kaplan's June 2002 "good cause" determination in its January 16, 2020 Memorandum Opinion, which stated that "the 2002 Memorandum Opinion and Order issued by Judge Joseph H.H. Kaplan, lengthens the time frame

[8] The Court anticipated that "[f]ull compliance with the Court's June 2000 declaration will not occur until the BCPSS receives at least $225 million in additional State funding under the Thornton Act by, at the latest, FY 2008,'' and the Court promised that at that point the Court "will revisit the issue of its continuing jurisdiction, and determine whether the Consent Decree should then be additionally extended for good cause." Aug. 20, 2004 Mem. Op. at 67 ¶ 2, 68 ¶ 6. Though full Thornton funding was achieved by Fiscal Year 2008 as expected, the Court's promise to revisit the question of its jurisdiction went unfulfilled throughout the thirteen years of this case's dormancy that began in 2006 and ended in March 2019. The lack of any court efforts "to monitor and to enforce compliance with the terms of this Decree" during that long period, Consent Decree ¶ 69, itself demonstrates the lack of "good cause" for extending court supervision.

of judicial supervision until such time as compliance with the 2000 Order," and on that basis concluded that "[t]his Court retains jurisdiction under the terms of the Consent Decree." *Id.* at 9-10.[9]

B. Plaintiffs' and BCPSS's Concession in Discovery That They Do Not Assert any Violation of or Noncompliance with the Consent Decree or Court Orders Constitutes a Material Change in Circumstances That Deprives the Court of the Good Cause on Which It Has Relied for Its Jurisdiction Under the Consent Decree

Now, as plaintiffs and BCPSS have confirmed in their discovery responses, quoted above at pages 15 and 16, enforcement of the Consent Decree and this Court's Orders no longer supplies justification for litigation of the petition for further relief. Plaintiffs and BCPSS are unable to point to any noncompliance on the part of MSBE or the State, and they disclaim lack of compliance as a basis for the relief sought.

This concession by plaintiffs and BCPSS marks a significant change from what was alleged in the petition, what plaintiffs represented to the Court orally at the December 10, 2019 hearing,

[9] The Court's January 16, 2020 opinion also noted two other provisions of the Consent Decree, paragraphs 69 and 53, but neither of those purports to supplant paragraph 68's "good cause" requirement for extended court supervision. Indeed, if those other provisions authorized extending the Consent Decree's term, then the Court would have had no need to invoke paragraph 68 in its June 2002 Order extending supervision. Paragraph 69 recognizes that the purpose of the Court's retention of "continuing jurisdiction during the term of this Decree" is "to monitor and to enforce compliance with the terms of this Decree." Plaintiffs and BCPSS have confirmed in their discovery responses that the petition for further relief does not ask the Court to "monitor" or "enforce compliance with the terms" of the Consent Decree. As for paragraph 53, as stated in its plain language, and as it has been described by the Court of Appeals, paragraph 53's authorization of a request for additional funds was available only "[f]or Fiscal Years 2001 and 2002," Consent Decree ¶ 53, and therefore, it provides no support for litigation concerning more recent periods. According to the Court of Appeals' reading of the Consent Decree, "Paragraph 53 provided, in addition, that, *for FY 2001 and 2002*, the Board could request funds in excess of those required under ¶ 47 after completion of the interim evaluation described in ¶ 40.4." *Md. State Bd. of Educ. v. Bradford*, 387 Md. 353, 366-67 (2005) (emphasis added); *see also* June 30, 2000 Mem. Op. at 4 ("For its last two years, FY 2001 and 2002, the Decree provides an additional mechanism for the New Board to ask for funds after an 'interim evaluation' of the schools has occurred, and authorizes a return to Court if the funds are not forthcoming." (describing Consent Decree ¶ 53)).

and what the Court ultimately relied on in its January 16, 2020 decision. The petition manifestly asserted that its purpose was to enforce the Court's prior orders and that such enforcement was needed due to continuing noncompliance with the orders. *See* Pet. at 1; 6 ¶ 18; 7 ¶ 20(b); 8 ¶¶ 21 and 22. Plaintiffs reemphasized the assertion in their written opposition to the motion to dismiss: "This Petition seeks to remedy that non-compliance both under the Court's unquestionable authority to enforce its own orders and under the 'supplemental relief' provision of the Declaratory Judgments Act[.]" Opp. to Motion to Dismiss (Aug. 23, 2019) at 55. At the December 10, 2019 hearing, plaintiffs' counsel repeatedly and unequivocally reiterated that the basis for the petition was MSBE's alleged failure to comply with the Consent Decree and related orders:

> MS. MCCLELLAN: . . . So to be clear, the issue is not that plaintiffs have delayed in filing suit, but that the *defendants have delayed in complying with this court's orders*. And this is really been the reason that there has not been finality in this case because of the defendant's delaying . . . .
>
> . . .
>
> MS. MCCLELLAN: . . . [W]hat the plaintiffs seek is declaration from the court. And in addition*, the plaintiffs seek an injunction that the state comply with the existing court declarations* and finally a comprehensive plan for compliance with article eight going forward.
>
> . . .
>
> MS. MCCLELLAN: Your Honor, *plaintiffs seek for the consent decree to be enforced through injunction.*
>
> . . .
>
> MS. MCCLELLAN: . . . Although there has been some limited success, there has not been finality in this case because *there has not been compliance*.

Dec. 10, 2019 Oral Arg. Tr. 56:4-9; 63:9-14; 65:2-4; 67:1-2 (emphases added).

As indicated by the Court's January 16, 2020 Memorandum Opinion, the Court accepted and relied on the premise that plaintiffs were seeking "an injunction ordering the State to *comply with the previous orders of the Court* by closing the annual funding gap, and ordering Defendant to develop a *plan for compliance with* Article VIII and *previous Court orders*." Jan. 16, 2020

Mem. Op. at 7 (emphasis added). As Judge Kaplan had done in the June 2002 and August 2004 Orders, the Court based its determination of continuing jurisdiction under the Consent Decree on the belief, encouraged by plaintiffs' arguments, that there was "good cause" in the form of a continuing lack of '"compliance with the 2000 Order.'" *Id.* at 9.

Through the recent concession by plaintiffs and BCPSS that the relief sought by the petition is not based on any noncompliance or need to secure compliance with any court orders, they have withdrawn from this case critical allegations, on which the Court relied. Plaintiffs' and BCPSS's inability to point to any violation of or noncompliance with court orders belies the Court's expressed understanding that it had "good cause" for extended jurisdiction due to previously alleged, but now disclaimed, noncompliance with the Court's orders.

C. Plaintiffs' and BCPSS's Concession That the Petition Is Not Based on Any Violation of or Noncompliance with the Consent Decree or Court Orders Reflects the Reality That There Is No Such Violation or Noncompliance

Plaintiffs' and BCPSS's inability to identify any violation or noncompliance is understandable, because as MSBE has previously shown in submissions that remain uncontradicted, the State timely and fully complied with the terms of the Consent Decree, and just as clearly the State has complied with Judge Kaplan's post-Decree Orders. Mem. in Support of Motion to Dismiss (June 19, 2019) at 7-10, 22. Lack of compliance with the June 2000 Order, which Judge Kaplan cited to justify extending court supervision beyond June 30, 2002, does not even arguably persist today.

In the June 2000 Memorandum Opinion and Order, Judge Kaplan relied on the interim evaluation of Metis Associates, Inc., which looked at BCPSS's "overall resources available" from all funding sources and concluded that in addition to its then "current per pupil expenditure of $7,576," BCPSS needed "an amount $2,698 higher" to achieve adequacy, for a total of "$10,274

per pupil." June 30, 2000 Mem. Op. at 15; *see id.* at 14 ("This Court also finds and adopts the overall conclusions of the Metis Report as its findings."); *id.* at 15 ("This Court also finds and adopts the specific conclusions and recommendations of the Metis Report as its findings"). In light of other evidence, and because "[t]he amount of additional funding required cannot be determined with absolute precision," Judge Kaplan "determine[d] . . . that the Baltimore City public schools need[ed] additional funding of approximately $2,000 to $2,600 per pupil" for Fiscal Years 2001 and 2002, *id.* at 26, which would amount to a range of overall resources per pupil from $9,576 (i.e. $7,576 + $2,000) to $10,176 (i.e. $7,576 + $2,600).

According to the Court of Appeals, the June 2000 Order "was essentially hortatory," *Bradford*, 387 Md. at 370. Nevertheless, BCPSS's total funding has exceeded the aspirational funding targets expressed in the Order in every fiscal year since at least Fiscal Year 2007 (the earliest period for which DLS-compiled funding information is still available online). The overall resources per pupil available to BCPSS has significantly exceeded both the high end of Judge Kaplan's range ($10,176 per pupil) and the slightly higher amount recommended by Metis ($10,274 per pupil), adjusted to account for inflation.

The following table compares BCPSS's total per pupil funding per fiscal year with the inflation-adjusted high end of the range declared in the June 2000 Order and the inflation-adjusted Metis recommendation. The inflation adjustment for each fiscal year was computed by using the Bureau of Labor Statistics online inflation calculator app, available at https://www.bls.gov/data/inflation_calculator.htm. The app was used by entering the original amounts derived from the June 30, 2000 Memorandum Opinion ($10,176 and $10,274, respectively) and prompting the app to calculate corresponding inflation-adjusted figures, based on the Consumer Price Index for January of each fiscal year shown in the table. The resulting inflation-adjusted amounts for each fiscal

year are then compared to BCPSS's total funding for each fiscal year, as reported annually by the Department of Legislative Services ("DLS").[10]

[10] *2007 – Overview of Maryland Local Governments – Finances and Demographic Information* at 78, available at http://dls.maryland.gov/pubs/prod/InterGovMatters/Demog/Document.pdf; *2008 - Overview of Maryland Local Governments - Finances and Demographic Information* at 80, available at https://mgaleg.maryland.gov/Pubs/BudgetFiscal/2008-local-government-finances-demographics.pdf; *2009 - Overview of Maryland Local Governments - Finances and Demographic Information* at 84, available at https://mgaleg.maryland.gov/Pubs/BudgetFiscal/2009-local-government-finances-demographics.pdf; *2010 - Overview of Maryland Local Governments - Finances and Demographic Information* at 88, available at https://mgaleg.maryland.gov/Pubs/BudgetFiscal/2010-local-government-finances-demographics.pdf; *2011 - Overview of Maryland Local Governments - Finances and Demographic Information* at 90, available at https://mgaleg.maryland.gov/Pubs/BudgetFiscal/2011-local-government-finances-demographics.pdf; *2012 - Overview of Maryland Local Governments - Finances and Demographic Information* at 90, available at https://mgaleg.maryland.gov/Pubs/BudgetFiscal/2012-local-government-finances-demographics.pdf; *2013 - Overview of Maryland Local Governments - Finances and Demographic Information* at 94, available at https://mgaleg.maryland.gov/Pubs/BudgetFiscal/2013-local-government-finances-demographics.pdf; *2014 - Overview of Maryland Local Governments - Finances and Demographic Information* at 96, available at https://mgaleg.maryland.gov/Pubs/BudgetFiscal/2014-local-government-finances-demographics.pdf; *2015 - Overview of Maryland Local Governments - Finances and Demographic Information* at 94, available at https://mgaleg.maryland.gov/Pubs/BudgetFiscal/2015-local-government-finances-demographics.pdf; *2016 - Overview of Maryland Local Governments - Finances and Demographic Information* at 90, available at https://mgaleg.maryland.gov/Pubs/BudgetFiscal/2016-local-government-finances-demographics.pdf; *2017 - Overview of Maryland Local Governments - Finances and Demographic Information* at 88, available at https://mgaleg.maryland.gov/Pubs/BudgetFiscal/2017-local-government-finances-demographics.pdf; *2018 - Overview of Maryland Local Governments - Finances and Demographic Information* at 88, available at http://dls.maryland.gov/pubs/prod/InterGovMatters/LocFinTaxRte/Overview-of-Maryland-Local-Governments-2018.pdf; *2019 - Overview of Maryland Local Governments - Finances and Demographic Information* at 90, available at http://dls.maryland.gov/pubs/prod/InterGovMatters/LocFinTaxRte/Overview-of-Maryland-Local-Governments-2019.pdf; *2020 – Public School Funding tables* at 2, available at http://dls.maryland.gov/pubs/prod/NoPblTabPDF/PublicSchoolFunding.pdf; *2021 – Public School Funding tables* at 2, available at http://dls.maryland.gov/pubs/prod/NoPblTabPDF/2021PublicSchoolFunding.pdf.

Fiscal Year	High End of Per Pupil Resources Target Declared in June 30, 2000 Order (inflation adjusted)	Metis Associates Recommendation (inflation adjusted)	BCPSS Total Funding Per Pupil from all sources
2007	$11,947.71	$12,062.77	$14,091
2008	$12,459.11	$12,579.09	$15,508
2009	$12,462.83	$12,582.85	$15,621
2010	$12,790.06	$12,913.24	$16,619
2011	$12,998.78	$13,123.96	$16,338
2012	$13,379.02	$13,507.87	$17,001
2013	$13,592.40	$13,723.30	$16,879
2014	$13,807.01	$13,939.98	$16,904
2015	$13,794.68	$13,927.53	$16,740
2016	$13,984.09	$14,118.76	$16,713
2017	$14,333.70	$14,471.74	$16,942
2018	$14,630.48	$14,771.38	$17,211
2019	$14,857.43	$15,000.52	$17,493
2020	$15,226.87	$15,373.52	$18,230
2021	$15,440.01	$15,588.71	$18,396

The following table shows, for each fiscal year, the dollar amount and percentage by which BCPSS's total funding from all sources exceeded the top of the range of overall resources per pupil (as adjusted for inflation) declared necessary in the June 30, 2000 Order.

BCPSS Total Funding Per Pupil
Excess Above High End of Per Pupil Resources Target Declared
in June 30, 2000 Order
(inflation adjusted)

Fiscal Year	Excess Dollars Per Pupil	Percentage Above Top of Target Range
2007	$2,143.29	17.94%
2008	$3,048.89	24.47%
2009	$3,158.17	25.34%
2010	$3,828.94	29.94%
2011	$3,339.22	25.69%
2012	$3,621.98	27.07%
2013	$3,286.60	24.18%
2014	$3,096.99	22.43%
2015	$2,945.32	21.35%
2016	$2,728.91	19.51%
2017	$2,608.30	18.20%
2018	$2,580.52	17.64%
2019	$2,635.57	17.74%
2020	$3,003.13	19.72%
2021	$2,955.99	19.14%

As these tables demonstrate, since at least Fiscal Year 2007 and in every fiscal year since, BCPSS's total funding per student has exceeded, by a significant margin, the high end of the range of overall resources per student declared necessary by the June 30, 2000 Order. In fact, BCPSS's total funding per fiscal year has exceeded Judge Kaplan's highest expectation (adjusted for inflation) by a margin that ranges from a low of 17.74% in 2019 to a high of 27.07% in 2012, for an average excess funding of 22.02% per fiscal year. Therefore, contrary to the justification the Court cited and relied upon for both the June 2002 Order extending court supervision and the 2004 Order with its further declarations, as well as the Court's January 16, 2020 determination that it had jurisdiction to entertain the petition for further relief, noncompliance with the June 30, 2000 Order no longer even arguably exists and has not existed since at least Fiscal Year 2007.

Now, given plaintiffs' and BCPSS's discovery responses, MSBE's compliance with the Consent Decree and this Court's Orders is undisputed. Therefore, the Court should deny the

petition, and terminate the case because undisputed facts confirm the absence of the "good cause" for extending court supervision on which the Court relied in 2002, 2004, and 2020. Without that "good cause," as Judge Kaplan recognized, the term of the Consent Decree has expired, as has this Court's jurisdiction over the matter.

IV. FURTHER RELIEF UNDER THE MARYLAND UNIFORM DECLARATORY JUDGMENTS ACT IS UNAVAILABLE IN LIGHT OF PLAINTIFFS' AND BCPSS'S CONCESSION THAT THE RELIEF THEY SEEK IS NOT BASED ON ANY FAILURE TO IMPLEMENT THE COURT'S PRIOR ORDERS

Plaintiffs' and BCPSS's concession that they do not seek relief based on any noncompliance with this Court's prior declarations also means the Court lacks authority to grant relief pursuant to the statute plaintiffs have expressly invoked, § 3-412 of the Courts and Judicial Proceedings Article, part of the Maryland Uniform Declaratory Judgments Act, Md. Code Ann., Cts. & Jud. Proc. Title 3, subtitle 4. Maryland's Act is based on the Uniform Declaratory Judgments Act ("UDJA"), some version of which has been adopted by 41 states. *See, e.g.*, Idaho Code § 10-1208; Oregon Revised Statutes § 28.080; Texas Civ. Prac. & Rem. Code § 37.011. True to the word "Uniform" in its name, Maryland's Act directs that it "shall be interpreted and construed to make uniform the law of those states which enact it, and to harmonize as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees." Cts. & Jud. Proc. § 3-414. Pursuant to § 3-414, Maryland courts have looked to decisions from other states for guidance in interpreting the Act. *Nova Research*, 405 Md. at 460-61 (citing decisions from Kentucky, Massachusetts, New Mexico, and West Virginia interpreting "further relief" provisions of declaratory judgment statutes); *see also Bankers & Shippers Ins. Co. of New York v. Electro Enterprises, Inc*., 287 Md. 641, 655 (1980) (citing decisions from Arizona, California, Illinois, Mississippi, and Rhode Island).

Under the Act, "[a] court may grant a declaratory judgment or decree in a civil case, if it

will serve to terminate the uncertainty or controversy giving rise to the proceedings, and if . . . [a]n actual controversy exists between contending parties." Cts. & Jud. Proc. § 3-409(a)(1). Section 3-412 of the Act also permits courts to grant "[f]urther relief based on a declaratory judgment or decree … if necessary or proper." Cts. & Jud. Proc. § 3-412(a). This provision authorizes a party to a declaratory judgment to seek "ancillary relief believed necessary to implement a declaratory judgment," *Falls Rd. Community Ass'n*, 437 Md. at 148, that is, "to effectuate the declaratory judgment entered by the court," *Nova Research*, 405 Md. at 460. Before a court may grant a request for further relief, however, the Act expressly requires that the court must, as a fundamental prerequisite, "hav[e] jurisdiction to grant the relief." Cts. & Jud. Proc. § 3-412(b); *see Bachman v. Lembach*, 192 Md. 35, 43 (1949) (Declaratory Judgments Act does not "enlarge the equitable jurisdiction" of a court beyond what would otherwise exist) (citation omitted). Because as shown above, the case is moot and the Court lacks jurisdiction under the Consent Decree due to the absence of the "good cause" the Court previously found and relied upon, the Court cannot satisfy the requirement of § 3-412(b) and is without jurisdiction to entertain a petition for further relief.

Even if the Court otherwise had jurisdiction, "[t]he further relief provision of the Declaratory Judgments Act does, however, have limitations" that bar the relief sought here. *Ultra Res., Inc. v. Hartman*, 346 P.3d 880, 890 (Wyo. 2015). The provision "allows for additional or supplemental relief to be granted between the *same parties* on the *same claim*." *Id.* at 889 (emphasis added). The Act's "further relief 'provision was not intended to give the court continuing jurisdiction to resolve *subsequent disputes* between the parties over matters not involved in the original litigation.'" *Id.* at 890 (quoting *Oklahoma Alcoholic Beverage Control Bd. v. Cent. Liquor Co.*, 421 P.2d 244, 247 (Okl. 1966)) (emphasis added). The Act's authorization of further relief "does *not* permit the re-litigation of issues already resolved," such as the Article

VIII claims settled by the Consent Decree here, "or the determination of *new issues* unrelated to the declaratory judgment," such as the new Article VIII claims plaintiffs now wish to pursue. *Sohani v. Sunesara*, 608 S.W.3d 532, 538 (Tx. Ct. App. 2020) (emphasis added) (citing *Lakeside Realty, Inc. v. Life Scape Homeowners Ass'n*, 202 S.W.3d 186, 191 (Tx. Ct. App. 2005)). Nor may the Act's "further relief" provision be employed in a way that subjects a party to "the peril of an open-ended review with no articulated standards." *Port Everglades Auth. v. Int'l Longshoreman Ass'n*, 652 So. 2d 1169, 1174 (Fla. Dist. Ct. App. 1995). Instead, further relief is available only if it is "necessary to implement a declaratory judgment" according to what the court has previously declared, *Falls Rd. Community Ass'n*, 437 Md. at 148, which otherwise would not be "effectuate[d]" *Nova Research*, 405 Md. at 460, if the requested further relief were not granted.

It is now undisputed that the Court's prior declarations have been "effectuated" and not violated, and both plaintiffs and BCPSS have insisted in their discovery responses that the relief they seek is not based on a need to "implement" any of the Court's prior orders. Nor does the petition satisfy the requirement that "further relief" may be granted only to "the *same parties* on the *same claim*" as were involved in the prior orders. *Ultra Res., Inc.*, 346 P.3d at 889 (emphasis added). Therefore, the Court lacks authority to grant "further relief" under § 3-412.

V. THE COURT SHOULD DISSOLVE THE CONSENT DECREE BECAUSE IT HAS EXCEEDED ITS PRESCRIBED TERM, THE STATE HAS FULFILLED ALL OBLIGATIONS REQUIRED BY THE DECREE AND, ESPECIALLY IN LIGHT OF PROFOUND LEGISLATIVE CHANGES, CONTINUATION OF THE DECREE WOULD BE UNREASONABLE AND INEQUITABLE

As agreed by the parties, the text of the Consent Decree made clear that time was of the essence. For example, paragraph 5 provided that the Decree would "be null and void" unless "by May 1, 1997," the State satisfied the two contingencies provided in paragraph 4: enactment of the "partnership" legislation and approval of the State Budget with additional funding for FY 1998 as

specified in paragraph 47 of the Decree. The State timely satisfied not only the requirements of paragraphs 4 and 5, but also all its other obligations under the Decree. Paragraph 68 of the Decree provided that the Decree would end "June 30, 2002, unless the Court extends the term . . . upon a showing of good cause," and as shown above, it is now conceded that the "good cause" on which the Court relied is nonexistent. The Decree has remained in effect more than nineteen years *beyond* its originally intended termination date, and years after the State fulfilled all funding obligations and other requirements set forth in the Decree. Dissolution of the Decree is warranted on this ground alone, because its continuation beyond its intended term, and without good cause, '"exceed[s] the scope of consent.'" *Pettiford*, 467 Md. at 646 (citation omitted).

Dissolving the Decree is also appropriate because further continuation of the Decree is unreasonable and inequitable. *Burch*, 391 Md. at 697. The plaintiffs long ago received all the consideration for which they bargained in the form of specified funding, legislation, and structural changes. Yet the State has yet to receive the only consideration that it bargained for: an end to the litigation. Moreover, multiple generations of significant changes that have occurred since entry of the Decree "render its further operation" even more "unreasonable" and "inequitable." *Id.* These include material "statutory changes," *id.*, so dramatic that Maryland's current statutory scheme for public school funding could not have been envisioned by the Court and the parties in 1996 when the Decree was entered, or in June 2002 when it was due to end. Such profound changes to the statutory scheme "furnish an appropriate basis for a court to dissolve" the Decree. *Id.* at 701.

CONCLUSION

For the reasons stated, the Court should deny the petition for lack of subject-matter jurisdiction. In addition, the Court should dissolve the Consent Decree because it has exceeded its prescribed term, the State has fulfilled its obligations required by the Decree, and in light of the legislative changes, continuation of the Decree would be unreasonable and inequitable.

Dated: November 10, 2021

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

STEVEN M. SULLIVAN
ELLIOTT L. SCHOEN
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, MD 21202
(410) 576-6465
ssullivan@oag.state.md.us
eschoen@oag.state.md.us

Charles O. Monk, II (CPF# 7412010249)
Jason M. St. John (CPF# 0012130303) Mark A. Simanowith (CPF# 0712120278) SAUL EWING ARNSTEIN & LEHR LLP 500 E. Pratt Street, Suite 800
Baltimore, MD 21202
(410) 332-8600
charles.monk@saul.com
jason.stjohn@saul.com
mark.simanowith@saul.com

Attorneys for Defendant,
Maryland State Board of Education

EXHIBIT B

KEITH BRADFORD, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION,	*	BALTIMORE CITY
	*	Case No.: 24C94340058
Defendants.	*	

* * * * * * * * * * * * *

MOTION TO DISMISS PLAINTIFFS' PETITION FOR FURTHER RELIEF

The defendant, the Maryland State Board of Education, moves to dismiss plaintiffs' Petition for Further Relief on the following grounds:

1. The Petition, which seeks relief ancillary to orders entered more than fourteen years ago, is barred by applicable statutes of limitations and laches;

2. The Petition and the relief it seeks are not authorized by the Consent Decree entered November 26, 1996, which is a final judgment embodying the parties' settlement of this case;

3. The issue plaintiffs seek to litigate through their Petition—the appropriate level of State funding for public schools in one of Maryland's 24 counties—constitutes a nonjusticiable political question; and

4. Applicable law and sovereign immunity preclude the Petition's request for an order authorizing an award of damages and attorneys' fees.

The grounds and authorities for this motion are more fully set forth in the accompanying memorandum. A proposed Order is submitted with this motion.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

STEVEN M. SULLIVAN
ELIZABETH M. KAMEEN
ELLIOTT L. SCHOEN
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, Maryland 21202
(410) 576-6465 (Telephone)
(410) 576-6309 (Facsimile)
ssullivan@oag.state.md.us
ekameen@oag.state.md.us
eschoen@oag.state.md.us

Attorneys for
Maryland State Board of Education

June 19, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of June, 2019, a copy of the foregoing Motion to Dismiss Plaintiffs' Petition for Further Relief, with supporting memorandum, exhibits, and a proposed Order, was sent electronically by email and a hard copy was mailed, postage prepaid, to:

Elizabeth B. McCallum, Esquire
(admitted pro hac vice)
Baker & Hostetler LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
emcallum@bakerlaw.com

Deborah A. Jeon, Esquire
American Civil Liberties Union
Foundation of America
3600 Clipper Mill Road
Suite 350
Baltimore, MD 21211
jeon@aclu-md.org

Ajmel Quereshi, Esquire
Cara McClellan, Esquire
Sherrilyn Ifill, Esquire
NAACP Legal Defense Fund
700 14th Street, NW, 6th Floor
Washington, DC 20005
aquereschi@naacpldf.org
smcclellan@naacpldf.org
sifill@naacpldf.org

Attorneys for Bradford Plaintiffs

Warren N. Weaver, Esquire
Ilana Subar, Esquire
Whiteford, Taylor & Preston, L.L.P.
Seven Saint Paul Street, Suite 1500
Baltimore, Maryland 21202
wweaverf@wtplaw.com
isubar(@wtulaw.com

Attorneys for Baltimore City Board of School Commissioners

Steven M. Sullivan
Assistant Attorney General

KEITH BRADFORD, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION,	*	BALTIMORE CITY
	*	Case No.: 24C94340058
Defendants.	*	

* * * * * * * * * * * * *

ORDER

Upon consideration of the defendant's Motion to Dismiss Plaintiffs' Petition for Further Relief and any opposition thereto, it is Ordered that

1. The motion is GRANTED;
2. The petition for further relief is DISMISSED; and
3. The Clerk shall close the case.

_____ _____

Date Audrey J. S. Carrion, Circuit Judge

KEITH BRADFORD, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION,	*	BALTIMORE CITY
	*	Case No.: 24C94340058
Defendants.	*	

* * * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS' PETITION FOR FURTHER RELIEF

BRIAN E. FROSH
Attorney General of Maryland

STEVEN M. SULLIVAN
ELIZABETH M. KAMEEN
ELLIOTT L. SCHOEN
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, Maryland 21202
(410) 576-6465 (Telephone)
(410) 576-6309 (Facsimile)
ssullivan@oag.state.md.us
ekameen@oag.state.md.us
eschoen@oag.state.md.us

Attorneys for
Maryland State Board of Education

June 19, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

As more fully explained below, the plaintiffs' Petition for Further Relief should be dismissed and the requested relief denied for at least four reasons. First, applicable statutes of limitations and laches bar the Petition's request for relief ancillary to orders entered more than fourteen years ago. Second, the Petition and the relief it seeks are not authorized by the Consent Decree entered November 26, 1996, which is a final judgment embodying the parties' settlement of this case. Third, the subject of the requested relief—the appropriate level of State funding for public schools in one of Maryland's 24 counties—is a nonjusticiable political question that is committed by the Constitution to the political branches for determination. Finally, applicable law and sovereign immunity preclude the Petition's request for an order authorizing an award of damages and attorneys' fees.

STATEMENT OF THE CASE

This case commenced with the filing of a complaint in December 1994, before being settled by all parties through a consent decree entered November 26, 1996 (the "Consent Decree" or "Decree"), a copy of which is attached as Defendant's Exhibit ("Def. Ex.") 1. This Court entered its last substantive order in the case on August 20, 2004. Upon appeal, the only part of that order subjected to review was reversed and vacated by a unanimous Court of Appeals, with an admonishment that "caution[ed] the court to be careful in the kinds of declarations and orders it issues." *Maryland State Bd. of Educ. v. Bradford*, 387 Md. 353, 388 and n.12 (2005). Whether due to that instruction or otherwise, this Court did not issue any further declarations or grant any substantive relief. The last docket entries in the case were withdrawals of attorneys' appearances in January 2007. The case lay

completely dormant thereafter, with no filings by any party, and the Court treated it as closed.

During this case's dormancy, financial resources for educating public school students in Baltimore City increased considerably, largely thanks to the General Assembly's legislative initiatives. In Fiscal Year 2019, funding of Baltimore City Public Schools from State, local, and federal sources amounted to $17,493 per pupil (based on total enrollment), the third highest per pupil amount among all of Maryland's 24 local jurisdictions.[1] The State supplied 69.9% of that funding.[2] The current funding for Baltimore City Public Schools is approximately 2.3 times greater than the per pupil funding in 2000, as found by the Court then.[3] Baltimore City Public Schools rank second among all local jurisdictions in State funding per pupil.[4]

After this case had been closed with no activity for more than twelve years, on March 7, 2019, the *Bradford* plaintiffs filed a Petition for Further Relief attempting to reopen the case and seeking relief ancillary to orders the Court had entered in the years 2000, 2002, and 2004. Among other requests, the Petition asks the Court to order the defendant, the Maryland State Board of Education (the "State Board" or "MSBE"), to

---

[1] Def. Ex. 14, Dept. of Legislative Services, Office of Policy Analysis, *Overview of Maryland Local Governments: Finances and Demographic Information* (Jan. 2019) at 87-88.

[2] *Id.* at 89.

[3] Memorandum Opinion (June 30, 2000) at 15 (finding then "current per pupil expenditure" to be $7,576).

[4] Def. Ex. 15, Dept. of Legislative Services, Office of Policy Analysis, *Overview of State Aid to Local Governments, Fiscal 2020 Allowance* (Jan. 2019) at 24.

provide the Baltimore City Public School System ("BCPSS") "at a minimum" an additional $290 million per year from Fiscal Year 2015 forward, "as adjusted for subsequent inflation," *id.* at 8 ¶ 21, and to "develop and submit a comprehensive plan," with "the final approved plan to be entered as an enforceable judicial decree," *id.* at 8 ¶ 22, 9 ¶ 23. The petition further seeks an award of damages and attorneys' fees for any noncompliance. *Id.* at 9 ¶ 24. The Petition and its supporting memorandum do not cite any provision of the Consent Decree that would authorize the filing of the Petition or the relief sought. Instead, the plaintiffs expressly base the Petition on a provision of the Declaratory Judgments Act, Md. Code Ann., § 3-412. *See* Plaintiffs' Memorandum of Grounds, Points, and Authorities (Mar. 7, 2019) ("Mem. of Grounds") at 68.

The plaintiffs also requested that the case be specially assigned, and their counsel represented that the Baltimore City Board of School Commissioners (the "City Board") concurred with that request. After the Court directed that the City Board enter its appearance, it did so on June 3, 2019. On June 5, 2019, Judge Pierson ordered the case specially assigned to Judge Carrion.

Commencement of Suit and Pretrial Proceedings

In December 1994, parents of Baltimore public school students (the "*Bradford* plaintiffs"), filed suit against the State Board and various State officials[5] claiming that students in Baltimore City Public Schools were not receiving an adequate education, as

[5] This Court dismissed the Governor and Comptroller as party defendants. *See Bradford*, 387 Md. at 364.*Bradford*, 387 Md. at 364.

required by Article VIII of the Maryland Constitution, because the State failed to provide the City public schools with adequate funding. *Bradford v. Maryland State Board of Educ.*, Case No. 94340058/CE19672. The complaint also asserted due process claims. In September 1995, the Mayor and City Council of Baltimore and the Baltimore City Board of School Commissioners also sued, alleging that the City school system was not able to provide the constitutionally required education because the State had failed to provide the City school system with the resources and funding necessary to meet that goal. *Board of School Comm'rs v. Maryland State Board of Educ.,* Case No. 95258055/CL202151.

In October 1995, the State Board and the State Superintendent of Schools filed in both cases third-party complaints against the Board of School Commissioners and the City School Superintendent. The State Board and Superintendent's complaints alleged that the inadequate education of the City's public school students was attributable to the school system's own mismanagement of available resources. Thereafter, all parties filed motions for summary judgment.

In a two-page order issued October 18, 1996, the Court granted partial judgment in favor of plaintiffs on the issue of the adequacy of education provided under Article VIII, but concluded that there remained "a genuine dispute regarding the cause of the inadequate education provided to students in Baltimore City Public Schools and the liability therefor." *Id.* at 2 ¶¶ 2-3. On October 29, 1996, the Court entered an order granting the State defendants' motion for summary judgment as to plaintiffs' due process claims in Counts II and III of the complaint.

The parties then attempted to negotiate a settlement, while simultaneously preparing for what was expected to be a lengthy trial on causation and remedy, scheduled to begin in late November 1996. The parties had designated as many as 27 expert witnesses to testify at trial, plus numerous fact witnesses. *See* Joint Pretrial Statement (Oct. 9, 1996) at 80-94; *id.*, Exhibits G-J (listing fact witnesses). The *Bradford* case and the *Board of School Commissioners* case were joined for trial with *Vaughn G., et al. v. Mayor and City Council of Baltimore, et al.*, U.S. District Court D. Md. No. MJG-84-1911, a long-running federal case in which plaintiffs sought the establishment of a receivership over all BCPSS operations or, alternatively, a partial receivership to oversee matters affecting special education.[6]

Settlement and Entry of Consent Decree

Shortly before trial was to commence, the parties agreed to settle the cases and entered into a Consent Decree. Def. Ex. 1. In that agreement, the parties explicitly chose to leave unresolved their "differing claims as to the causes of and appropriate remedies for" the inadequate education of students in Baltimore City. *Id.*at 1-2. In exchange for relinquishing their respective claims, the parties agreed to a period of Court supervision that would "be in effect through June 30, 2002," an expiration date that could be extended only "upon a showing of good cause to extend the Decree." *Id.*at 22-23 ¶ 68. The Consent Decree provided that Baltimore City Public Schools would be "restructured," and to that end, the Decree proposed "City-State partnership legislation" to be enacted by the General

[6] The *Vaughn G.* case effectively ended when the district court approved the special master's final expense reconciliation report on November 2, 2010.

Assembly. *Id.* at 3 ¶ 2; *see id.* at 4 ¶ 8–11 ¶ 38. The Consent Decree also addressed "Financial Resources": in addition to those funds that would otherwise be appropriated through normal procedures, the State agreed to increase funding to the school system in each of the five "Fiscal Years 1998 through 2002." *Id.* at 3 ¶ 3; *see also id.* at 15 ¶ 47. The State would provide the City Schools with a five-year total of $230 million in additional operating funds, to be disbursed in the amounts of $30 million in Fiscal Year ("FY") 1998, and $50 million in each of the fiscal years 1999, 2000, 2001, and 2002. *Id.* The State further agreed to appropriate $10 million in capital funds per year for the City Schools "[i]n each of Fiscal Years 1998 through 2002," with the funds to be "made available in the proportion of 90% State funds to 10% City funds." *Id.* at 15 ¶ 48; 373 ¶5.

In addition to the specifically enumerated additional funding, the Consent Decree also provided two mechanisms through which the Board of School Commissioners could request greater "additional" funds. First, under ¶ 52 of the Consent Decree, "[f]or Fiscal Years 1999 through 2002," the City Board could request additional funds "through the currently established State Budget process," if it presented a detailed plan to the State showing why greater funds were needed and how they would be spent. *Id.* at 16. The State was to "use best efforts" to provide those funds, "subject to the availability of funds." *Id.* The Consent Decree contained no mechanism or procedure that granted the Circuit Court oversight or review authority over this provision.

Second, under ¶ 53 of the Consent Decree, "[f]or Fiscal Years 2001 and 2002" only, the Board could "request funds in amounts greater than" the $50 million per year provided in ¶ 47. *Id.* at 16 ¶ 53. The Consent Decree called for a period of negotiation between the

State and the City Board concerning the additional funds for those two fiscal years. If by June 1, 2000 negotiations failed, the City Board could request relief from the Court via an expedited hearing. *Id.*, ¶ 53 and ¶ 53(A). Under ¶ 53(A), the State expressly "reserves all of its defenses" to any Court order requiring funds greater than those provided in ¶ 47.

The State's Full Compliance with the Terms of the Consent Decree

It is undisputed that the State satisfied all of the requirements of the Consent Decree, and actually provided Baltimore City Public Schools more additional funding than was specified by the Consent Decree. In 2002, the State submitted two unrebutted affidavits of State officials confirming the State's compliance. *See* Def. Ex. 2, Affidavit of Tina Bjarekull (dated June 10, 2002) and Def. Ex. 3, Affidavit of Yale Stenzler (dated June 5, 2002) (both previously filed in Court as Exhibits 1 and 2 to State Defendants' Memorandum in Opposition to Motion for Extension of Judicial Supervision (June 12, 2002)). The following table summarizes measures taken to implement the Consent Decree:

Para. No.	Consent Decree Provision	Implementation
¶¶ 4-7	Effective Dates of Decree (enactment of partnership legislation and funding)	On April 9, 1997, the Governor signed Senate Bill 795, 1997 Md. Laws ch. 105, the City-State Partnership legislation.[7] In the same legislative session, the Legislature enacted the FY 1998 State Budget with the additional funds required by the Decree, thus making the Decree fully effective.
¶¶ 43-54	Financial Resources	The State more than fully complied with the appropriations required by the Consent Decree. In

[7] The Consent Decree authorized the filing of a motion to determine whether any variance between enacted legislation and the terms of the Decree affects a party's "substantive rights" under the Decree. *Id.* at 4 ¶ 6. Any such motion was required to be filed "no later than 10 business days after the legislation is signed by the Governor." *Id.*

Para. No.	Consent Decree Provision	Implementation
		accordance with ¶ 47 of the Decree, the State appropriated an additional $30 million for FY 1998 and an additional $50 million for each of fiscal years 1999 through 2002. The State also provided an additional $8 million in FY 2001 and an additional $20 million in FY 2002 as BCPSS Remedy Grants. *See* Def. Ex. 2, Bjarekull Affidavit. In capital funding, the State exceeded the requirements of the Consent Decree by providing a total of $145,958,000 in public school construction funds to BCPSS from FY 1998 through FY 2002. The General Assembly approved legislation increasing the State's obligation to provide school construction funds to $20 million in FY 2002, and $13,840,000 in FY 2003. *See* Def. Ex. 3, Stenzler Affidavit.
¶¶ 8-20	New Board of School Commissioners	By enacting § 3-108.1 of the Education Article in its 1997 Session, the General Assembly established the New Board of School Commissioners consistent with the Decree requirements. In its 2002 Session, the legislature repealed and reenacted § 3-109.1 with an amendment removing the term "New" before "Board of School Commissioners." 2002 Md. Laws ch. 288.
¶¶ 21-26	Management Structure	The General Assembly enacted Education §§ 4-304, 4-305, 4-306, and 4-308, which established, respectively, the new City Board's Chief Executive Officer, Chief Academic Officer, Chief Financial Officer, and Parent and Community Advisory Group.
¶¶ 27-28	Transition Plan	The Transition Plan of the New Baltimore City Board of School Commissioners was submitted to and approved by the State Board and State Superintendent in August 1997.
¶¶ 29-34	Master Plan	In July 1998, the State Board approved the BCPSS Master Plan, which emphasized accountability and incorporated critical reform strategies. Certain initiatives were revised through annual Plan updates. In 2002, the General Assembly amended certain statutory

No party filed such a motion. Therefore, as provided in ¶ 6 of the Decree, "the parties shall be deemed to have waived any variance."

Para. No.	Consent Decree Provision	Implementation
		requirements of the Master Plan and required that a five-year comprehensive plan be submitted for approval to the State Board by July 30, 2002, and updated annually. 2002 Md. Laws ch. 545; *see* Md. Code Ann., Educ. §§ 4-309, 4-309.1.
¶¶ 35-38	Personnel and Procurement	The General Assembly enacted Education § 4-310, which required the City Board to adopt rules and regulations governing procurement of goods and services by BCPSS. The City Board adopted such rules and regulations in July 1, 2000. As provided in Education § 4-311, the City Board established a personnel system including a performance-based evaluations system for teachers, principals, and administrators, which were approved by the City Board in December 1997.
¶ 39	Reporting	BCPSS issued a public report annually, beginning in December 1997.
¶¶ 40-42	Review and Evaluation	The State Board and the City Board contracted with Metis Associates, Inc. to evaluate interim progress. Its *Interim Evaluation of the Baltimore City Public School System* was issued in February 2000. The State Board and the City Board contracted with Westat to perform a final comprehensive review and evaluation of the City schools. Its *Report on the Final Evaluation of the City-State Partnership* was issued in December 2001. *See* Exhibits 5 and 12 to the City Board and *Bradford* plaintiffs' Joint Motion for Extension of Judicial Supervision (May 24, 2002).
¶¶ 55-58	Transition from Corporate Governance of BCPSS	Beginning on January 7, 1997, a Transition Committee provided recommendations to the State Board for the initial New BCPSS Board members, and gathered information for the New BCPSS Board to examine upon its establishment. By the stipulated extended deadline of February 26, 1997, the State Board forwarded to the Governor and to the Mayor of Baltimore a list of qualified candidates for the New BCPSS Board. On May 27, 1997, the Governor and the Mayor announced the New BCPSS Board appointments. Subsequent vacancies were filled in a timely manner by the Governor and the Mayor from a list of nominees submitted by the State Board.

Para. No.	Consent Decree Provision	Implementation
¶¶ 59-67	Modifications to Special Education	In October, 1997, the New BCPSS Board appointed a head of City Schools' special education efforts to replace the Court-appointed administrator. On May 3, 2000, the parties in *Vaughn G., et al. v. Mayor and City Council, et al.*, signed a Consent Order Approving Ultimate Measurable Outcomes, which replaced the Long-Range Compliance Plan for Special Education.

Post-Consent-Decree Proceedings: 2000 Petition for Further Relief

The City Board availed itself of the opportunity to seek more funds pursuant to ¶ 53 of the Consent Decree, by asking for $49.7 million in additional funds for FY 2001. The negotiations contemplated by ¶ 53 failed to reach agreement.

On June 9, 2000, the City Board filed a petition for further relief under ¶ 53 to request the additional $49.7 million for FY 2001. Petition of the New Board of School Commissioners for Baltimore City for Further Relief Pursuant to the Consent Decree (Jun. 9, 2000) at 3 ¶ c. The City Board expanded that request beyond the terms of the Consent Decree, however. Although the City Board's petition acknowledged that "the management changes and new funding brought about by the Consent Decree have resulted in improvements to both the management and instructional programs of the Baltimore City public schools," the City Board asked the Court to issue declarations deciding the substance of claims that the parties had settled in the Consent Decree, namely, the amount of State funding necessary to provide "a constitutionally adequate education" under Article VIII. *Id.* at 2, 3. In its opposition to the petition, the State requested that the Court limit its review to the adequacy of the State's response to the Board's specific request for an additional

$49.7 million, because the litigation of constitutional adequacy was not contemplated by the Consent Decree. *See* Memorandum in Support of State Board's Opposition to Plaintiffs' Petition for Further Relief (June 23, 2000) at 16-21.

Nevertheless, the Court's ruling on the petition not only accepted the City Board's invitation to exceed the bounds of the Consent Decree, but actually declared that the State had an obligation to provide vastly greater funding than the additional $49.7 million the City Board had requested. First, the Court's June 30, 2000 Order described its October 18, 1996 partial summary judgment ruling as having "Declared . . . that the State of Maryland was not providing the children of the Baltimore City Public Schools with a Constitutionally Adequate Education when measured by Contemporary Educational Standards," when, in fact, the October 18, 1996 Order contained no such declaration. Instead, the partial summary judgment ruling had expressly declined to resolve the "cause" or "liability"—or the party responsible—for its determination "that the public school children in Baltimore City are not being provided with an education that is adequate." Oct. 18, 1996 Order at 2 ¶¶ 2-3. The Consent Decree subsequently confirmed that those questions had not been resolved on partial summary judgment; the Decree recites that the parties agreed "to resolve their differing claims" as to "the causes of and appropriate remedies" "through an amicable settlement." Consent Decree at 2-3.

The Court's June 30, 2000 Order not only departed from its own partial summary judgment ruling and the Consent Decree by declaring that "the State is not fulfilling its obligations under Article VIII," *id.* at 2, but the Court further declared that an "additional approximately $2,000 to $2,600 per pupil" in State funding for Baltimore City Schools was

"needed" to fulfill those obligations, *id.* at 1. When multiplied by City Schools' full-time equivalent student enrollment for FY 2001 (91,479 students, as stipulated in ¶ 49 of the Consent Decree), the "$2,000 to $2,600 per pupil" amount declared by the Court would mean additional annual State funding of approximately $183 million to nearly $238 million, a range that represents more than 3½ to 4½ times the $49.7 million actually requested by the City Board in its petition. However, as the Court of Appeals subsequently characterized it, the June 30, 2000 Order "was essentially hortatory," *Bradford*, 387 Md. at 370, given that its final provision stated that "the Court trusts"—rather than "orders" or "decrees" or "mandates" —"that the State will act to bring itself into compliance with its constitutional and contractual obligations under the Consent Decree for Fiscal Years 2001 and 2002 without the need for Plaintiffs to take further action."

The State defendants appealed the Court's decision, but by the week before oral argument the State and the City Board had "come to interim terms of agreement" on additional State funding of $55 million. Def. Ex. 27, Joint Motion to Postpone Argument (Jan. 26, 2001) at 1 ¶ 2. The State and the City Board jointly filed both a motion to stay the appeal and a motion to postpone oral argument. *See id.*; Def. Ex. 28, Joint Motion to Stay Appeal (Jan. 26, 2001). The Court of Appeals "denied that request, whereupon the State dismissed its appeal." *Bradford*, 387 Md. at 371.

The Thornton Commission and the Bridge to Excellence in Public Schools Act

Established in the fall of 1999, the Commission on Education Finance, Equity, and Excellence (also known as the "Thornton Commission") distilled its findings and

recommendations into a final report submitted to the Governor and the General Assembly in January 2002. Def. Ex. 4, Affidavit of John W. Rohrer (dated July 15, 2004) at 2 ¶ 4. The Thornton Commission's work served as the basis for the Bridge to Excellence in Public Schools Act, 2002 Md. Laws ch. 288 ("Bridge to Excellence Act"). *Id.*

Until the passage of the Bridge to Excellence Act, the State had not linked its school financing system to expected student outcomes. To establish this link, the Commission contracted with a consultant to conduct "adequacy" studies to quantify the resources that would be needed for schools and school systems to meet the State's performance standards. Def. Ex. 4, Rohrer Affidavit at 2-7. The adequacy studies conducted for the Commission estimated a base per pupil funding—the "foundation program" formula—as well as the additional costs associated with students in three special needs categories: special education, limited English proficient, and economically disadvantaged. *Id.* at 4 ¶ 10; 5 ¶ 12.

The funding formula adopted by the General Assembly in the Bridge to Excellence Act followed the recommendations of the Thornton Commission. *Id.* at 2 ¶ 4; *see* Md. Code Ann., Educ. § 5-202 (establishing the foundation program formula); §§ 5-207 to 5-209 (establishing the weighted supplements for economically disadvantaged students, limited-English proficient students, and special education students). Because the funding is mandatory, it must be included in the Governor's budget submitted to the General Assembly annually in January. *See* Md. Code Ann., State Fin. & Proc. § 7-108(a), paragraphs (2) and (8) (requiring Governor to include in the budget "appropriations requested for public schools" and "any other appropriations required by the Maryland

Constitution or other law to be included in the budget bill"); Md. Const. art. III, § 52, paragraphs (4)(f), (11), (12).

The Bridge to Excellence Act significantly enhanced State funding for public schools, and it simplified the State's school financing structure by eliminating a number of small categorical aid programs. At the time of the Act's passage in 2002, the Department of Legislative Services ("DLS") estimated that State education aid, for all counties, would increase by an additional $1.3 billion by fiscal year 2008, to reach a projected $5.07 billion in total State education aid by FY 2008.[8] That estimate was exceeded by actual State education funding expended in FY 2008.[9]

The Department of Legislative Services' Adequacy Analyses under the Bridge to Excellence Act

The Petition mischaracterizes the analyses performed by the Department of Legislative Services and other policy makers who evaluate implementation of the Bridge to Excellence Act and work to develop other ways to improve public education in Maryland. That is, the Petition seeks to obtain relief for an alleged lack of "constitutional adequacy" based on an "adequacy gap" calculated by DLS, Petition at 4 ¶ 10; 8 ¶ 21, but the DLS assessment does not purport to be a measure of whether the Constitution is satisfied. Rather, DLS and other Maryland education policy makers use the methodology derived from the Thornton Commission's recommendations when analyzing "adequacy."

---

[8] Def. Ex.16, Fiscal Note on Senate Bill 856, 2002 Session, Exhibit 3.

[9] Def. Ex. 11, Dept. of Legislative Services, Office of Policy Analysis, *Adequacy of Education Funding in Maryland* (Jan. 9, 2017) (presentation to the Commission on Innovation and Excellence in Education) at 18.

As explained in the Commission's final report, the Commission recognized a difference between what the Constitution requires and the concept of "adequacy" the Commission ultimately recommended. *See* Commission on Education Finance, Equity, and Excellence, *Final Report* (Jan. 2002) at 5, 6 (noting that "the meaning of the constitutional mandate to provide a 'thorough and efficient' public school system and its relationship to the concept of adequacy of education funding is somewhat unclear," "[g]iven the absence of clear guidance as to the meaning of the term 'thorough and efficient' in the context of adequate funding"). Rather than prescribe a test for "constitutional adequacy," the Commission drew upon the experiences of education policy makers from around the country who had employed the "successful school district" approach, to measure adequacy by comparison to the per pupil costs of operating the most successful, high-performing schools. *Id.* at 7, 9, 26.

Similarly, when DLS analyzes adequacy, the goal is to determine the resources necessary for every public school to provide students the educational opportunities available to students who attend Maryland's most successful schools.[10] That objective, though embraced by the Bridge to Excellence Act, is not mandated by the Constitution. As interpreted by the Court of Appeals, Article VIII does not "compel" maintenance of "exact equality in per pupil funding and expenditures among the State's school districts"

---

[10] *See* Def. Ex.11, Dept. of Legislative Services, Office of Policy Analysis, *Adequacy of Education Funding in Maryland* (Jan. 9, 2017) at 2 (explaining that its analyses calculate adequacy according to the estimated amount of funding "sufficient to acquire the total resources needed to reasonably expect that all students can meet academic performance standards").

or "requir[e] that the funds raised to support the public school system be apportioned in any particular way." *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 619, 631 (1983); *see id.* at 623-24 (explaining that the current Article VIII superseded its predecessor's requirement of a "uniform" system and replaced it with language containing no provision "that the statewide school system be 'uniform'").

Thus, analyses performed by DLS, including the calculation of "adequacy" and the estimated "adequacy gap," represent targets to align spending from State, local, and federal resources with education policy goals. By design, these targets are not "uniform" from county to county, due to the statutory scheme established by the Bridge to Excellence Act. In keeping with the Act's funding model, DLS analyzes adequacy by considering four components: (1) a uniform or "base" cost per pupil that is necessary to provide general education services to students in every school system; (2) adjustments for the additional costs associated with educating three at-risk student populations (special education students, students eligible for free and reduced-price meals, and students with limited English proficiency); (3) an adjustment that accounts for differences in the local costs of educational resources; and (4) a school-system's full-time student enrollment.[11] Because of differences in student enrollment, including at-risk student populations, and differences in the local cost of education, funding "adequacy" varies among local school systems.[12]

---

[11] *See* Def. Ex. 11, Dept. of Legislative Services, Office of Policy Analysis, *Adequacy of Education Funding in Maryland* (Jan. 9, 2017) at 2.

[12] *See id.* at 7 (listing 2015 per pupil adequacy targets by local school system).

The estimates of "adequacy" used by DLS and other policy makers do not constitute entitlements to any guaranteed amounts of State funding for local jurisdictions. Although the General Assembly has enacted funding mandates for public schools, the Legislature has not specified the exact amount of State funding that would constitute "adequacy" for a given county's public schools under Article VIII and applicable statutes. The Petition does not allege that Baltimore City Public Schools have, in any instance, failed to receive funds that the General Assembly has mandated by statute.

Post-Consent-Decree Proceedings: 2002 Request for Extension of Judicial Supervision

On May 24, 2002, the City Board and the *Bradford* plaintiffs filed a joint motion that again sought to adjudicate the substantive claims that the parties had settled in the Consent Decree. Joint Motion for Extension of Judicial Supervision (May 24, 2002). The joint motion asked the Court "to continue its judicial supervision of this matter until such time as the constitutional inadequacy of the education provided by the Baltimore City Public School System has been remedied." *Id.* at 1. That request essentially sought to abandon the Consent Decree's finite five-year term and substitute a term of indefinite duration that would end only with the satisfaction of plaintiffs' claims, which they had already agreed to settle in the Consent Decree. The State defendants opposed that motion on the ground that the State had more than fully complied with the terms of the Consent Decree, because it had fulfilled all the governance terms and appropriated for BCPSS all the monies set forth in the Consent Decree. State Defendants' Memorandum in Opposition

to Motion for Extension of Judicial Supervision (June 13, 2002); *see* Def. Ex. 2, Bjarekull Affidavit; Def. Ex. 3, Stenzler Affidavit.

On June 25, 2002, the Court issued an order stating that it would "retain jurisdiction and continue judicial supervision of this matter until such time as the State has complied with this Court's June 2000 order." The Court's memorandum opinion acknowledged that the passage of the Bridge to Excellence Act, adopted in the 2002 Session, "will arguably result in substantial compliance with the June 2000 order by 2008," but deemed it "uncertain that all the recommended increases will be funded." Memorandum Opinion (June 25, 2002) at 5.

Post-Consent-Decree Proceedings: 2004 Motion for Declaration Regarding Compliance with Prior Orders

On July 8, 2004, the Bradford plaintiffs filed a "Motion for a Declaration Ensuring Continued Progress Towards Compliance with Court Orders and Constitutional Requirements." That motion abandoned any pretense of adhering to the terms of the Consent Decree and its funding provisions limiting the State's funding obligations to fiscal years ending in FY 2002. Instead, the plaintiffs sought "a declaration ... preserving [the] gradual remedy, and directing the State, City, and City Board to revisit their plans to address the fiscal crisis [in Baltimore City Schools] to make certain that the funds available to educate students in the 2004-05 school year are sufficient to ensure continued progress in the direction of that remedy." Motion for Declaration at 3.

On July 16, 2004, the State responded by requesting a declaration that "State aid as legislated by the Bridge to Excellence Act satisfies the constitutional standard of

adequacy," and that "all necessary actions" should be taken "for the restructuring of the Baltimore City Public School System in order for the system to function efficiently and effectively. . . ." State Defendant's Motion for Declaratory Ruling and Other Relief (July 16, 2004) at 1.

After conducting an evidentiary hearing, the Court on August 20, 2004 "Ordered, Adjudged, and Declared" that (1) "[f]ull compliance with the Court's June 2000 declaration" and "constitutional adequacy will not occur until the BCPSS receives at least $225 million in additional State funding by at the latest, FY 2008"; (2) the State had "unlawfully underfunded the Baltimore City School System by $439.55 million to $834.68 million representing amounts owed under this Court's final 2000 order for fiscal years 2001, 2002, 2003 and 2004"; (3) "it would be appropriate for the State to accelerate increases in full Thornton funding to the BCPSS"; (4) "to ensure continued progress towards constitutional adequacy," the "parties" should "mak[e] available" to BCPSS in FY 2005 "at least an additional $30-45 million in operational funding"; (5) the provision in Senate Bill 894, 2004 Md. Laws ch. 148, § 4, requiring that the school system's deficit must be eliminated by the end of FY 2006 was "unconstitutional as applied to the BCPSS"; (6) the provision in the Memorandum of Understanding between the City and BCPSS requiring that the school system's deficit must be eliminated by the end of FY 2006 was "null and void as against public policy"; (7) the City "shall be repaid" remaining amounts owed on its $42 million loan to the City Board "as scheduled"; and (8) absent additional State funding, "BCPSS shall not retire the deficit before fiscal year 2008" and "shall not dedicate more than $ 5 million per year toward the creation of a $ 20 million cash reserve."

August 20, 2004 Order at 2-4. The Court also ordered the parties to file a report in four weeks "on the status of additional funding and plans for its use." *Id.* at 4 ¶ 15.

On September 17, 2004, the State reported to the Court that it would not provide the additional funding proposed by the August 20, 2004 Order, but it would continue to provide funding to BCPSS in accordance with current appropriations. Def. Ex. 5, Letter to Judge Kaplan from Assistant Attorney General Valerie Cloutier (Sept. 17, 2004). In response to that report, the *Bradford* plaintiffs requested and the Court ordered the State defendants to file a more comprehensive report describing how they would ensure that an "additional $30-45 million will be provided to BCPS[S]." *Bradford* Plaintiffs' Response to Sept. 30, 2004 Submissions and Motion for Further Order (Sept. 30, 2004); *see* Order (Nov. 1, 2004) (ordering the State, the City, and the City Board to file revised reports addressing items specified by the Court). The State's subsequent report addressed the items requested by the Court but reiterated that no additional funds for BCPSS would be appropriated, although the State was assisting the school system in numerous ways. State Defendants' Report (Nov. 12, 2004).

The Court of Appeals' Decision

The State appealed the August 20, 2004 Order. After granting certiorari, the Court of Appeals determined that "in its August 20, 2004 order, the [circuit] court has actually done very little of any immediate effect" and that, for the most part, the statements in the August 20, 2004 Order "do not order anyone to do anything." *Bradford,* 387 Md. at 386, 385. Accordingly, the Court of Appeals deemed the Order to be not appealable, except for certain of its rulings not germane to plaintiffs' current Petition for Further Relief, namely,

those declaring § 4 of Senate Bill 894 unconstitutional; voiding the deficit elimination requirement of the Memorandum of Understanding; prohibiting retirement of BCPSS' deficit before FY 2008 and limiting amounts that could be set aside as a cash reserve; and requiring the City Board to repay the City's loan as scheduled. *Id.* at 386-87. As to those challenged parts of the August 20, 2000 Order that were found to be appealable, the Court of Appeals adjudged them "invalid and void."[13] *Id.* at 388. "Because no other aspect of the August, 2004 order, or any other order entered by the Circuit Court to date, [was] properly before [the Court of Appeals]," its decision "express[ed] no opinion with respect to them." *Id.* Nevertheless, the decision ended with an admonition: "Given the importance of this case and the fact that it has been pending already for nearly eleven years with no end in sight, at least until 2008, we caution the Court to be careful in the kinds of declarations and orders it issues." *Bradford,* 387 Md. at 388 n.12.

Proceedings on Remand and Closing of the Case

After the remand, this Court requested reports from the parties. The last filing of any substance in the case occurred in August 2006 when the Board of School Commissioners and the State Board filed reports with the Court. *See* Def. Ex. 6, Case Search Report docket entries for Case No. 24C94340058.

---

[13] The Court of Appeals opted not to address one appealable component of the August 20, 2004 Order—the directive that the City's loan to the City Board be repaid as scheduled—because "the State has not complained in this appeal about that directive." *Bradford*, 387 Md. at 386.

The State's Full Compliance with the Court's 2000, 2002, and 2004 Orders

This Court's August 20, 2004 Order contemplated that "[f]ull compliance" and "constitutional adequacy will not occur until the BCPSS receives at least $225 million in additional State funding by at the latest, FY 2008." *Id.* at 2 ¶¶ 2, 3. Just as the Court anticipated, the State attained what the Court considered to be "full compliance" and "constitutional adequacy" by FY 2008. As a result of the Bridge to Excellence Act, total annual State education aid for Baltimore City increased from $584.3 million in FY 2002 to $889.8 million in FY 2008, for a total increase of $305.5 million.[14] The funding for Baltimore City Public Schools in FY 2008 more than met its adequacy target.[15]

Maryland's Efforts to Overcome a Structural Deficit and the Fiscal Impact of the Recession

Absent from the Petition is an acknowledgment of the extreme difficulties the State of Maryland had to overcome to maintain funding of public education in the late 2000s when faced with significant revenue shortfalls, which were exacerbated by the most severe economic downturn since the Great Depression. Due in part to the significant increase in State education aid under the Bridge to Excellence Act, by the end of 2006 the State's general fund suffered from a structural deficit, with ongoing revenues expected to fall short

---

[14] Def. Ex. 11, Dept. of Legislative Services, Office of Policy Analysis, *Adequacy of Education Funding in Maryland* (Jan. 9, 2017) at 18 (State funding amounts including aid for student transportation and other purposes).

[15] *Id.* at 5.

of operating costs by approximately $1.3 billion for FY 2008.[16] Within the next year, the budget crisis worsened as the United States economy experienced its most severe and prolonged economic downturn in decades.[17] For the next several years, the State government endured a period of significant revenue shortfalls, budget cuts, elimination of positions, employee furloughs, and other belt-tightening measures, but through it all, the State strove to protect the gains Maryland had made in education aid, though fiscal constraints would limit the State's ability to increase the level of funding.[18]

For example, in the 2007 regular Legislative Session, the General Assembly passed a State budget with one-time transfers and budget cuts totaling $235.9 million,[19] but by the following summer more cuts were needed. In July 2007, the Board of Public Works approved further cuts of FY 2008 appropriations amounting to more than $220 million[20] —just one of eight rounds of budget cuts the Board of Public Works undertook between January 2007 and July 2010.[21] By October 2007, the Governor found it necessary to call

---

[16] Def. Ex. 20, Spending Affordability Committee, 2006 Interim Report (Dec. 2006) at 36.

[17] Def. Ex. 21, Phil Oliff, Chris Mai, and Vincent Palacios, *States Continue to Feel Recession's Impact* (Center on Budget and Policy Priorities, June 27, 2012).

[18] *See* Def. Ex. 12, Dept. of Legislative Services, Office of Policy Analysis, *Overview of Local Governments* (2008 through 2019), Exhibit 7.4.

[19] Def. Ex. 22, The 90 Day Report – A Review of the 2007 Legislative Session (April 13, 2007) at A-1.

[20] Def. Ex. 23, Board of Public Works, After Meeting Agenda Summary (July 11, 2007) at 13.

[21] Def. Ex. 24, Dept. of Legislative Services, *Major Issues Review 2007-2010* (July 1, 2010) at A-3.

a Special Session of the Legislature, in which the General Assembly adopted several measures to address the structural deficit, most prominently a combination of spending cuts and revenue enhancements, including a one-percentage-point increase in the State sales tax rate. 2007 Md. Laws (Special Session) ch. 2 (Budget Reconciliation Act); *id.*, ch. 3 (Tax Reform Act of 2007); *id.*, ch. 6 (Transportation and State Investment Act). The Legislature also passed a proposed constitutional amendment authorizing video lottery terminal gaming, *id.*, ch. 5, later ratified by voters, and enacted accompanying legislation providing that a portion of gaming revenues would be placed in a new Education Trust Fund, to be used for purposes including "public elementary and secondary education, through continuation of the funding formulas established under the programs commonly known as the Bridge to Excellence in Public Schools Act . . . ," as well as school construction and capital improvements. *Id.*, ch. 4.

Although the Governor and General Assembly managed to prevent education funding from being cut, the severity of the budget crisis demanded efforts to slow the growth of education spending. Among the many cost-containment measures adopted during the 2007 Special Session, the General Assembly eliminated inflation increases to the Bridge to Excellence Act funding formulas for fiscal years 2009 and 2010 and altered the annual inflation adjustment to moderate annual growth in subsequent years. 2007 Md. Laws (Special Session) ch. 2.[22] To offset some of the effect of eliminating the inflation

[22] The Bridge to Excellence Act provided for annual adjustments to the per pupil foundation amount (the base amount used to calculate per student funding levels under the State's major aid formulas) beginning in FY 2009, after the full phase-in of the formulas.

adjustments for 2009 and 2010, the General Assembly established supplemental grants to ensure that each school system received at least a 1 percent annual increase in State aid for those fiscal years. *Id.*

The effects of the recession and the struggle to eliminate the structural deficit continued beyond the end of the decade.[23] Ultimately, the Legislature found it necessary to further limit the growth of spending under the State's education funding formula, first, by limiting the per pupil "foundation" component increase to 1 percent for FY 2012. 2009 Md. Laws ch. 487 (Budget Reconciliation and Financing Act). The following year, the General Assembly extended the 1 percent annual inflation cap through FY 2015. 2010 Md. Laws ch. 484 (Budget Reconciliation and Financing Act). Then, legislation enacted in the 2011 Session held the per pupil foundation amount at its FY 2011 level for FY 2012. 2011 Md. Laws ch. 397 (Budget Reconciliation and Financing Act).

Under the Act, the annual adjustments were to be based on increases in the Implicit Price Deflator for State and Local Government Purchases ("IPD"). In 2002, when the law was enacted, annual changes in the IPD over the next several years were expected to range from 2.3 to 3.0 percent, but beginning in FY 2006, the actual IPD exceeded that range, reaching 5.67 percent in FY 2008. Fiscal Note on House Bill 1 of 2007 Special Session, at 5-6. Chapter 2 of the 2007 Special Session limited the annual inflation adjustment to the lesser of: (1) the increase in the IPD; (2) the increase in the Consumer Price Index for All Urban Consumers for the Washington-Baltimore Metropolitan Area; or (3) 5 percent.

[23] *See* Def. Ex. 25, Dept. of Legislative Services, *Major Issues Review 2011-2014* (June 4, 2014) at A-1; Def. Ex. 21, Phil Oliff, Chris Mai, and Vincent Palacios, *States Continue to Feel Recession's Impact* (Center on Budget and Policy Priorities, June 27, 2012).

These measures to contain the growth of State education spending rendered it less likely that a given local jurisdiction would meet DLS's aspirational adequacy estimates, and led to increases in the size of the estimated adequacy gaps for some school systems, including Baltimore City Public Schools.[24] Nevertheless, despite all of the economic turmoil and legislative struggles to contend with it, total annual State aid for Baltimore City Public Schools consistently remained above the level of funding that was attained when the Bridge to Excellence Act formula became fully implemented in FY 2008.[25] According to the annual *Overview of Maryland Local Governments: Finances and Demographic Information* prepared by DLS,[26] Baltimore City Public Schools received the following amounts of total State funding in Fiscal Years 2008 through 2019:

Fiscal Year	Total State Aid	Per Pupil State Aid	Ranking Among All Counties by Per Pupil Aid
2008	$881,987,140	$11,360	1
2009	$902,531,370	$11,520	1
2010	$914,527,946	$11,690	1
2011	$953,723,458	$12,083	1

[24] For consistency purposes, and because these adequacy estimates are targets designed to give policy makers and legislators guidance for efforts to achieve "the educational outcomes that are desired by the State," Commission on Education Finance, Equity, and Excellence, *Final Report* (Jan. 2002) at 5, DLS continued to calculate the "adequacy target" for a jurisdiction based on the Bridge to Excellence Act provisions as originally enacted, using the inflation adjustment based on IPD, without using the Consumer Price Index or factoring in the annual cap the Legislature subsequently adopted.

[25] Def. Ex. 12, Dept. of Legislative Services, Office of Policy Analysis, *Overview of State Aid to Local Governments* (2008 through 2019), Exhibit 7.4.

[26] *Id.*

Fiscal Year	Total State Aid	Per Pupil State Aid	Ranking Among All Counties by Per Pupil Aid
2012	$957,116,763	$12,040	1
2013	$961,636,019	$12,017	1
2014	$983,688,016	$12,274	1
2015	$983,777,835	$12,245	1
2016	$953,776,777	$12,049	1
2017	$943,957,162	$12,091	1
2018	$924,537,941	$12,104	2
2019	$918,890,326	$12,223	2

The Petition evidently takes issue with the General Assembly's decisions to limit increases in State funding to adjust for inflation, but those decisions were well within the Legislature's constitutional authority. As the Court of Appeals held in this very case, "[a]s part of its responsibility for establishing throughout the State a thorough and efficient system of free public schools, the General Assembly has at least the authority, if not an obligation, to ensure that appropriations for educational purposes are managed wisely" and to "prohibit" deficits or "insist that they be promptly eliminated." *Bradford*, 387 Md. at 388.

The Kirwan Commission and the Blueprint for Maryland's Future

In 2016, the General Assembly established the Commission on Innovation and Excellence in Education, better known as the "Kirwan Commission," with a broad mandate

to consider challenges facing Maryland's public schools and to make recommendations for improving State policies. 2016 Md. Laws ch. 701. Among its various responsibilities is the task of "updating the base funding level for students without special needs and updating the per pupil weights for students with special needs to be applied to the base funding level as established by the Bridge to Excellence in Public Schools Act of 2002 to ensure that students are adequately prepared for college and careers." *Id.*, § 1(g)(6)(i). The Commission issued its Preliminary Report in January 2018, http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2018-Preliminary-Report-of-the-Commission.pdf, along with a Technical Supplement entitled "How Does Maryland Stack Up," http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2018-Preliminary-Report-of-the-Commission_VolumeII.pdf. The Legislature then created a fund for implementing the Kirwan Commission's recommendations. 2018 Md. Laws ch. 361 § 1, codified at Md. Code Ann., Education § 5-219.

In addition to establishing the Kirwan fund in 2018, the General Assembly has passed several other measures to provide additional education funding to Baltimore City and other counties. For example, because the statutory "foundation" amount of State funding is based, in part, on a school system's full-time student enrollment, as student enrollment in Baltimore City Public Schools decreased significantly since the Bridge to Excellence Act's adoption, Baltimore City received a lower total amount of State aid under

the formula.[27] To ameliorate lower enrollment's effect on State funding levels, the General Assembly created a State education grant program to provide supplemental grant funding based on a three-year enrollment average, for those jurisdictions with declining enrollment. 2017 Md. Laws ch. 6.

The Legislature also acted to address another funding issue encountered by Baltimore City Public Schools: the "wealth" component of the "foundation" formula caused a problem in 2015 because Baltimore City's "property wealth grew by more than $1.3 billion" in 2014 — "by far the fastest rate in Maryland."[28] That increase in the City's wealth lowered the "foundation" amount of State aid required under the Bridge to Excellence Act, even though much of that increased wealth would not yield increased revenue for Baltimore City Public Schools, due to tax breaks the City had granted to spur economic development.[29] The General Assembly addressed the problem with 2016 legislation providing that those economic tax incentives would not count toward "wealth" for purposes of the foundation formula.[30]

---

[27] *Compare* Def. Ex. 17, Maryland State Dept. of Education, *Final Calculations for Major State Aid Programs for Fiscal Year 2002* (June 15, 2001) at 2 (Baltimore City Public Schools' full-time student enrollment for purposes of determining FY 2002 State aid was 92,799.00) *with* Def. Ex. 15, Dept. of Legislative Services, Office of Policy Analysis, *Overview of State Aid to Local Governments, Fiscal 2020 Allowance* (Jan. 2019) at 24 (showing Baltimore City Public Schools full-time equivalent enrollment as 73,580.25 for purposes of determining State aid).

[28] Def. Ex. 18, Luke Broadwater, "Baltimore's development boom leads to loss in school aid," *Baltimore Sun* (Feb. 7, 2015).

[29] *Id.*

[30] 2016 Md. Laws ch. 258; *see* 2018 Md. Laws ch. 387 (removing sunset provision); Def. Ex. 19, Luke Broadwater, "Assembly passes bill to avoid $300M loss to Baltimore schools stemming from city's tax deals," *Baltimore Sun* (March 27, 2018).

To bolster education funding more generally, the General Assembly proposed an amendment to the Maryland Constitution that requires the Governor to include in the annual State Budget, as *supplemental* funding for prekindergarten through grade 12 in public schools, the revenues from video lottery operation licenses and any other commercial gaming dedicated to public education in an amount above the level of State funding for education in public schools provided by the Bridge to Excellence Act. 2018 Md. Laws ch. 357. The amendment, known as "the education lockbox," was adopted by the voters in the general election in November 2018.

In its most recent Session, the Legislature enacted the Blueprint for Maryland's Future, 2019 Md. Laws ch. 777, adopting the Kirwan Commission's policy recommendations as State policy for public education in Maryland. The law also provides for enhancements to State education aid based on the Kirwan Commission's recommendations. With these enhancements, State aid to local school systems increases by $252 million in FY 2020 and is projected to increase by $351 million in FY 2021 and at least $370 million in FY 2022. Fiscal Note on Senate Bill 1030 of 2019, at 2. On June 4, 2019, Senate President Miller and House Speaker Jones announced appointment of the Blueprint for Maryland's Future Funding Formula Workgroup to finalize recommendations for a new funding formula for public schools to replace the Thornton formula, in time for consideration of those recommendations in the 2020 Legislative Session. Def. Ex. 7, Press Release (June 4, 2019).

Plaintiffs' Petition for Further Relief

On March 7, 2019, the *Bradford* plaintiffs filed their Petition for Further Relief seeking to reopen the case. The Petition reiterates the history of the case from 1996 to 2004, and then makes further allegations going forward to FY 2015. First, the Petition reasserts claims that were raised in the original complaint and settled in the Consent Decree. For example, the plaintiffs seek a declaration that the "State has been in continuous violation of Article VIII since this litigation commenced. . . ." Petition at 7 ¶ 20(b). However, the Petition primarily focuses on facts alleged to have occurred long after this case was closed. Specifically, the plaintiffs allege that "[s]tarting in FY 2009, the State has acted to halt full Thornton funding," and "[b]y FY 2013, the Department of Legislative Services ('DLS'). calculated an adequacy gap of $156 million, and for FY 2015, that gap had risen to $290 million." *Id.* at 4 ¶ 10. The plaintiffs ask the Court to make various declarations and, *inter alia*, order defendants to

- "comply immediately with the Court's prior rulings that 'full Thornton funding,' at the very least, is constitutionally required, using, at a minimum, the $290 million shortfall in annual funding that the DLS found was needed for 'full Thornton funding' for FY 2015, as adjusted for subsequent inflation," *id.* at 8 ¶ 21;

- "develop and submit a comprehensive plan for full compliance with Article VIII and the Court's prior orders and declarations, subject to review and approval by the Court," addressing various matters specified by the plaintiffs, including capital improvements, *id.* at 8 ¶ 22, with "the final approved plan to be entered as an enforceable judicial decree of the Court," *id.* at 9 ¶ 23; and

- "pay compensatory damages" for noncompliance, "including attorney's fees incurred in enforcing the Court's orders and decrees, as well as penalties to compel compliance," *id.* at 9 ¶ 24.

ARGUMENT

I. THE PETITION FOR FURTHER RELIEF IS BARRED BY APPLICABLE STATUTES OF LIMITATIONS AND LACHES.

The Petition for Further Relief, filed more than 14 years after the last substantive court order was entered in this case, cannot be entertained because it is barred by applicable statutes of limitations and laches. Plaintiffs expressly base their request for relief on the Declaratory Judgments Act, Md. Code Ann., Cts. & Jud. Proc. § 3-412(a)Proceedings § 3-412(a) ("Further relief based on a declaratory judgment or decree may be granted if necessary or proper."). *See* Mem. of Grounds at 68. Plaintiffs say they are seeking further relief under § 3-412(a), including "injunctive and additional declaratory relief," to enforce "the Court's prior declaratory orders." Mem. of Grounds at 68-69. As the Court of Special Appeals has held, such further relief ancillary to a declaratory judgment "may be stale and therefore can be subject either to limitations or laches as the case may be." *Murray v. Midland Funding, LLC*, 233 Md. App. 254, 262 (2017).

Generally, "when additional relief is sought ancillary to a declaratory judgment action, the court will look to the remedy sought to see if that relief is at law or at equity," to determine "whether that ancillary relief is barred by the statute of limitations" (for relief "at law") or "barred by laches" (for relief "of an equitable nature"). *Id.* at 263. However, as the Court of Appeals has held, if a case is deemed to "involve[] concurrent legal and equitable remedies, 'the applicable statute of limitations for the legal remedy is equally applicable to the equitable one,'" and both will be barred by the statute of limitations.

Frederick Road Ltd. P'ship v. Brown & Sturm, 360 Md. 76, 117 (2000) (citation omitted). In this case, how one characterizes the relief, as either legal or equitable, does not affect the outcome: whether one considers applicable statutes of limitations or the principles of laches, the Petition is time-barred.

A. Maryland's Twelve-Year Statute of Limitations for an Action on a Judgment Bars Plaintiffs' Claim to Enforce Declaratory Judgments Entered More than Fourteen Years Ago.

The Petition seeks to enforce "declarations [entered] in 1996, 2000, 2002, and 2004," Petition at 1, and most specifically, the portions of those declarations pertaining to the level of State funding for Baltimore City Public Schools. That request for relief is barred by the statute of limitations on specialties, § 5-102(a)(3) of the Courts Article, which requires that "[a]n action on" a "[j]udgment" must be "filed within 12 years after the cause of action accrues." "The statute of limitations begins to run as to judgments from the date of the judgment. . . ." *Lang v. Wilmer*, 131 Md. 215, 227 (1917).

Because plaintiffs base their claim for further relief on § 3-412(a) of the Courts Article, Mem. of Grounds at 68, their Petition is, according to the language of that statute, "based on a declaratory judgment." Therefore, the Petition itself purports to be an "action on" a "judgment," within the meaning of the statute of limitations, § 5-102 (a)(3). As to the most recent of the declarations that form the basis of the Petition, the statute of limitations for enforcing it began to run on the date of the August 20, 2004 Order. The twelve-year statutory period as to that Order expired in August 2016, more than two and a half years before plaintiffs filed the Petition. The limitations period as to the 1996, 2000

and 2002 declarations necessarily expired even earlier. Consequently, the Petition is barred by the twelve-year statute of limitations in § 5-102(a)(3).

Notwithstanding plaintiffs' insistence that their petition for further relief is submitted "pursuant to . . . Section 3-412(a)," Mem. of Grounds at 68, if they were to argue in reply that the Petition's claims are somehow freestanding and independent from the prior judgments they seek to enforce, and thus are not governed by the twelve-year limitation for enforcement of judgments, then those claims would still be time-barred under the general three-year statute of limitations in § 5-101 of the Courts Article. Of the acts alleged in the Petition to be wrongful, the most recent were matters of public record known to plaintiffs by Fiscal Year 2009, at the earliest, and no later than Fiscal Year 2015, which ended more than 3½ years before the Petition was filed in March 2019. *See* Petition at 4 ¶ 10 ("Starting in 2009, the State has acted to halt full Thornton funding. . . . A state-required evaluation separately calculated a $358 million annual 'adequacy gap' in FY 2015. This means that, despite enactment of legislation in 2000 to implement the Thornton funding levels, children in Baltimore City were no better off in 2015 than they were in 2000. . . ."). Therefore, if not barred by the twelve-year limitation in § 5-102(a), then the Petition is barred by the three-year limitation in § 5-101.

B. The Petition Is Also Barred by Laches.

Applying laches yields the same result. First, if the Court were to determine that the remedies sought by the Petition sound in both law and equity, then the Court must apply the statute of limitations to the Petition in its entirety, and laches need not be considered. *Frederick Road Ltd. Partnership*, 360 Md. at 117. If, on the other hand, the relief sought

by the Petition is viewed as wholly equitable in nature, then the Petition is barred by laches for much the same reasons that it is barred by the statute of limitations.

"Laches 'is a defense in equity against stale claims, and is based upon grounds of sound public policy by discouraging fusty demands for the peace of society.'" *Ross v. State Bd. of Elections*, 387 Md. 649, 668 (2005) (citation omitted). Laches "applies when there is an unreasonable delay in the assertion of one's rights and that delay results in prejudice to the opposing party." *Frederick Road Ltd. Partnership*, 360 Md. at 117. Laches is not limited to delay in filing the initial complaint in a case; rather, laches may preclude relief in a longstanding case, if plaintiffs delay in prosecuting it. *See Stoewer v. Porcelain Enamel & Mfg. Co. of Baltimore*, 199 Md. 146 (1952) (laches barred relief after plaintiff failed to prosecute suit for more than ten years after it was filed). The pertinent or most analogous statutory limitations period "provides a benchmark for the application of laches" to "assess whether the [plaintiffs'] delay . . . was unreasonable and whether it prejudiced the interests of [defendants]." *Lamone v. Schlakman*, 451 Md. 468, 485 (2017).

Thus, in assessing the unreasonableness of delay, "generally courts sitting in equity will apply statutory time limitations." *Ross*, 387 Md. at 670. "'In most cases involving an exclusively equitable remedy,' Maryland courts '"refer to the limitations period for the cause of action at law most analogous to the one in equity'" to determine whether the remedy is barred by laches. *State Center, LLC v. Lexington Charles Ltd. Partnership*, 438 Md. 451, 604 (2014) (citation omitted). '"Generally, if there is no action at law directly analogous to the action in equity, the three-year statute of limitations found in . . . § 5–101 of the Courts and Judicial Proceedings Article will be used as a guideline.'" *Id.* (citations

omitted). Where, as here, a case involves a specialty, including an action to enforce a judgment, Maryland precedent has long held that "in obedience to" the statute of limitations for specialties, "equity follows the law in applying . . . the proper period of limitations." *Jones v. Burgess*, 176 Md. 270, 277 (1939) (applying the twelve-year limitation in the predecessor to the current § 5-102, as formerly codified at Article 57, § 3 (citations omitted)).

If a plaintiff has filed a claim for equitable relief after the expiration of the most analogous statute of limitations (or, if there is no analogous statute, the three-year general statute of limitations), then the delay will be deemed unreasonable and, consequently, the "claims succumb to laches on that basis." *State Center, LLC*, 438 Md. at 606. As explained above, the Petition was filed after expiration of both the twelve-year limitations period for enforcing a judgment, § 5-102(a)(3), and the three-year general statute of limitations, § 5-101. Therefore, plaintiffs' delay in seeking the relief was unreasonable, and their claims must "succumb to laches on that basis." *State Center, LLC*, 438 Md. at 606.

The interests of the State have unquestionably been prejudiced by plaintiffs' decision to file their Petition when they did, after allowing the case to lie dormant for more than 14 years since the last substantive Order was issued. For purposes of laches, prejudice is "'generally held to be any thing [*sic*] that places [the defendant] in a less favorable position.'" *Ross*, 387 Md. at 670 (citation omitted). "To establish prejudice, the State need not prove that the delay makes it impossible" to protect its interests and offer a defense to the Petition; instead, the Court need only determine "that the delay places the State 'in a less favorable position' . . ." *Jones v. State*, 445 Md. 324, 360 (2015) (citation omitted).

Like the public policy advanced by statutes of limitations, laches typically aims to prevent three forms of prejudice: "'evidence has been lost, memories have faded, and witnesses have disappeared.'" *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1418-19 (2017) (Sotomayor, J., dissenting) (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). The incidence of prejudice corresponds to the length of plaintiffs' delay: "The longer the petitioner delays . . . , the more likely it will be that memories will have faded and evidence will have disappeared, thus impairing the State's ability to defend" and "the trial court's ability to accurately resolve" the claims asserted in the Petition. *Jones v. State*, 445 Md. at 349. Thus, in *Jones v. State*, the coram nobis petitioner's "thirteen-year delay placed the State in a less favorable position. . . ."

In this case, plaintiffs' similar delay has unquestionably "placed the State in a less favorable position," *id.*, due to "evidence . . . lost, memories . . . faded, and witnesses . . . disappeared," *Midland Funding, LLC*, 137 S. Ct. at 1418-19. Just as in *Jones v. State*, due to the extreme delay in filing the Petition, the State has been prejudiced because a key witness who testified for the State in the hearing prior to the August 20, 2004 Order, former Superintendent Nancy Grasmick, now lacks "independent recollection," *id.*, 445 Md. at 360, of pertinent details that would be needed for her testimony if there were to be proceedings on the Petition. Def. Ex. 8, Affidavit of Nancy S. Grasmick (June 12, 2019) at 2 ¶ 6. She also lacks both pertinent records of material activity and personal knowledge of pertinent events that occurred after her retirement in 2011. *Id.* There have been three other Superintendents since Dr. Grasmick's retirement. *Id.* ¶ 5. Officials currently responsible for the work of the State Board and the Maryland State Department of

Education were not involved when this case was previously active, and they have no personal knowledge of the *Bradford* case. Def. Ex. 9, Affidavit of Karen B. Salmon (June 12, 2019); Def. Ex. 10, Affidavit of Amalie E. Brandenburg (June 11, 2019).

As the Court has informed the parties, the Court itself has encountered difficulty locating the record of this long-closed case. The State faces similar difficulties, as it attempts to locate case files that have been moved multiple times since 2004, due to office renovations, personnel changes, and other events. Even if pertinent records could be located, "the State would nonetheless be prejudiced by being forced to rely on a document instead of testimony" from those witnesses whose memories have faded, "which would have constituted more compelling evidence," if they had been able to testify while matters were still fresh in their memory. *Jones v. State*, 445 Md. at 361. For these reasons, to the extent the Petition seeks further relief that goes beyond enforcing prior orders, that relief is also barred by laches.

II. THE CONSENT DECREE PRECLUDES PLAINTIFFS FROM LITIGATING THE CLAIMS ASSERTED IN THE PETITION FOR FURTHER RELIEF.

As a final judgment that embodies the parties' agreement to settle this case, the Consent Decree defined the limits of authorized relief when the Decree was entered and, now that plaintiffs are attempting to reopen the case, the Decree continues to control the proper disposition of the Petition for Further Relief. The plaintiffs are not entitled to pursue the relief they now seek unless that relief is authorized by the terms of the Consent Decree, which contains no such authorization.

A. The Consent Decree Is a Final Judgment Representing the Parties' Agreement to Relinquish the Ability to Litigate Their Respective Claims.

The Consent Decree, which provided for additional State funding to Baltimore City Schools through Fiscal Year 2002, *see* Decree at 3 ¶ 3, 15 ¶¶ 47-49, 16 ¶¶ 52-53, is both "contractual and judicial in nature." *Kent Island, LLC v. DiNapoli*, 430 Md. 348, 360 (2013). It "carries the same weight and is treated as any other final judgment," *id.*, which means it "'is subject to the rules generally applicable to other judgments,'" *Long v. State*, 371 Md. 72, 82-83 (2002) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992)). Like other final judgments, a consent decree may not be modified without "satisfying the criteria set forth in either Maryland Rule 2-535 or § 6-408–535 or § 6–408 of the Courts and Judicial Proceedings Article," which, after 30 days from entry, "permit revision or modification of a final judgment only upon motion by a party to the proceeding asserting fraud, mistake, or irregularity." *Kent Island*, 430 Md. at 367. No such motion has ever been filed in this case. A court's authority to modify or depart from a consent decree "is limited" to the same extent as its authority over final judgments, and for the same reason: because "'the public policy of this State demands that there be an end to that litigation.'" *Id.* at 366 (citations omitted).

In addition to being a final judgment, a consent decree represents a binding contract that "memorializes the parties' agreement to relinquish the right to litigate the controversy, 'and thus save themselves the time, expense, and inevitable risk of litigation.'" *Kent Island*, 430 Md. at 360 (quoting *Long*, 371 Md. at 83). The consent decree confirms that the parties have waived the opportunity to have their claims and defenses adjudicated, "in

exchange for a certain outcome and/or, perhaps, expedience." *Long*, 371 Md. at 83. That is, "[b]y agreeing to settle their dispute, the parties give up any meritorious claims or defenses they may have had in order to avoid further litigation." *Id.* at 86. "Because the defendant has, by the decree, waived [the] right to litigate the issues raised, . . . the conditions upon which [the defendant] has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff[s] established [their] factual claims and legal theories in litigation." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

Here, the Consent Decree itself expressly recites what claims the parties, including the *Bradford* plaintiffs, "relinquish the right to litigate." *Kent Island*, 430 Md. at 360. The first four paragraphs of the Consent Decree's preamble describe the respective claims for relief asserted by the various plaintiffs. The first of these paragraphs summarizes the *Bradford* plaintiffs' claims as ones seeking "declaratory and injunctive relief to ensure that all school children within the Baltimore City Public Schools ('BCPS') who are at risk of educational failure are provided with a public school education that is adequate when measured by contemporary educational standards, pursuant to Article VIII, Section 1, of the Maryland Constitution." The fifth paragraph of the preamble acknowledges the Court's October 18, 1996 grant of partial summary judgment regarding the adequacy of education that was then being provided by Baltimore City Public Schools, but the sixth paragraph further recognizes that "there remain among the parties differing claims as to the causes of and appropriate remedies for the failure of the BCPS to provide public school children in Baltimore City with an education that is adequate when measured by contemporary

educational standards." The final paragraph of the preamble then states, "all the parties . . . jointly desire to resolve their differing claims through an amicable settlement in order to provide a meaningful and timely remedy crafted to meet the best interests of the school children of Baltimore City." These recitals leave no doubt that this Consent Decree, like the one in *Kent Island*, is intended to be "a final disposition of the matter in controversy," one that has "adjudicated the claims against all parties." *Id.*, 430 Md. at 360.

B. Maryland Precedent Strictly Limits a Court's Ability to Alter or Depart from the Terms of a Consent Decree.

A court may take no action to deny any parties to a consent decree "the benefit of their bargain." *Long*, 371 Md. at 89. Generally, a court "'is not entitled to change the terms of the agreement stipulated to by the parties'" in a consent decree, *Long*, 371 Md. at 87 (citation omitted), and a court lacks authority to "substitute[] its own judgment for that of the parties," *id.* at 89. If, for example, "the decree 'failed to provide for certain contingencies,'" such a "void" is one that could have been filled only "'by the draftsmen," but "not by the courts.'" *Id.* (citation omitted). Indeed, if the terms of a consent decree as entered have altered or departed from the parties' agreement in any respect, then a court interpreting or applying the decree must "look to the agreement as submitted by the parties," and treat that agreement as controlling. *Id.* at 84. "It is the parties' agreement that defines the scope of the decree," *id.* at 83, which "must be discerned within its four

corners, and not by reference to what might satisfy the purposes of one of the parties to it," *Armour & Co.*, 402 U.S. at 682.

Under Maryland's "objective test of contract interpretation," the Court must interpret and apply the parties' agreement according to what the parties "plainly and unambiguously expressed" in the consent decree. *Long*, 371 Md. at 84. Treating the Consent Decree this way '"is consistent with the public policy dictating that courts should look with favor upon the compromise or settlement of law suits in the interest of efficiency and economical administration of justice and the lessening of friction and acrimony.'" *Id.* at 84-85. This public policy "is so strong" that a settlement agreement embodied in a consent decree "will not be disturbed even though the parties may discover later that settlement may have been based on a mistake or if one party simply chooses to withdraw its consent to the settlement." *Id.* at 85 (citations omitted).

C. The Consent Decree Does Not Authorize Plaintiffs' Petition for Further Relief.

In this case, the terms of the Consent Decree contain no provision authorizing plaintiffs' Petition or the relief they now seek. First, the plaintiffs do not even purport to ground their Petition in any provision of the Consent Decree. Instead, they frame the Petition as a claim for further relief under a provision of the Declaratory Judgments Act, Md. Code Ann., Cts. & Jud. Proc. § 3-412(a), a statute not mentioned in the Consent Decree. *See* Mem. of Grounds at 68. Their ability to avail themselves of that statutory provision, however, is foreclosed by the Consent Decree, through which the plaintiffs "relinquish[ed] the right to litigate the controversy" concerning the claims for relief

asserted in their complaint, *Kent Island*, 430 Md. at 360, including their prayer for declaratory and injunctive relief regarding the adequacy of education provided by Baltimore City Public Schools. *See* Consent Decree at 1-2, 3.

Plaintiffs choose not to rely on the Consent Decree, presumably, because it so clearly does not sanction their Petition. The Petition's predominant focus is a desire for more State funding,[31] a subject expressly addressed in the Consent Decree, but not in a way that offers any support for plaintiffs' belated request for relief. The Consent Decree provides for funding through Fiscal Year 2002 only and contains no language that authorizes the Court to award funding for any subsequent period. Paragraph 3 of the Consent Decree makes clear that the timeframe covered by its funding provisions does not extend beyond Fiscal Year 2002: "Additional funds, as provided in paragraphs 43 through 54 of this Decree shall be provided by the State to BCPS in Fiscal Years 1998 through 2002." Paragraph 47 of the Consent Decree obligates the State to provide, "subject to appropriation by the General Assembly":

FY 1998	$30 million
FY 1999	$50 million
FY 2000	$50 million
FY 2001	$50 million
FY 2002	$50 million

[31] Every page of the Petition, and almost every one of its paragraphs, address "funding," sometimes referred to as "resources." *See, e.g.*, Petition at 1; 2 ¶¶ 2-4; 3 ¶¶ 5 and 7; 4 ¶¶ 8-10; 5 ¶ 11; 6 ¶¶ 14-15; 7 ¶¶ 17-18 and ¶ 20, subparagraphs b, c, d; 8 ¶ 20, subparagraphs e, f, ¶ 21 and ¶ 22, subparagraphs b, c, d; 9 ¶ 22, subparagraph e.

In addition, ¶ 48 obligates the State to "provide at least $10 million to BCPS" through the Maryland School Construction Program, per "each of Fiscal Years 1998 through 2002."

The Consent Decree contains only two limited authorizations for augmenting these funding obligations, and both mechanisms confine the available additional funding to periods ending with Fiscal Year 2002. *See* Consent Decree ¶ 52 (specifying that funds may be requested "[f]or Fiscal Years 1999 through 2002"); ¶ 53 (specifying that funds may be requested "[f]or Fiscal Years 2001 and 2002").

Even if the Consent Decree's funding provisions were not expressly time-limited, the Consent Decree still would not authorize the *Bradford* plaintiffs to pursue a request for funding. The Consent Decree's funding provisions expressly designate "the Board" (meaning the City Board) as the only party authorized to request funds in excess of those provided in ¶ 47. The Consent Decree expressly limits the *Bradford* plaintiffs' role to expressing their "views" in the negotiation process and "appear[ing] and present[ing] evidence" at the expedited hearing provided by ¶ 53(A). Paragraph 53(B) further limits the plaintiffs' appeal rights ("the *Bradford* Plaintiffs may appeal only if the Board appeals"). Although ¶ 69 of the Consent Decree states that generally, "any party to this Decree may seek to enforce the terms of this Decree," that authorization is limited by the proviso "[e]xcept as expressly provided otherwise." Consequently, even if the Consent Decree could be enforced in 2019, the *Bradford* plaintiffs are ineligible to pursue enforcement of the Decree's funding terms, because their lack of authority to seek such relief is expressly limited by ¶ 53.

D. The Consent Decree's Provisions for Extending Jurisdiction Do Not Authorize the Court to Alter or Depart from the Substantive Provisions of the Consent Decree.

These provisions limiting funding relief to a period ending with FY 2002, and limiting who may request funding, are unaffected by the Consent Decree's provisions regarding the term of the Decree and the duration of the Court's jurisdiction. Paragraph 68 provides that the Consent Decree "shall be in effect through June 30, 2002, unless the Court extends the term upon timely motion of one of the parties and upon a showing of good cause to extend the Decree." But an authorization to extend the term of the Consent Decree does not constitute authorization to alter the Decree's substantive provisions, such as the funding provisions of paragraphs 43 through 54. If the parties had meant to provide a means for the Court to create new funding obligations for periods after FY 2002, they could have so stated in the Consent Decree, but chose not to. Similarly, if the parties had intended the term of the Consent Decree to persist indefinitely, until plaintiffs or the Court were satisfied with the adequacy of the education provided by Baltimore City Public Schools, or the adequacy of the funding the State provides, then the language of the Consent Decree would have so stated, but it does not. Because this Court "'is not entitled to change'" the Decree's patent lack of any provision requiring post-2002 funding, *Long*, 371 Md. at 87, and because that "void" is not to be filled "by the courts," *id.* at 89, the further relief sought by the Petition cannot be granted.

Second, although the Consent Decree gave the Court power to extend its term 'for good cause," "good cause to extend the Decree" cannot consist of a party's desire to litigate claims that were "relinquish[ed]" upon entry of the Consent Decree, *Kent Island*, 430 Md.

at 360, including, in this case, plaintiffs' claims regarding whether the education provided by Baltimore City Public Schools "is adequate when measured by contemporary educational standards," Consent Decree at 1. Yet, plaintiffs' current Petition for Further Relief seeks to re-litigate those claims. The Petition asks for a declaration that:

- "The State has been in continuous violation of Article VIII since this litigation commenced and has never complied with the Court's prior declarations as to its constitutional obligations under Article VIII, including the Court's declaration that, at a minimum, 'full Thornton funding' is constitutionally required," *id.* at 7 ¶ 20(b); and

- "The State's continuing failure to provide funding to BCPSS at levels required by Article VIII has deprived BCPSS students of [at] least $2 billion that this Court has ordered over the past decades," *id.* at 7 ¶ 20(d).

Interpreting "good cause" to permit plaintiffs to return to those relinquished claims would contradict the Court of Appeals' instruction that "[b]y agreeing to settle their dispute, the parties give up any meritorious claims or defenses they may have had in order to avoid further litigation." *Long*, 371 Md. at 86. It would also deny the State defendants "the benefit of their bargain." *Id.* at 89.

Paragraph 69 of the Decree merely authorizes the Court to "retain[] continuing jurisdiction during the term of this Decree to monitor and to enforce compliance with the terms of this Decree," but does not suggest that the Court may depart from the terms of the Consent Decree or impose requirements not contained in the Decree. In this case, it is undisputed, and has been undisputed since at least 2002, that the State has fully complied with the terms of the Consent Decree. In 2002, the State submitted to this Court unrebutted exhibits and declarations confirming that the State had satisfied all of the Decree's

requirements, and had actually exceeded the Decree's funding commitments. *See* Statement of the Case, *supra* at 7-10; Def. Ex. 2, Bjarekull Affidavit; Def. Ex. 3, Stenzler Affidavit; State's Opposition to Joint Motion and Exhibits (June 12, 2002).

Thus, it is undisputed that the State funds specified in ¶ 47 of the Decree were timely appropriated; that the General Assembly enacted the partnership legislation contemplated by the Consent Decree; that no party invoked the procedure in ¶ 6 for challenging any variance between the enacted legislation and the Consent Decree's proposed legislation; and that Baltimore City Public Schools were restructured as provided in the Consent Decree. Even when plaintiffs and the Board moved to extend the Decree in 2002, they did not base that request on any allegation that the State had failed to comply with a requirement established by the Decree. *See* Joint Motion for Extension of Judicial Supervision (May 24, 2002). Similarly, nowhere does the present Petition identify any obligation under the Consent Decree that the State has not already fulfilled, some seventeen or more years ago.

The final sentence of the Consent Decree's ¶ 69 reinforces the Decree's temporal limitations by providing that "[n]otwithstanding termination of this Decree, the Court shall retain jurisdiction to resolve any dispute that may have arisen *during the term of this Decree*." (Emphasis added.) This language does not contemplate ongoing jurisdiction to adjudicate disputes that might arise *after* the Decree's intended term, such as the Petition's allegations regarding developments over the past dozen years and more. Nothing in the Consent Decree could plausibly be construed to authorize extending its term indefinitely, to convert it into the perpetual decree that plaintiffs wish it to be. Certainly, none of the

Decree's funding provisions purport to impose any enforceable obligation with respect to appropriations beyond FY 2002.

E. The Court's Post-Consent-Decree Orders Did Not Contemplate Jurisdiction of Indefinite Duration.

Although the Court acted to extend its jurisdiction in 2002 and to retain jurisdiction in 2004, the Court gave no indication that it intended the case to extend in perpetuity. Instead, the June 25, 2002 Order stated that the Court would "continue judicial supervision of this matter until such time as the State has complied with this Court' June 2000 order." Subsequently, the Court's August 20, 2004 Memorandum Opinion and Order indicated that "[f]ull compliance with the Court's June 2000 declaration" would be achieved once "the BCPSS receives at least $225 million in additional State funding under the Thornton Act [meaning the "Bridge to Excellence in Public Schools Act," 2002 Md. Laws ch. 288] by, *at the latest, FY 2008*." Memorandum Opinion at 67, ¶ 2 (emphasis added). The next paragraph of the Memorandum Opinion repeated the same statement, except it added that, with the already legislated Thornton funding, achievement of "constitutional adequacy" would occur "by, *at the latest, FY 2008*." (Emphasis added.) Similarly, paragraphs 2 and 3 of the August 20, 2004 Order repeated the Court's understanding that the amounts to be received by BCPSS under Thornton would both satisfy the Court's June 2000 declaration and "achieve constitutional adequacy" by "*at the latest, FY 2008*." (Emphasis added.)[32]

---

[32] In representations to the Court of Appeals, the *Bradford* plaintiffs themselves acknowledged that the full Thornton funding to be achieved by FY 2008 would constitute satisfaction of this Court's June 2000 declaration. *See* Def. Ex. 26, Brief of Bradford Plaintiffs/Appellees, Court of Appeals, Sept. Term 2004, No. 85 (Jan. 24, 2005), at 14 ("If

It is undisputed that the Thornton funding specified in the August 20, 2004 Order was provided to BCPSS by FY 2008. *See* Statement of the Case, *supra* at 22; Def. Ex. 11, Dept. of Legislative Services, Office of Policy Analysis, *Adequacy of Education Funding in Maryland* (Jan. 9, 2017) at 5, 18. Since FY 2008, annual total State funding for Baltimore City Public Schools has been maintained at levels above those achieved in FY 2008. *See* table *supra* at 26-27; Def. Ex.12, Dept. of Legislative Services, Office of Policy Analysis, *Overview of State Aid to Local Governments,* (2008 through 2019), Exhibit 7.4.

Paragraph 6 of the August 20, 2004 Order stated that "[w]hen the full funding outlined herein is received, the Court will revisit the issue of its continuing jurisdiction, and determine whether the Consent Decree should then be additionally extended for good cause." As that sentence indicates, the Court did not intend that the Consent Decree would be "additionally extended" beyond the period contemplated by the Order (i.e. "at the latest, FY 2008") absent a determination by the Court that there was "good cause" for such an extension. No such determination of "good cause" ever occurred, nor did plaintiffs ever request an extension or make a showing of "good cause" to extend. Under these circumstances, it was reasonable for the Court and the parties to presume that the matter was closed, as evidenced by the absence of any request, by any party, for any Court action after 2006.

---

all the increases anticipated by the Thornton drafters are fully phased in . . . the Bridge to Excellence Act will result in $1.3 billion in additional annual State funding for all counties by FY 2008, including an additional $258.6 million for Baltimore City—an amount roughly equivalent to the $2,000 to $2,600 per pupil the Circuit Court had declared necessary in its June 2000 opinion.").

In this case, which had been closed due to the lack of any activity for more than a dozen years, and in which the State long ago provided all of the funding and other relief authorized under the Consent Decree, the plaintiffs' Petition for Further Relief should be denied as unauthorized by the Decree.

F. The Post-Consent-Decree Orders Do Not Constitute "Law of the Case."

Finally, although the Consent Decree is as binding on the parties and this Court as any other enrolled final judgment would be, *Kent Island*, 430 Md. at 360, the "law of the case" doctrine does not render the Court's post-Consent-Decree orders similarly binding. Except as to those portions of the August 20, 2004 Order that the Court of Appeals addressed and vacated, *see Bradford*, 387 Md. at 386-88, law of the case does not apply.

"'[L]aw of the case doctrine is one of appellate procedure,'" which takes effect "'[o]nce an appellate court rules upon a question presented on appeal.'" *Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 55 (2008) (citations omitted). Only at that point do "'litigants and lower courts become bound by the ruling, which is considered to be the law of the case.'" *Id.* (citation omitted). An issue is not governed by law of the case unless and until it has been "definitively resolved" by an appellate court. *Id.* at 56. Thus, if and to the extent an issue is discussed in an appellate decision, but those remarks are not "adopted as a final determination" as part of the decision's holding, then the decision's discussion of the issue must be treated as "dicta" and "may not serve as binding law of the case." *Id.* at 57. If an appeal is dismissed without a ruling on the merits, then law of the

case does not apply in the proceedings on remand. *People's Counsel for Baltimore County v. Prosser Co., Inc.*, 119 Md. App. 150, 177 (1998).

Under these principles, the only parts of this Court's post-Consent-Decree orders that are subject to law of the case are those portions of the August 20, 2004 Order that were reversed and vacated by the Court of Appeals, namely, the Order's declaration striking down § 4 of 2004 Md. Laws ch. 148, the "part of the court's order directing BCPS not to comply with that [Chapter 148, § 4] mandate," and "the associated declaration regarding the City Financing Agreement." *Bradford*, 387 Md. at 388. Law of the case otherwise plays no role in this matter, because "no other aspect of the August, 2004 order, or any other order entered by the Circuit Court to date," has been "properly before" an appellate court, and the Court of Appeals has "express[ed] no opinion with respect to them."[33] *Id.*

III. THE SCHOOL FUNDING ISSUE AT THE HEART OF THE PETITION IS A NONJUSTICIABLE POLITICAL QUESTION.

The issue the Petition seeks to adjudicate—essentially, the appropriate level of State funding for one of the State's 24 local public school systems—presents a nonjusticiable political question, which the Maryland Constitution has entrusted to the political branches for determination, rather than the judiciary. Assessing whether a question is justiciable involves a two-part inquiry that asks (1) '"whether the claim presented and the relief sought

[33] The voluntary dismissal of the appeal from the June 30, 2000 Order did not render that Order law of the case because, in that instance, no appellate court "rule[d] upon a question presented on appeal.'" *Garner*, 405 Md. at 55; *see People's Counsel for Baltimore County*, 119 Md. App. at 177 (rejecting application of law of the case where "appellants noted an appeal but dismissed it prior to briefing and any action by this [appellate] Court").

are of the type which admit of judicial resolution," meaning "the 'duty asserted can be judicially identified and its breach judicially determined,'" and "'protection for the right asserted can be judicially molded,'" and (2) "whether the structure of government 'renders the issue presented a 'political question'—that is, a question which is not justiciable in federal [or State] court because of the separation of powers provided by the Constitution.'" *Estate of Burris v. State*, 360 Md. 721, 744-45 (2000) (quoting *Powell v. McCormack*, 395 U.S. 486, 516–17 (1969) (brackets in original); *see Lamb v. Hammond*, 308 Md. 286, 293 (1987). If either element of the analysis is not satisfied, then the question is not justiciable. *See, e.g., Smigiel v. Franchot*, 410 Md. 302, 325-26 (2009) (finding question nonjusticiable because the second element was unsatisfied); *Estate of Burris*, 360 Md. at 751-52 (basing finding of nonjusticiability on factors pertinent to the second element).

Setting aside whether the question of funding might theoretically be susceptible to judicial resolution under the first element, it cannot satisfy the second element of the test, because it is a political question that a court could not decide without engaging in a nonjudicial function, in violation of the separation of powers guaranteed by Article 8 of the Declaration of Rights. Article 8 provides that the "Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." "In light of the separation of powers provision . . ., a court has no jurisdiction to perform a nonjudicial function." *Duffy v. Conway*, 295 Md. 242, 254 (1983).

The Court of Appeals has identified various indicia of a nonjusticiable political question, including at least three that pertain to the funding claims asserted in the Petition:

(1) "'a textually demonstrable constitutional commitment of the issue to a coordinate political department,'" (2) "'a lack of judicially discoverable and manageable standards for resolving it,'" and (3) "'the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.'" *Estate of Burris*, 360 Md. at 745 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The presence of even one of these indicia may suffice to render a case nonjusticiable. *See Baker v. Carr*, 369 U.S. at 217. On the other hand, the factors are not mutually exclusive and may be interrelated. *See, e.g., Estate of Burris*, 360 Md. at 751 (finding two of the indicia interrelated, under the circumstances of the case).

A. The Constitution Commits School Funding Issues to the Political Branches.

As to the first indicator of a nonjusticiable political question, the Maryland Constitution unquestionably commits to the political branches the issue of public schools funding. Plaintiffs base their claims on Article VIII of the Maryland Constitution, adopted by the 1867 Constitutional Convention. *See* Petition at 1; 2 ¶ 2; 3 ¶ 5; 4 ¶ 8; 6 ¶¶ 14 and 17; 7 ¶¶ 18, 20(a) and (b); 8 ¶¶ 20(f) and 22(a). As the Court of Appeals has discerned from the text and history of Article VIII, the intent of its drafters was "to leave implementation of the details of the public school system to legislative determination," that is, "'to leave the Legislature entirely untrammeled,'" so "that the legislature be left free to adopt the system it deemed best." *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 626, 627 (1983). The drafters of Article VIII intended that the General Assembly would determine "'all the details,'" including "'the rate of taxation.'" *Id.* at 626 (citation

omitted). In the words of a Convention delegate quoted by the Court of Appeals, there should be '"no doubt that under the power contained in this section [Article VIII] the Legislature has full authority over the subject'" of public education, and '"[t]his authority is properly confided to the Legislature, as they will be able to decide the amount of taxes necessary to be levied and to apportion the taxes. . . .'" *Id.* at 627 (Delegate Wickes, as quoted in *The Baltimore Gazette* (June 22, 1867)); *see id.* at 628 ("[T]he question of the amount of the tax levy to support the school system, according to the Chairman of the Education Committee, was also for the legislature to determine." (citation omitted)).

Thus, after reviewing the history of Article VIII's adoption and more than a century of its implementation, the Court in *Hornbeck* concluded that "[t]he quantity and quality of educational opportunities to be made available to the State's public school children is a determination *committed to the legislature* or to the people of Maryland through adoption of an appropriate amendment to the State Constitution." 295 Md. at 658-59 (emphasis added). Consequently, complaints regarding "quantity and quality of educational opportunities" are "to be addressed to the legislature for its consideration and weighing," for "it is not within the power or province of members of the Judiciary to advance their own personal wishes or to implement their own personal notions of fairness under the guise of constitutional interpretation." *Id.* at 658.

Here, the Petition's focus on State appropriations for public schools makes it all the more certain that the Constitution commits the issue to "coordinate political branches," and not to the judiciary. Under Article III, § 52, of the Maryland Constitution, which prescribes requirements for all appropriations from the State Treasury, "the General Assembly, and

only the General Assembly, can enact the annual budget for the State." *Workers' Compensation Com'n v. Driver*, 336 Md. 105, 119 (1994). On the other hand, "[o]nly the Governor may propose an expenditure in the initial budget," and "the budget system as it has evolved in Maryland imposes the power over and the responsibility for the fiscal affairs of the State primarily in the Governor." *Judy v. Schaefer*, 331 Md. 239, 248, 258 (1993).

In Section 52's "comprehensive scheme for an executive budget system," *id.* at 257, "the Governor and the General Assembly together, with the Governor having a preeminent role, enact a budget for the ensuing fiscal year based on departmental estimates of needs and on estimated revenues," *id.* at 250. The scheme "has, as its main objective, the maintenance of a balanced budget as required by Art. III, § 52(5a)." *Id.* at 257. Section 52 expressly provides that its appropriations regime is intended to be employed for, among other purposes, "the establishment and maintenance throughout the State of a thorough and efficient system of public schools in conformity with Article 8 [VIII] of the Constitution and with the laws of the State." Md. Const., art. III, § 52(4). Nowhere does the Constitution's "comprehensive scheme" for State appropriations contemplate the possibility that public schools funding decisions could be made by judges.

The history of the pertinent constitutional provisions reveals why allowing circuit courts to determine the level of State school funding would be antithetical to their purposes. Both Article III, § 52 and Article VIII became part of the Constitution because their proponents wanted to achieve greater control over State spending. The Court in *Hornbeck* quoted Convention Delegates who condemned the education system that had preceded Article VIII's adoption. The Delegates objected to "[t]he enormous expenses of the

[predecessor] system, the mode of raising the money and the mode of expending it," 295 Md. at 625, and sought, through the adoption of Article VIII, "to make provision 'for the establishment of a more economical and satisfactory system. . . . ,'" *id.* at 628. Similarly, Article III, § 52 was adopted in 1916 to remedy the prior state of affairs in which Maryland "had no orderly system of planned public expenditures," but instead, "[a]ppropriations for various purposes were made piece-meal by the General Assembly, each project receiving independent consideration without relation to other claims upon the public purse." *McKeldin v. Steedman*, 203 Md. 89, 96 (1953). That "piece-meal" approach to State appropriations encouraged "fiscal irresponsibility which led to deficits." *Judy v. Schaefer*, 331 Md. at 245. By ratifying Article III, § 52, Marylanders opted instead for "a budget system in which the executive plays a dominant role," because of "the desire to avoid further deficits and to ensure a balanced budget." *Id.* at 246.

Allowing a circuit court to determine the appropriate level of State funding for one jurisdiction's public schools would defeat the purposes that motivated adoption of Article VIII and Article VIII, § 52, by reverting to the "fiscal irresponsibility" of a "piece-meal" approach to State appropriations, albeit one that would be even less accountable than what the voters rejected in 1916. For if, as plaintiffs would have it, the Circuit Court for Baltimore City has the power to determine State funding for Baltimore City Public Schools upon "independent consideration without relation to other claims upon the public purse," *McKeldin v. Steedman*, 203 Md. at 96, then each circuit court in each of Maryland's 23 other counties would have similar authority to make that determination for the public schools in their respective jurisdictions. That arrangement would foster "fiscal

irresponsibility" and "deficits," *Judy v. Schaefer*, 331 Md. at 245, and create a less "economical and satisfactory system," *Hornbeck*, 295 Md. at 628, than the one that was intended by the adopters of Article III, § 52 and Article VIII.

Plaintiffs argue that the Constitution's commitment of the issue of school funding to the political branches, and the case law confirming that commitment, can be overlooked because of a single decision, *Ehrlich v. Perez*, 394 Md. 691 (2006), but plaintiffs' reliance on that case is entirely unwarranted. In affirming part of a preliminary injunction "prospectively reinstating medical benefits" to plaintiffs there, the Court of Appeals made clear that the circuit court's order was not "directing the appropriation of specific funds" but was merely a determination of "a likelihood that Appellants' action was unconstitutional." *Id.* at 735, 736. (The decision reversed and vacated the order to the extent it mandated retrospective reinstatement of medical benefits. *Id.* at 734.). The order sought by plaintiffs here differs from the one in *Perez* because it would necessarily be "directing the appropriation of specific funds," *id.*, to be provided to Baltimore City Public Schools, else there would be little point to the Petition, since, as plaintiffs repeatedly assert, this Court's prior orders already declared what it found to be "unconstitutional."

Perez is also distinguishable because its gist was an Article 24, Declaration of Rights equal protection claim of discrimination based on a suspect classification—nationality—and no such claim is asserted in the Petition. Plaintiffs' claim is based, not on a provision of the Declaration of Rights, but on a provision of the Constitution, Article VIII, which is expressly made part of the "comprehensive scheme" for State appropriations set forth in Article III, § 52, as explained above. *Perez* itself instructs that "the more

specific budget provisions" of the Constitution "would prevail" in the case of any "conflict" with other provisions of the Constitution. Therefore, nothing in *Perez* contradicts the important reasons rendering plaintiffs' request for judicial determination of public schools funding nonjusticiable.

B. No Judicially Discoverable and Manageable Standards for Resolving Plaintiffs' State Funding Claims Could Avoid Expressing Lack of the Respect Due Coordinate Branches of Government.

Two other indicia of nonjusticiability are also present. As was found in *Estate of Burris*, there is "not only 'a textually demonstrable constitutional commitment of [school funding issues] to a coordinate political department' but a lack of judicially discoverable and manageable standards for resolving them 'without expressing lack of the respect due coordinate branches of government.'" 360 Md. at 751. That is, any attempt by a court to fashion and implement a standard would necessarily involve disrespect for those coordinate branches of government that have been vested by the Constitution with sole authority to determine the level of State funding for Maryland's public schools, including those in Baltimore City. Resolving the Petition to plaintiffs' satisfaction would require this Court to make the quintessential legislative determination, by deciding how much of the State's finite revenues should be allocated to one school system as opposed to another. "[A]ny attempt to determine" that issue judicially "would constitute a substantial interference with the authority and discretion vested in the other two branches of government." *Id.* at 752. Therefore, the claims asserted in the Petition are nonjusticiable.

C. Plaintiffs Previously Acknowledged that Separation of Powers Would Preclude the Relief They Now Seek.

In briefing this case before the Court of Appeals, plaintiffs defended this Court's prior rulings by arguing that they were distinguishable from case law prohibiting courts from exercising nonjudicial functions, because this Court's rulings merely "provid[ed] guidance . . . without actually ordering that any particular remedy be adopted," the rulings "did not seek to overturn budgetary choices committed to the discretion of the Governor," and plaintiffs themselves did "not ask the judiciary to exercise discretion in budgetary choices that properly are committed to the political branches." Def. Ex. 13, Brief of Appellees at 35, 37, 38, *Maryland State Board of Education, et al. v. The New Board of School Commissioners for Baltimore City and the Bradford Plaintiffs*, Court of Appeals of Maryland, No. 72, Sept. Term, 2000. The current Petition crosses plaintiffs' own recognized threshold of nonjusticiability, by expressly asking the Court to venture into and decide the very "budgetary choices" that plaintiffs previously acknowledged to be "committed to the political branches." *Id.* They seek an order "compelling" the political branches to provide funding at levels previously recommended by the Court in its prior rulings and at levels now requested by plaintiffs. Petition at 7 ¶ 18; *see* Mem. of Grounds at 7, 60. Plaintiffs even ask the Court to order that the State "may be required to pay compensatory damages, including attorney's fees" if the demanded funding is not provided. Petition at 24 ¶ 24. As plaintiffs correctly understood when they were before the Court of Appeals in 2000, these claims are nonjusticiable.

IV. THE PETITION'S PRAYER FOR DAMAGES AND ATTORNEYS' FEES IS BARRED BY PRECEDENT AND SOVEREIGN IMMUNITY.

The Petition seeks an order that, "should Defendants not comply with these orders and decrees, Defendants may be required to pay compensatory damages, including attorney's fees incurred in enforcing the Court's orders and decrees, as well as penalties to compel compliance." Petition at 24 ¶ 24. Generously construed, the relief sought in ¶ 24 of the Petition appears to be a sanction for constructive civil contempt. *See* Md. Rule 15-202(a) (defining "constructive contempt" to include "any contempt other than a direct contempt"); Rule 15-202(b) (defining "direct contempt" to mean "a contempt committed in the presence of the judge presiding in court or so near to the judge as to interrupt the court's proceedings"); Rule 15-206 (procedures for constructive civil contempt); *see Meyers v. State*, 23 Md. App. 275, 278 (1974) (explaining differences between civil and criminal contempt). If there were to be proceedings for constructive civil contempt in this case, damages and attorneys' fees would be precluded by applicable case law and the State's sovereign immunity.

First, the bulk of the Petition consists of allegations that the State previously failed to comply with orders issued in 2000, 2002, and 2004. Those alleged past failures to comply are not the proper subject of civil contempt. Maryland's appellate courts have "consistently held that a civil contempt action will not lie" for "a past failure to comply with a court order." *State v. Crawford*, 239 Md. App. 84, 122 (2018) (citing *Lynch v. Lynch*, 342 Md. 509, 529 (1996); *Rutherford v. Rutherford*, 296 Md. 347, 357 (1983); *Elzey*

v. Elzey, 291 Md. 369, 375–376 (1981); *State v. Roll and Scholl*, 267 Md. 714, 728, 730 (1973)).

Second, "compensatory damages may not ordinarily be recovered in a civil contempt action" of any kind, and "may never be recovered in a civil contempt action based upon a past negligent act by the defendant." *Dodson v. Dodson*, 380 Md. 438, 454 (2004). The Court of Appeals has reserved the question whether "under exceptional circumstances, a willful violation of a court order, clearly and directly causing the plaintiff a monetary loss, could form the basis for a monetary award in a civil contempt case." *Id.*; *but see Royal Investment Group, LLC v. Wang*, 183 Md. App. 406 (2008) (finding that "extraordinary circumstances" involving "a willful violation of a court order" justified damages for contempt in that case). It is difficult to imagine how funding decisions made collectively by the elected members of Maryland's political branches, pursuant to their constitutional authority to make such decisions, could constitute "exceptional circumstances" amounting to "a willful violation" for these purposes. That notion finds no support whatsoever in Maryland statutes or case law. In any case, an award of damages for a "willful" act would be barred by the State's sovereign immunity, as explained below.

Third, as to the petition's request for attorneys' fees, no such award is available under the terms of the Consent Decree or applicable law governing civil contempt. Maryland's appellate courts have consistently adhered to the American Rule, "in which each party is responsible for its own legal fees, regardless of who wins in the litigation." *Henriquez v. Henriquez*, 413 Md. 287, 294 (2010) (citations omitted). Under the "American Rule," the prevailing party may not recover attorney's fees unless a contract or

statute so provides, the defendant's wrongful conduct forces a plaintiff into litigation with a third party, or the plaintiff is forced to defend against a malicious prosecution. *Thomas v. Gladstone*, 386 Md. 693, 699 (2005). No exception applies here. No contract or statute authorizes an award of fees to the plaintiffs, and they do not claim to have been forced into litigation against a third party or forced to defend a malicious prosecution.

The only pertinent "contract" is the parties' agreement enshrined in the Consent Decree, which does not provide for an award of damages or attorneys' fees, or an opportunity for plaintiffs to request such an award. Nor is there any statutory authority for an attorneys' fees award. "There is no statutory provision or rule authorizing the recovery of attorney's fees in contempt proceedings." *Bahena v. Foster*, 164 Md. App. 275, 289 (2005) (noting that "Md. Rule 15-207, which governs constructive contempt proceedings, does not provide for the recovery of attorney's fees or expert witness fees"). In the absence of any authorization in the Consent Decree or any statute or rule, the Court lacks authority to grant an award of attorneys' fees.

Finally, even if there were any source of authority for an award of damages and attorneys' fees generally, such an award against the State or one of its agencies would be barred by sovereign immunity. "In the absence of a waiver of sovereign immunity by the General Assembly," sovereign immunity "bars actions against the State for money damages," thereby "protecting it from interference with governmental functions and preserving its control over its agencies and funds." *Rodriguez v. Cooper*, 458 Md. 425, 451, 430 (2018) (citations omitted). "The decision whether to waive or alter the application of sovereign immunity . . . 'is entirely within the prerogative of the General Assembly,'"

id. (quoting *Rios v. Montgomery County*, 386 Md. 104, 140 (2005)), and the Court of Appeals has "long held that courts should not 'either directly or by necessary implication' dilute the doctrine of sovereign immunity by 'judicial fiat,'" *Stern v. Board of Regents, Univ. Sys. of Maryland*, 380 Md. 691, 719 (2004) (citation omitted). The test for applying sovereign immunity asks '"(1) whether the entity asserting immunity qualifies for its protection; and, if so, (2) whether the legislature has waived immunity, either directly or by necessary implication, in a manner that would render the defense of immunity unavailable.'" *Id.* at 700-01 (citation omitted).

The first criterion of sovereign immunity is satisfied because "[a]s a governmental agency of the state [the Maryland State Board of Education] shares the immunity from suit to which the state itself is entitled, in the absence of any legislative waiver of that exemption." *Williams v. Fitzhugh*, 147 Md. 384, 386 (1925). The second criterion is also satisfied, because the General Assembly has not waived sovereign immunity from an award of damages or attorneys' fees as a sanction for civil contempt. No existing statutory waiver provision mentions civil contempt, nor any other form of contempt, and no such statute either expressly or implicitly purports to waive immunity from an award of damages or attorneys' fees in a contempt scenario. Moreover, the General Assembly has refused to waive sovereign immunity in cases involving "malice or gross negligence," Md. Code Ann., Cts. & Jud. Proc. § 5-522(a)(4)(ii), thereby precluding recovery for a "willful violation," the only type of act that might conceivably warrant damages for civil contempt under *Dodson*, 380 Md. at 454, as discussed above. *See Barbre v. Pope*, 402 Md. 157, 182, 187 (2007) (explaining that for purposes of § 5-522(a)(4)(ii) "malice" and "gross

negligence" encompass harm inflicted "willfully" (citations omitted)). The plain language of existing statutory waivers, such as the one in the Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-104, cannot be stretched to encompass damages or attorneys' fees for contempt, because waivers of sovereign immunity must be "strictly construed . . . in favor of the sovereign," *Zimmer-Rubert*, 409 Md. 200, 212 (2009)(citations omitted), and a court will '"neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute,'" *Espina v. Jackson*, 442 Md. 311, 326 (2015) (citation omitted). Any '"altering"' of the statutory conditions and limitations on recovery from the State is a task '"to be performed by the legislature."' *Rios*, 386 Md. at 140 (citation omitted).

For these reasons, the Court should reject the Petition's request for an order regarding damages and attorneys' fees, there being no statute that expresses or necessarily implies any intent to waive sovereign immunity from damages and attorneys' fees as a sanction for noncompliance with a court order.

CONCLUSION

For the reasons stated, the Petition for Further Relief should be dismissed.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

STEVEN M. SULLIVAN
ELIZABETH M. KAMEEN
ELLIOTT L. SCHOEN
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, Maryland 21202
(410) 576-6465 (Telephone)
(410) 576-6309 (Facsimile)
ssullivan@oag.state.md.us
ekameen@oag.state.md.us
eschoen@oag.state.md.us

Attorneys for
Maryland State Board of Education

DATE: June 19, 2019

EXHIBIT C

KEITH A. BRADFORD, et al.,	*	**IN THE**
Plaintiffs,	*	**CIRCUIT COURT**
v.	*	**FOR**
MARYLAND STATE BOARD OF EDUCATION	*	**BALTIMORE CITY, PART 23**
	*	**Case No.: 24-C-94-340058**
Defendant.		

* * * * * * * * * * * * * *

MEMORANDUM OPINION

This matter comes before the Court on the Maryland State Board of Education's ("Defendant") Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105000), filed June 19, 2019, Keith Bradford, et al.'s ("Plaintiffs") Opposition to Motion to Dismiss (docket # 00105001), filed August 23, 2019, the Baltimore City Board of School Commissioners' ("City Board") Response/Opposition to the Motion to Dismiss (docket # 00105004), filed September 17, 2019, Defendant's Reply in Support of Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105005), filed October 18, 2019, Plaintiffs' Sur-reply in Opposition to Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105006), filed November 18, 2019, and the City Board's Sur-Reply in Opposition to Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105007), filed November 18, 2019.

I. Facts & Procedural History

On December 7, 1994, Plaintiffs filed suit against Defendant alleging that students in the Baltimore City Public Schools System ("BCPSS") were not receiving an adequate education, as required under Article VIII of the Maryland Constitution, due to Defendant's failure to provide adequate funding. The parties entered into a consent decree on November 26, 1996 ("Consent Decree").

The Consent Decree in relevant parts states:

> 47. The State shall provide to the Baltimore City Public Schools the following additional funds, subject to appropriation by the General Assembly.
>
> FY 1998 $30 million
> FY 1999 $50 million
> FY 2000 $50 million
> FY 2001 $50 million
> FY 2002 $50 million

Consent Decree at 15, ¶ 47.

> 53. For Fiscal Years 2001 and 2002, the Board may also request funds in amounts greater than those described in paragraph 47, after the completion of the interim evaluation described in paragraphs 38 and 39. If the Board requests such funds, the *Bradford* plaintiffs and *Vaughn G.* Plaintiffs will be offered an opportunity to present to the Board and to the State in writing their views on the request for such funds. The State and the Board may negotiate from April 30, 2000 through June 1, 2000 regarding such requests, and the State and the Board shall consider the views of the independent consultant and the Plaintiffs in the *Bradford* and *Vaughn G.* cases. If the State and the Board do not reach an agreement, the Board, on or after June 1, 2000, may seek relief from the Circuit Court for Baltimore City for funding amounts greater than those described in paragraph 47...

Id. at 16-17, ¶ 53.

> 68. This Decree shall be in effect through June 30, 2002, unless the Court extends the term upon timely motion of one of the parties and upon a showing of good cause to extend the Decree.
>
> 69. The Court retains continuing jurisdiction during the term of this Decree to monitor and to enforce compliance with the terms of this Decree. Except as expressly provided otherwise, any party to this Decree may seek to enforce the terms of this Decree. Notwithstanding termination of this Decree, the Court shall retain jurisdiction to resolve any disputes that may have arisen during the term of this Decree.

Id. at 22-23, ¶ 68-69.

The City Board filed a petition for further relief requesting an additional $49.7 million for fiscal year 2001 on June 9, 2000. Mem. Op. at 4, June 30, 2000. The Circuit Court determined that the changes brought about by the Consent Decree resulted in improvements to the

management and instructional programs of Baltimore City schools, but that the education provided remained inadequate due to insufficient funding. *Id.* at 25. Therefore, the Circuit Court concluded that additional funding was required to enable the schools to provide an adequate education. *Id.* at 26. The State appealed the decision; however, the appeal was dismissed upon the parties reaching an agreement. Mem. Op. at 10, Aug. 20, 2004.

In response to the 2000 Circuit Court Memorandum Opinion, the State Legislature enacted the Bridge to Excellence in Education Act ("S.B. 856"), in May 2002. Mem. Op. at 3, 12, Aug. 20, 2004. S.B. 856 adopted many recommendations made by the Commission on Education Finance, Equity, and Excellence, referred to as the "Thornton Commission." *Id.* at 3.

The Thornton Commission, and S.B. 856, recognized the substantial adequacy gap in Baltimore City, with S.B. 856 declaring a gap of $3,380 per pupil. *Id.* at 12. In efforts to close the gap, S.B. 856 noted increases in State aid in Baltimore City by approximately $18.7 million in FY 2003, $28.1 in FY 2004, $68.9 million in FY 2005, $125.5 million in FY 2006, $187.6 million in FY 2007, and $258.6 million in FY 2008. *Id.* at 13. Additionally, S.B. 856 mandated a further adequacy analysis to be conducted at the end of the phase in of funding, in 2012. *Id.* at 14.

On May 24, 2002, in anticipation of the termination of judicial supervision pursuant to the Consent Decree on June 30, 2002, the City Board and Plaintiffs filed a Joint Motion for Extension of Judicial Supervision until such time as the constitutional adequacy of the education provided by the BCPSS has been remedied. *See* Mem. Op. at 3, June 25, 2002. Following a hearing, the Circuit Court concluded that pursuant to paragraph 68 of the Consent Decree, the

Court should retain jurisdiction and continue supervision of the matter until such time as the State has complied with the Court's 2000 Order. *Id.* at 5.

Plaintiffs filed a Motion for Declaration Ensuring Continued Progress Toward Compliance with Court Orders in July 2004. Mem. Op. at 4, Aug. 20, 2004. The 2004 Circuit Court issued an opinion rendering sixteen declarations. *Id.* at 67-70. The first five (5) declarations address the continuing inadequacy of Baltimore City schools and failure of the State to properly fund the schools. *Id.* at 67-68. Declaration six (6) states:

> The Court will continue to retain jurisdiction to ensure compliance with its orders and constitutional mandates, and to continue monitoring funding and management issues. When the full funding outlined herein is received, the Court will revisit the issue of continuing jurisdiction, and determine whether the Consent Decree should then be additionally extended for good cause.

Id. at 68. The opinion of the Circuit Court continued, discussing the steps that had been taken, admonishing the BCPSS to not reduce opportunities, and declaring that parties with revenue raising capacity should increase available funding. *Id.* at 68-69. Declarations ten (10), eleven (11), and thirteen (13) discuss Senate Bill 894, 2004 Md. Laws ch. 148, § 4 ("S.B. 894") and the Memorandum of Understanding ("MOU") between BCPSS and Baltimore City, both of which required payment of the $58 million deficit within two years.

> 10. To ensure that the necessary operational funding is available for BCPSS to provide the basic educational programs that have been reduced, the Court declares that S.B. 894's provision that the BCPSS' deficit must be eliminated by the end of fiscal year 2006 is unconstitutional as applied to the BCPSS.
>
> 11. To ensure that necessary operational funding is available for BCPSS to provide the basic educational programs that have been reduced, the Court declares that the MOU's provision that the BCPSS' deficit must be eliminated by the end of fiscal year 2006 is null and void as against public policy.
>
> 13. Absent additional funding from the State of Maryland, BCPSS shall not retire the deficit before fiscal year 2008 and BCPSS shall not dedicate more than $5 million per year toward the creation of a $20 million cash reserve.

Id. at 69. The remaining declarations address Baltimore City's role in monitoring the BCPSS's expenditures and the duty of the parties to report to the Circuit Court for Baltimore City as to the status of additional funding in the future. *Id.* at 69-70.

Defendant appealed the 2004 Circuit Court Order and the Court of Appeals of Maryland granted certiorari prior to proceedings in the Court of Special Appeals. *Maryland State Bd. of Educ. v. Bradford,* 387 Md. 353, 382 (2005). The Court of Appeals addressed only four of the sixteen declarations in the 2004 Memorandum Opinion, of which the Court then narrowed the declarations into two appealable issues: Paragraph 12 and intertwined Paragraphs 10, 11, and 13. *Id.* at 386-87. It noted that although appealable, Paragraph 12, which ordered that the City be repaid the $8 million balance of its loan as scheduled, was not objected to by the State and would therefore not be considered by the Court of Appeals. *Id.* at 386. Paragraphs 10, 11, and 13 were determined to be intertwined because Paragraphs 10 and 11 were the underpinnings for the directive in Paragraph 13. *Id.* at 387. Paragraph 10 declared S.B. 894's provision that the deficit be eliminated by the end of fiscal year 2006 to be unconstitutional, Paragraph 11 stated that the contractual obligation under the MOU of the BCPSS to eliminate the deficit by FY 2006 is null and void as against public policy, and Paragraph 13 gave the directive that absent additional funding the deficit will not be retired before FY 2008 and the BCPSS shall not dedicate more than $5 million per year to creating the reserve. *Id.* at 386-87; Mem. Op. at 69, Aug. 20, 2004. The Court of Appeals determined that the challenged directive, Paragraph 13, as well as its underpinnings in Paragraphs 10 and 11, were invalid and void. *Bradford,* 387 Md. at 387. It

declared that no other aspects of the of the August 2004 order, or any other orders, were properly before them at that time. *Id.* at 388.

Plaintiffs' filed the Petition for Further Relief on March 7, 2019. In the Petition, Plaintiffs allege that State's violations of Article VIII have been continuous since litigation commenced in 1994. They aver that the State has halted full funding as required under the Thornton Commission, resulting in the growth of the adequacy gap.

Defendant filed their Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105000) on June 19, 2019. On August 23, 2019, Plaintiffs filed their Opposition to Motion to Dismiss (docket # 00105001). The City Board filed their Response/Opposition to the Motion to Dismiss (docket # 00105004) on September 17, 2019. Defendant's Reply in Support of Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105005) was filed on October 18, 2019. Plaintiffs filed their Sur-reply in Opposition to Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105006) on November 18, 2019 and the City Board filed their Sur-Reply in Opposition to Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105007) on November 18, 2019. This Court held a hearing on Defendant's Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105000) on December 10, 2019.

II. Analysis

A. Plaintiff's Petition is not barred by statute of limitations or laches.

In the Motion to Dismiss Plaintiffs' Petition for Further Relief, Defendant claims that relief is barred by applicable statute of limitations and laches.

Defendant alleges that the Petition is barred by the twelve (12) year statute of limitations on judgments, or, if inapplicable, by the general three (3) year statute of limitations. Def. Mot. to

Dismiss at 33-34. Md. Courts & Judicial Proceedings Art., § 5-102(a)(3) provides that "[a]n action on one of the following specialties shall be filed within 12 years after the cause of action accrues, or within 12 years from the date of the death of the last to die of the principal debtor or creditor, whichever is sooner . . . Judgment." However, Plaintiffs Petition requests three types of relief: a declaratory ruling that the State is violating Article VIII by failing to provide an adequate education, an injunction ordering the State to comply with the previous orders of the Court by closing the annual funding gap, and ordering Defendant to develop a plan for compliance with Article VIII and previous Court orders. Pls. Opp. at 26-27. These requests for equitable relief are not subject to statutes of limitations.

Additionally, Defendant claimed that the Petition was barred by laches based upon the delay. Def. Mot. to Dismiss at 34-38. Laches is a defense in equity against stale claims. *Ross v. State Bd. of Elections*, 387 Md. 649, 668 (2005). As such, laches applies only in cases where there is an unreasonable delay and the delay results in prejudice to the opposing party. *Frederick Road Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 117 (2000). Here, the requested relief is of an equitable nature, yet laches is inapplicable. Where a party seeks primary relief of a simple declaration, there will be no time bar to that cause of action. *Murray v. Midland Funding, LLC*, 233 Md. App. 254, 261 (2017).

Even if laches does apply to the relief requested, the defense would not bar the Petition. First, Defendant must show that there was an unreasonable or impermissible delay in asserting the claim. Courts look to "the motivations of the parties" and consequences of permitting or precluding the suit in determining whether the delay was unjustifiable and inexcusable. *State Cir., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 608 (2014). Here, Plaintiffs have

continued to raise the issue of inadequate funding through numerous methods over the years. *See* Pl. Opp. at 35-39. Therefore, Plaintiffs were not sitting idly as time passed allowing for a defense of laches.

Additionally, the delay that did occur in filing did not prejudice the Defendant. The second prong of laches requires a showing of prejudice to the opposing party because of the unreasonable delay. *Frederick Road Ltd. P'ship*, 360 Md. at 117. Mere passage of time is not enough to constitute prejudice. *Jones v. State,* 445 Md. 324, 339-40 (2015). Defendant is required to show in what specific way their case has actually been damaged by the delay of Plaintiffs. *Id.* Defendant alleges that its case was prejudiced by a delay in filing because of faded memories, specifically those of former Superintendent Nancy Grasmick. Def. Mot. to Dismiss at 37-38. However, "memory problems alone do not establish . . . that he has been prejudiced." *State v. Christian*, 463 Md. 647, 654 (2019). Therefore, memory loss of a witness to previous inadequacies of state funding of BCPSS would not be sufficient prejudice to bar the Petition.

As Defendant cannot meet the burden, Plaintiffs' Petition is not barred by statute of limitations or laches.

B. Plaintiff's Petition is authorized by the Consent Decree entered November 26, 1996.

Defendant alleges in their Motion to Dismiss Plaintiffs' Petition for Further Relief that the Petition is not authorized by the 1996 Consent Decree. As a final judgement, the Defendant alleges that the Consent Decree controls the proper disposition of the case, cannot be modified, and as written does not allow for this remedy. Def. Mot. to Dismiss at 38-42.

The Consent Decree is a binding contract and judgment; however, there is no need to modify the terms to find authorization within the Consent Decree. The Consent Decree specifically derives certain authorizations.

> [T]he Board may also request funds in amounts greater than those described in paragraph 47. . .

Consent Decree at 16, ¶ 53.

> If the State and the Board do not reach an agreement, the Board, on or after June 1, 2000, may seek relief from the Circuit Court for Baltimore City for funding amounts greater than those described in paragraph 47...

Consent Decree at 17, ¶ 53.

> This Decree shall be in effect through June 30, 2002, unless the Court extends the term upon timely motion of one of the parties and upon a showing of good cause to extend the Decree.

Consent Decree at 22-23, ¶ 68.

> This Court retains continuing jurisdiction during the term of this Decree to monitor and to enforce compliance with the terms of this Decree. Except as expressly provided otherwise, any party to this Decree may seek to enforce the terms of this Decree. Notwithstanding termination of this Decree, the Court shall retain jurisdiction to resolve any disputes that may have arisen during the term of this Decree.

Consent Decree at 23, ¶ 69.

Defendant avers that the Consent Decree terminated in 2002. However, the terms of the Consent Decree includes references to "amounts greater than" and "on or after." *See* Consent Decree at 16-17, ¶ 53. Additionally, the 2002 Memorandum Opinion and Order issued by Judge Joseph H.H. Kaplan, lengthens the timeframe of judicial supervision until such time as compliance with the 2000 Order. Mem. Op. at 5, June 30, 2002. This Court retains jurisdiction under the terms of the Consent Decree. In fact, Defendant's position was rejected by Judge

Kaplan in this case. *See generally* Mem. Op. June 30, 2000; Mem. Op. June 25, 2002; Mem. Op. Aug. 20, 2004. This Court retains jurisdiction under the terms of the Consent Decree.

C. The issues presented in Plaintiff's Petition are not non-justiciable issues.

Defendant alleged in their Motion to Dismiss Plaintiffs' Petition for Further Relief that the issues raised in the Petition are non-justiciable issues because funding for public schools is authority left to the political branches of government. Def. Mot. to Dismiss at 51. Determining whether an issue is a non-justiciable political question requires answering two questions: "'whether the claim presented and the relief sought are of the type which admit of judicial resolution' and second, whether the structure of government "renders the issue a political question—that is, a question which is not justiciable in federal [or State] court because of the separation of powers provided by the Constitution.'" *Estate of Burris v. State*, 360 Md. 721, 744-45 (2000) (citing *Powell v. McCormack*, 395 U.S. 486, 516-17 (1969). The political question doctrine is applied narrowly, constraining review by the courts only where actions "are not within the express purview of the textually demonstrable constitutional commitment." *Jones v. Anne Arundel Cty.*, 432 Md. 386, 400-01 (2013). Defendant claims that the issue of school funding fails under the second element as a political question because it is a violation of the separation of powers. Def. Mot. to Dismiss at 52.

Judicial review of constitutional violations, such as violations of Article VIII of the Maryland Constitution's right to an adequate education, are not prohibited by separation of powers. Defendant alleges that Plaintiffs are asking the judiciary to partake in matters that are under the sole authority of the legislative and executive branches. Def. Mot. to Dismiss at 54. However, the Maryland courts maintain an inherent authority to review constitutional adequacy.

Indeed, "executive and legislative budget authority is subject to constitutional limitations." *Ehrlich v. Perez*, 394 Md. 691, 736 (2006) (*citing Judy v. Schaefer*, 331 Md. 239, 266 (1993). Therefore, review of adequacy of funding of public education in Maryland is within the purview of the Maryland Judiciary, though the actual appropriation of funds is the duty of other branches of government.

Defendant previously alleged here that the issues of adequacy of funding were non-justiciable political questions. Authority of the judiciary to weigh in on the issue of sufficiency of funding for education was previously argued before both the Circuit Court for Baltimore City and the Court of Appeals of Maryland. *See generally* Mem. Op. June 30, 2000; Mem. Op. June 25, 2002; Mem. Op. Aug. 20, 2004; *Maryland State Bd. of Educ. v. Bradford,* 387 Md. 353 (2005). Defendant's position is deficient in light of the history of this matter.

D. Plaintiff's Petition is not precluded by sovereign immunity.

Finally, Defendant claims that the Plaintiffs' Petition for Further Relief is barred by sovereign immunity. The doctrine of sovereign immunity shields the State, absent direct waiver of the General Assembly, from actions for monetary damages. *Rodriguez v. Cooper*, 458 Md. 4425, 451 (2018). The protection provided by sovereign immunity extends only to actions seeking monetary damages. Here, as discussed *supra* Section II, A, the primary relief requested by Plaintiffs is of equitable nature. The requested relief referenced by Defendant in alleging the bar of sovereign immunity is merely a declaration that Defendant *may* be subject to monetary sanctions if they fail to comply with the orders of this Court. Plaintiffs' Petition is not barred by the doctrine of sovereign immunity.

III. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105000), filed June 19, 2019, be, and the same is, hereby **DENIED**; and it is further

ORDERED that parties shall confer and provide a proposed scheduling order to this Court within thirty (30) days from the date of this Order.

IT IS SO ORDERED, this 16th day of January, 2020.

AUDREY J.S. CARRION
Part 23
Judge's Signature appears on the original document

Judge Audrey J.S. Carrión
Case No.: 24-C-94-340058

CC:

Elizabeth A. McCallum, Esq.,
Baker & Holstetler, LLP
1050 Connecticut Avenue NW
Washington, DC 20036
Attorneys for Plaintiffs

Deborah A. Jeon, Esq.,
American Civil Liberties Union Foundation of American
3600 Clipper Mill Road, Suite 350
Baltimore, Maryland 21211
Attorney for Plaintiffs

Ajmel Quereshi, Esq.,
Cara McClellan, Esq.,
Sherrilyn Ifill, Esq.,
NAACP Legal Defense Fund
700 14th Street, NW, 6th Floor
Washington, DC 20005
Attorneys for Plaintiffs

TRUE COPY
TEST
MARILYN BENTLEY, CLERK

Steven M. Sullivan, Esq.,
Elizabeth M. Kameen, Esq.,
Elliot L. Schoen, Esq.,
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, Maryland 21202
Attorneys for Defendant Maryland State Board of Education

Warren N. Weaver, Esq.,
Ilana Subar, Esq.,
Whiteford, Taylor & Preston, LLP
7 Saint Paul Street, Suite 1500
Baltimore, Maryland 21202
Attorneys for Baltimore City Board of School Commissioners

Sent via U.S. Mail
Case No.: 24-C-94-340058

KEITH A. BRADFORD, et al.,	*	**IN THE**
Plaintiffs,	*	**CIRCUIT COURT**
v.	*	**FOR**
MARYLAND STATE BOARD OF EDUCATION	*	**BALTIMORE CITY, PART 23**
	*	**Case No.: 24-C-94-340058**
Defendant.		

* * * * * * * * * * * * * *

ORDER

Upon consideration of the Maryland State Board of Education's ("Defendant") Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105000), filed June 19, 2019, Keith Bradford, et al.'s ("Plaintiffs") Opposition to Motion to Dismiss (docket # 00105001), filed August 23, 2019, the Baltimore City Board of School Commissioners' ("City Board") Response/Opposition to the Motion to Dismiss (docket # 00105004), filed September 17, 2019, Defendant's Reply in Support of Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105005), filed October 18, 2019, Plaintiffs' Sur-reply in Opposition to Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105006), filed November 18, 2019, City Board's Sur-Reply in Opposition to Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105007), filed November 18, 2019, the arguments presented at the hearing held before the undersigned on December 10, 2019, wherein Plaintiffs, Defendant, and the City Board were represented by counsel, the record herein, and in accordance with the reasoning contained in the Memorandum Opinion issued on even date, it is this 16th day of January, 2020, by the Circuit Court for Baltimore City, Part 23, hereby

ORDERED that Defendant's Motion to Dismiss Plaintiffs' Petition for Further Relief (docket # 00105000), filed June 19, 2019, be, and the same is, hereby **DENIED**; and it is further

ORDERED that parties shall confer and provide a proposed scheduling order to this Court within thirty (30) days from the date of this Order.

AUDREY J.S. CARRION
Part 23
Judge's Signature appears on the original document

Judge Audrey J.S. Carrión
Case No.: 24-C-94-340058

CC:
Elizabeth A. McCallum, Esq.,
Baker & Holstetler, LLP
1050 Connecticut Avenue NW
Washington, DC 20036
Attorneys for Plaintiffs

Deborah A. Jeon, Esq.,
American Civil Liberties Union Foundation of American
3600 Clipper Mill Road, Suite 350
Baltimore, Maryland 21211
Attorney for Plaintiffs

Ajmel Quereshi, Esq.,
Cara McClellan, Esq.,
Sherrilyn Ifill, Esq.,
NAACP Legal Defense Fund
700 14th Street, NW, 6th Floor
Washington, DC 20005
Attorneys for Plaintiffs

TRUE COPY
FROM THE RECORDS OF
MARYLAND JUDICIARY

Steven M. Sullivan, Esq.,
Elizabeth M. Kameen, Esq.,
Elliot L. Schoen, Esq.,
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, Maryland 21202
Attorneys for Defendant Maryland State Board of Education

Warren N. Weaver, Esq.,
Ilana Subar, Esq.,
Whiteford, Taylor & Preston, LLP
7 Saint Paul Street, Suite 1500
Baltimore, Maryland 21202
Attorneys for Baltimore City Board of School Commissioners

Sent via U.S. Mail
Case No.: 24-C-94-340058

EXHIBIT D

KEITH A. BRADFORD, *et al.*,	*	**IN THE**
***Plaintiffs*,**	*	**CIRCUIT COURT**
v.	*	**FOR**
MARYLAND STATE BOARD OF EDUCATION, *et al.*,	*	**BALTIMORE CITY, PART 23**
	*	**Case No.: 24-C-94-340058**
Defendant.		

* * * * * * * * * * * * * *

ORDER

Upon consideration of Maryland State Board of Education's ("MSBE") *Motion to Dismiss Plaintiffs' Petition for Further Relief* (docket #00183000), filed November 10, 2021, MSBE's *Motion to Dissolve November 26, 1996 Consent Decree* (docket #00184000), filed November 10, 2021, Plaintiffs' *Motion to Strike Defendant's Second Motion to Dismiss* and *Memorandum in Support of Motion to Strike and in Opposition to Defendant's Second Motion to Dismiss Plaintiffs' Petition for Further Relief and Dissolve Consent Decree* (docket #00189000), filed December 22, 2021, Baltimore City Board of School Commissioners'("BCBSC") *Opposition to Defendant's Motion to Dismiss Plaintiffs' Petition for Further Relief* (docket #00183001), filed December 23, 2021, BCBSC's *Opposition to Defendant's Motion to Dissolve Consent Decree* (docket #00184001), filed December 23, 2021, MSBE's *Reply in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction and to Dissolve Consent Decree* (docket #00183002), filed February 11, 2022, MSBE's *Opposition to Plaintiffs' Motion to Strike MSBE's Motion to Dismiss for Lack of Subject Matter Jurisdiction and to Dissolve Consent Decree* (docket #00189003), filed February 11, 2022, and Plaintiffs' *Reply in Support of Defendant's Second Motion to Dismiss* (not yet docketed), filed March 4, 2022, it is this 7th day of March 2022, by the CIRCUIT COURT FOR BALTIMORE CITY, PART 23, hereby

ORDERED that MSBE's *Motion to Dismiss Plaintiffs' Petition for Further Relief* (docket #00183000) filed November 10, 2021, and MSBE's *Motion to Dissolve November 26, 1996 Consent Decree* (docket #00184000) filed November 10, 2021, are hereby **DENIED**; and it is further

ORDERED that Plaintiffs' *Motion to Strike Defendant's Second Motion to Dismiss* and *Memorandum in Support of Motion to Strike and in Opposition to Defendant's Second Motion to Dismiss Plaintiffs' Petition for Further Relief and Dissolve Consent Decree* (docket #00189000), filed December 22, 2021, is hereby **DENIED**.

The papers and exhibits submitted, and the review of the record, are sufficient for this Court's consideration of this matter. A hearing would not aid the Court in the decision-making process.

AUDREY J.S. CARRION
Part 23
Judge's Signature appears on the original document

Judge Audrey J.S. Carrión
Circuit Court for Baltimore City
Case No.: 24-C-94-340058

CC:

Elizabeth McCallum, Esq.,
Baker & Holstetler, LLP
1050 Connecticut Ave. NW
Washington, DC 20036
Counsel for Plaintiffs

Deborah Jeon, Esq.,
ACLU of Maryland
3600 Clipper Mill Rd., Suite 350
Baltimore, MD 21211
Counsel for Plaintiffs

Ajmel Quereshi, Esq.,
NAACP Legal Defense Fund
700 14th St. NW, 6th Floor
Washington, DC 20005
Counsel for Plaintiffs

TRUE COPY
TEST
Marilyn Bentley
MARILYN BENTLEY, CLERK

Sherrilyn Ifill, Esq.,
Cara McClellan, Esq.,
NAACP Legal Defense Fund
40 Rector St., 5th Floor
New York, NY 10006
Counsel for Plaintiffs

Steven M. Sullivan, Esq.,
Elliot L. Schoen, Esq.,
Assistant Attorneys General
200 Saint Paul Pl., 19th Floor
Baltimore, MD 21202
Counsel for Maryland State Board of Education

Charles Monk, II, Esq.,
Jason St. John, Esq.,
Mark Simanowith, Esq.,
Saul Ewing Arnstein & Lehr LLP
500 E. Pratt St., Suite 800
Baltimore, MD 21202
Counsel for Maryland State Board of Education

Warren Weaver, Esq.,
Ilana Subar, Esq.,
Whiteford, Taylor & Preston, L.L.P.
7 Saint Paul St., Suite 1500
Baltimore, MD 21202
Counsel for Baltimore City Board of School Commissioners

James L. Shea, Esq., City Solicitor
Lydie E. Glynn, Esq.,
Stephen T. Salsbury, Esq.,
Baltimore City Law Department
100 N. Holliday St.
Baltimore, MD 21202
Counsel for the Mayor and City Council of Baltimore City

Clerk's Office to send copies via U.S. Mail.
Case No.: 24-C-94-340058
(Consolidated Case No.: 24-C-95-258055)

EXHIBIT E

Nov. 26, 1996

KEITH A. AND STEPHANIE E. BRADFORD, et al.,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION, et al.,	*	BALTIMORE CITY
Defendants and Third-Party Plaintiffs,	*	
v.	*	Case No. 94340058/CE189672
BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY, et al.,	*	
Third-Party Defendants.	*	

* * * * * * *

BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY, et al.,	*	
Plaintiffs,	*	
v.	*	Case No. 95258055/CL202151
MARYLAND STATE BOARD OF EDUCATION, et al.,	*	
Defendants.	*	

* * * * * * * * * * *

CONSENT DECREE

WHEREAS, Plaintiffs Keith A. Bradford, et al., seek declaratory and injunctive relief to ensure that all school children within the Baltimore City Public Schools ("BCPS") who are at risk of educational failure are provided with a public school education that is adequate when measured by contemporary educational standards, pursuant to Article VIII, Section 1, of the Maryland

Constitution;

WHEREAS, Plaintiffs and Third-Party Defendants Board of School Commissioners of Baltimore City and Phillip Farfel seek a declaratory judgment that the State has not fulfilled the requirement of Article VIII, Section 1, of the Maryland Constitution to provide a thorough and efficient education to the students enrolled in the BCPS and also seek additional resources to increase student achievement in the BCPS;

WHEREAS, Defendants and Third-Party Plaintiffs Maryland State Board of Education (the "State Board" or "MSBE") and State Superintendent Nancy Grasmick allege that BCPS has failed to manage its existing resources effectively and therefore seek reform within BCPS before additional State funds are devoted to BCPS;

WHEREAS, Plaintiffs in *Vaughn G., et al. v. Mayor, et al.*, Civil Action No. MJG-84-1911 in the United States District Court for the District of Maryland, seek in that federal action the establishment of a receivership over all operations of the BCPS or, in the alternative, appointment of a partial receiver with full authority to expend resources, effect personnel actions, and manage and oversee all matters affecting special education, and Plaintiffs' Motion for Additional Remedial Measures has been joined for trial with the above-captioned cases by order of the federal Court;

WHEREAS, the Court herein has entered partial summary judgment holding that Article VIII, Section 1, of the Maryland Constitution requires that the General Assembly provide all students in Maryland's public schools with an education that is adequate when measured by contemporary educational standards and that the public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards;

WHEREAS, there remain among the parties differing claims as to the causes of and

appropriate remedies for the failure of the BCPS to provide public school children in Baltimore City with an education that is adequate when measured by contemporary educational standards;

WHEREAS, all the parties to the above captioned cases herein and the *Vaughn G.* Plaintiffs jointly desire to resolve their differing claims through an amicable settlement in order to provide a meaningful and timely remedy crafted to meet the best interests of the school children of Baltimore City;

THEREFORE, all parties agree and the Court **ORDERS** that:

1. The Consent Decree entered in the *Vaughn G.* case is incorporated by reference and attached hereto as Exhibit A.

2. Governance and functions of the Baltimore City Public Schools will be restructured in accordance with paragraphs 8 through 42 and 55 through 67 of this Decree, and with proposed City-State partnership legislation (the "partnership legislation") in the form attached hereto as Exhibit B and incorporated by reference herein.

3. Additional funds, as provided in paragraphs 43 through 54 of this Decree shall be provided by the State to BCPS in Fiscal Years 1998 through 2002.

Effective Dates of Decree

4. This Decree shall not become fully effective until (a) the Governor signs the partnership legislation in a form that does not affect the substantive rights of the parties established by this Decree; and (b) the State Budget for FY 1998 is approved with the additional funds for FY 1998 as provided in paragraph 47. The transition provisions of paragraphs 55 through 58 shall be effective upon entry of this Decree.

5. If both contingencies described in paragraph 4 have not occurred by May 1, 1997, this

Decree, including the transition provisions of paragraphs 55 through 58, shall be null and void. In this event, trial of these actions shall commence jointly with the Plaintiffs' Motion for Additional Remedial Measures in the *Vaughn G.* case on Monday, May 12, 1997.

6. If the partnership legislation is enacted with any variance from the form attached hereto, the parties may waive the variance in writing. If any variance is not waived in writing, any party may file a motion with this Court, no later than 10 business days after the legislation is signed by the Governor, seeking a determination whether the variance affects the party's substantive rights under this Decree. If no party files a timely motion seeking such a determination, the parties shall be deemed to have waived any variance. If any variance either is waived or is determined by the Court not to affect the substantive rights of any party, the terms of this Decree shall be interpreted consistent with the legislation.

7. If the General Assembly revises or modifies the partnership legislation after the 1997 legislative session and before the expiration of this Decree, all parties reserve their rights to challenge any variances in the manner provided in paragraph 6.

Establishment of the
New Board of School Commissioners for Baltimore City

8. The new Board of School Commissioners for Baltimore City ("Board") shall be established as a City-State partnership and shall be held directly accountable for improving the academic achievement of Baltimore City school children as measured by the Maryland School Performance Program ("MSPP"). The Board shall not be deemed an agency of the State.

9. The Board shall be vested with full control of all functions relating to BCPS in accordance with the partnership legislation.

10. The Board shall consist of nine voting Members and one non-voting student Member, all of whom shall serve without compensation.

11. Each Member must reside in Baltimore City. To the extent practicable, the membership of the Board shall reflect the demographic composition of Baltimore City.

12. At least four members of the Board shall possess a high level of expertise concerning the successful administration of a large business, non-profit, or governmental entity and shall have served in a high-level management position within such an entity.

13 At least three Members shall possess a high level of knowledge and expertise in the field of education.

14 At least one Member shall be the parent of a student who is enrolled in the Baltimore City Public Schools as of the date of appointment.

15 Among the nine voting members, at least one Member shall also possess knowledge and/or experience in the education of children with disabilities. This knowledge and/or experience may be derived from being the parent of a child with a disability.

16 One non-voting Member shall be a student in the Baltimore City Public Schools, who will be chosen in the same fashion as are the student members of the Boards of Education for Maryland's other Local Educational Agencies.

17. The voting Members shall be appointed jointly by the Mayor of Baltimore City and the Governor from a list of qualified candidates submitted to them by the Maryland State Board of Education. The list shall contain at least twice the number of names as there are vacancies. To the extent practicable, the list shall include twice the number of names as there are vacancies in each category of qualifications. The Mayor and the Governor may jointly request that MSBE supplement

the list with additional qualified candidates. In assembling the list of candidates, the State Board shall solicit and receive recommendations from a wide variety of sources, including, but not limited to, the Mayor, the Plaintiffs in *Vaughn G.*, the Plaintiffs in *Bradford*, and various community organizations.

18. All voting Members shall serve three-year terms with staggered expiration dates. Student members shall serve one-year terms. The lengths of the initial terms shall be varied to establish staggered expiration dates. A Member whose term has expired shall remain in office for all purposes until a successor Member is appointed. Appointments shall be terminable during the term of appointment only for cause in accordance with §3-108 of Md. Educ. Code Ann., upon the joint approval of the Mayor and the Governor.

19 Upon appointment of the Board, the Mayor and the Governor shall jointly select one of the voting Members to serve as Chairperson for two years. Thereafter, the Board shall elect its Chairperson from among the voting members to serve no more than two years.

20. Meetings of the Board shall require a quorum of a majority of the voting Members then serving. Any Board action shall require the affirmative vote of a majority of the voting Members then serving on the Board.

Management Structure

21. The Board shall hire a Chief Executive Officer (CEO), who shall report directly to the Board and who shall be a member of the Mayor's Cabinet. If the Board hires or appoints an interim CEO, the interim CEO shall not be eligible for appointment as CEO. The CEO shall be paid a salary established by the Board. The CEO will be responsible for the overall administration of the Baltimore City Public School system. The CEO shall serve at the pleasure of the Board. The CEO's employment contract shall include provisions making the CEO's continued employment contingent

upon demonstrable and continuous improvement in the academic performance of students in the public schools in Baltimore City and sound management of the school system.

22. The CEO, with the Board's approval, shall select a Chief Academic Officer (CAO) who shall be responsible for system-wide curriculum and instruction and who shall report directly to the CEO. The CEO shall establish the salary of the CAO, subject to the approval of the Board. The CAO shall serve at the pleasure of the CEO and the Board. The CAO's employment contract shall include provisions making the CAO's continued employment contingent upon demonstrable and continuous improvement in the academic performance of students in the public schools in Baltimore City.

23. The CEO, with the Board's approval, shall select a Chief Financial Officer (CFO) who shall be responsible for the fiscal operations of the school system and who shall report directly to the CEO The CEO shall establish the salary of the CFO, subject to the approval of the Board. The CFO shall serve at the pleasure of the CEO and the Board. The CFO's employment contract shall include provisions making the CFO's continued employment contingent upon continuous effective fiscal management of the school system.

24. The Board and the CEO shall be held ultimately accountable for all functions delegated.

25. Upon the appointment of a CEO or an interim CEO, a Parent and Community Advisory Board shall be established to ensure parental involvement in the school improvement process. The Parent and Community Advisory Board shall consist of 14 persons, a majority of whom shall be parents of students currently enrolled in BCPS. Two members of the Advisory Board shall be selected by the *Bradford* Plaintiffs and three members shall be selected by the *Vaughn G.* Plaintiffs.

The remaining members shall be appointed by the CEO, subject to Board approval, as follows: three shall be from a list proposed by the Baltimore City Council of Parent-Teacher Associations; two shall be from a list proposed by the area-based parent networks; two shall be from a list proposed by the Title I liaisons; and two shall be selected by the CEO from other parent and/or community groups. In the event that one of the enumerated groups fails to propose a sufficient number of nominees to fill its allotted positions, the Board shall fill the position(s) with person(s) from other parent and/or community groups. The term of a member of the Parent and Community Advisory Board shall be two years, and no member may serve more than two terms. A member whose term has expired shall remain on the Advisory Board until a successor member is appointed. When all members have been appointed to the Parent and Community Advisory Board, this Advisory Board shall replace the Community Advisory Board established under the Stipulation and Order of April 4, 1994 entered in *Vaughn G.*

26. The Board and CEO shall consult regularly with the Parent and Community Advisory Board. The CEO shall meet with the Parent and Community Advisory Board on at least a quarterly basis. The CEO and Board shall also seek parental input from a variety of other sources, including the Parent Participation Project and school improvement teams.

Transition Plan for 1997-98

27. On or before September 1, 1997, after opportunity for public comment, the Board shall adopt a Transition Plan to guide the operation of the BCPS during the 1997-98 school year. In preparing the Transition Plan, the Board may review any planning for the 1997-98 school year already undertaken by the current Board and BCPS administration and shall receive and consider comments from the *Bradford* and *Vaughn G.* Plaintiffs. The Transition Plan shall identify the steps

to be taken to comply with this Decree (including all *Vaughn G.* orders) and the partnership legislation, to make progress in implementing the key recommendations from the 1992 Cresap Report and the 1994 and 1995 MGT Reports, to make use of the additional funds to be provided under this Decree, and to implement any major educational reform initiatives to be undertaken in the first year of operation of the Board in areas such as curriculum, instruction, and assessment.

28. The Transition Plan shall be a public document and shall be provided to this Court, the United States District Court in *Vaughn G.*, the Governor, the Mayor, the General Assembly, the State Board and the *Bradford* and *Vaughn G.* Plaintiffs.

Master Plan

29. On or before January 1, 1998, the CEO, or the interim CEO, shall submit to the Board for approval a Master Plan to increase student achievement in the BCPS. The Board shall review and approve the Master Plan at a public hearing on or before March 1, 1998.

30. In developing the Master Plan, the CEO or the CEO's designees shall receive and consider comments from the *Bradford* and *Vaughn G.* Plaintiffs and may consult with parents, teachers, students, representatives of the business community, and experts in educational instruction and administration.

31. The Master Plan shall include measurable outcomes and time lines, and shall include timetables for implementation, evaluation, and reporting.

32. The Master Plan shall include a comprehensive design for improvement of school management and accountability of all personnel, and shall include implementation of the key recommendations contained in the 1992 Cresap Report and the 1994 and 1995 MGT Reports.

33. The Master Plan shall identify the actions necessary to improve student achievement

in the BCPS. It shall address the following topics:

A. The curriculum and instructional programs of BCPS, including the development and implementation of: (i) a city-wide curriculum framework reflecting State learning outcomes and an appropriate developmental sequence for students; (ii) an adequate program of professional development and training for BCPS staff that is coordinated with and supports the implementation of the city-wide curriculum framework; and (iii) an effective educational program for meeting the needs of students at risk of educational failure;

B. The financial management and budgeting system needed to ensure maximization and appropriate utilization of all available resources;

C. The planning and provision of construction, repair, and maintenance services within BCPS,

D. BCPS' management information systems;

E The provision of adequate instructional materials, support services, student assessment and remediation;

F. Staff hiring, assignment, professional development and evaluation, recruitment, and retention;

G. The status of schools designated to be reconstitution eligible;

H. The delivery of special education services;

I. Parental participation; and

J. Compliance with all provisions of this Decree.

34. The Master Plan, as proposed and as adopted, shall be a public document and shall be provided to this Court, the United States District Court in *Vaughn G.*, the Governor, the Mayor,

the General Assembly in accordance with §5-109 of Md. Educ. Code Ann., the State Board, and the *Bradford* and *Vaughn G.* Plaintiffs.

Personnel and Procurement

35. The Board shall have complete control of all personnel and procurement involving the Baltimore City Public Schools. Upon appointment, the Board will review all collective bargaining agreements to determine if the provisions of the agreements are consistent with the purposes of this Decree and the partnership legislation and may negotiate changes.

36. Current collective bargaining agreements applicable to BCPS personnel shall remain in effect pending appointment of the new Board and the Board's exercise of its authority under paragraph 35 of this Decree and the partnership legislation. All current collective bargaining agreements shall expire on June 30, 1997. Notwithstanding any extensions and any discussions with the agents for the collective bargaining units applicable to BCPS personnel, neither the Mayor and City Council of Baltimore ("City") nor the current Board shall vary the terms and conditions or agree to issues for reopeners of the agreements, as they relate to BCPS personnel. The new Board shall be responsible for negotiations for agreements in FY 1998. The new Board shall retain its own chief negotiator for all collective bargaining.

37. The Board shall adopt the MBE/WBE goals of the City relating to procurement.

38. The new Board and the CEO shall consult with the Mayor and his designees regarding an orderly transition process for the Board to assume full responsibility for all personnel and procurement. This transition process shall be completed as quickly as possible and no later than June 30, 1998.

Reporting

39. By December 31 of each year during the term of this Decree, the Board shall issue an annual public report. This report shall include a financial statement, a comprehensive accounting of progress in implementing the Transition Plan or the Master Plan, and other information as required by State law. The annual reports shall be public documents and shall be provided to this Court, the United States District Court in *Vaughn G.*, the Governor, the Mayor, the General Assembly in accordance with §2-1312 of Md. State Gov't Code Ann., the State Board, and the *Bradford* and *Vaughn G.* Plaintiffs.

Review and Evaluation

40. No later than July 1, 1999, the Board and the Maryland State Board of Education jointly shall select and the Board shall contract with an independent consultant to evaluate the interim progress of reform in the City schools. The City and the State shall bear equally the cost of the independent consultant. By April 30, 2000, the independent consultant shall report the results of the interim evaluation. The report shall be provided to this Court, the United States District Court in *Vaughn G.*, the Governor, the Mayor, the General Assembly, the State Board, and the *Bradford* and *Vaughn G.* Plaintiffs. The interim evaluation shall be a public document.

41. The Board and the Maryland State Board of Education jointly shall develop the scope of the consultant's evaluation, which shall include, at a minimum, assessment of the educational and management reforms of the Board; assessment of the performance of students in the City schools; assessment of compliance with the terms of this Decree and the *Vaughn G.* orders; assessment of the utilization of the additional funding provided pursuant to this Decree; and an assessment of the sufficiency of the additional funding provided by the State. The independent consultant may make

recommendations concerning changes to the educational programs of the BCPS; the structure of the City-State partnership or the BCPS administration; modifications to the Master Plan or the Long Term Compliance Plan for special education; and the need for funding in excess of the amounts provided herein in order for the BCPS to provide its students with an education that is adequate when measured by contemporary educational standards.

42. On or before January 1, 2001, the Board shall contract with an independent consultant to conduct a final comprehensive review and evaluation of the Baltimore City Public Schools. This independent consultant may be the same consultant provided for in paragraph 40 of this Decree. The City and the State shall bear equally the cost of the independent consultant. The Board and the Maryland State Board of Education shall jointly select the consultant and determine the scope of the review and evaluation. At a minimum, the final review and evaluation shall examine the extent of progress made in improving schools and all of the topics examined in the interim evaluation. By December 1, 2001, the consultant shall issue a final review and evaluation. The final report shall be provided to this Court, the United States District Court in *Vaughn G.*, the Governor, the Mayor, the General Assembly, the State Board, and the *Bradford* and *Vaughn G.* Plaintiffs. The consultant's final report shall be a public document.

Financial Resources

43. As provided in this section, the State of Maryland shall provide BCPS with additional funds to assist the Board in implementing the City-State partnership, to improve the quality of public education in Baltimore City, and to raise the level of academic achievement in BCPS. This financial commitment shall be separate from established State funding pursuant to APEX and other current State funds provided to BCPS. The additional funds enumerated below may not be used to supplant

funds provided to or for the benefit of BCPS by the City, and may not be used to meet any statutory obligation of the City to maintain levels of local funding for education.

44. If new revenue becomes available to the State during FY 1998 through FY 2002, and if the State dedicates all or part of those new revenues to education generally, then BCPS shall receive its designated share of those revenues without reduction of the additional funds detailed in this Decree.

45. The additional funds provided by the State as described in this Decree shall not be provided by reducing any other State funds provided to Baltimore City. Nothing in this Decree, however, shall prevent the Governor or the General Assembly from reducing local aid to Baltimore City as part of any general statewide reduction in local aid or from exercising executive and legislative discretion with respect to any local aid for a special project or purpose.

46. The $12 million in additional State discretionary funds appropriated for reconstitution eligible schools and teacher salary parity in the FY 1997 State budget bill shall be released as provided by the terms of that bill. For purposes of implementing this provision, the phrase "creation of and progress in implementation of a City-State Partnership" shall mean the date upon which this Decree shall become fully effective in accordance with paragraph 4 of this Decree. Upon implementation and approval of the performance-based evaluation system required by the terms of the FY 1997 State Budget Bill, the Board in FY 1998 may request payment of the $2 million withheld in the FY 1997 State Budget Bill.

47. The State shall provide to the Baltimore City Public Schools the following additional funds, subject to appropriation by the General Assembly:

FY 1998	$30 million
FY 1999	$50 million
FY 2000	$50 million
FY 2001	$50 million
FY 2002	$50 million

If these additional funds are not appropriated in any of the designated fiscal years, this entire Decree shall become null and void as of the end of the last fiscal year for which these additional funds were appropriated.

48. In each of Fiscal Years 1998 through 2002, the State shall also provide at least $10 million to BCPS through the Maryland School Construction Program ("Program"). These funds shall be made available in the proportion of 90% State funds to 10% City funds. The State shall provide the funds before the City is required to provide its share. Any additional funds requested by the Board under the Program in excess of $10 million per year, if granted, shall be provided subject to the formula applicable to the City for matching funds in the Program.

49. In Fiscal Years 1998 through 2002, if BCPS' actual audited enrollment for any fiscal year is less than BCPS' current enrollment projections for those fiscal years, BCPS will not be required to return to the State APEX funds to the extent of the difference between the current enrollment projections and the audited enrollment for each fiscal year. For purposes of this Decree, "BCPS current enrollment projections" means the following:

FY1998	101,648.0	FTE
FY1999	97,842.5	FTE
FY2000	94,616.5	FTE
FY2001	91,479.0	FTE
FY2002	89,197.5	FTE

50. The additional funds described in paragraph 47 are provided: (a) to improve the educational performance of schools having a high percentage of students living in poverty; (b) to improve the educational performance of reconstitution eligible schools and other schools that are both failing to meet MSPP standards and failing to show progress toward meeting those standards; (c) to make progress toward meeting teacher salary parity with Baltimore County; and (d) to implement other improvements bearing a direct relationship to classroom instruction, such as investments in technology, management information systems, professional development and evaluation, and curriculum. A substantial proportion of the additional funds shall be utilized for programs, services, and/or resources that have a direct and substantial effect on improving academic achievement.

51. The dispute between the State and the BCPS related to the legislative audit of the 1994-95 school enrollment count is resolved by this Decree with no further action to be taken.

52. For Fiscal Years 1999 through 2002 the Board may request funds in amounts greater than those described in paragraph 47 from the State through the currently established State budget process, if the Board presents a detailed plan showing why such funds are needed and how they would be spent. The State will use best efforts to satisfy any such request, subject to the availability of funds.

53. For Fiscal Years 2001 and 2002, the Board may also request funds in amounts greater than those described in paragraph 47, after completion of the interim evaluation described in paragraphs 38 and 39. If the Board requests such funds, the *Bradford* Plaintiffs and *Vaughn G.* Plaintiffs will be offered an opportunity to present to the Board and to the State in writing their views on the request for such funds. The State and the Board may negotiate from April 30, 2000 through June 1, 2000 regarding such requests, and the State and the Board shall consider the views of the

independent consultant and the Plaintiffs in the *Bradford* and *Vaughn G.* cases. If the State and the Board do not reach agreement, the Board, on or after June 1, 2000, may seek relief from the Circuit Court for Baltimore City for funding amounts greater than those described in paragraph 47, through the following process:

A. The matter shall be placed on an expedited schedule, with a hearing commencing no later than fifteen days after any motion for relief is filed. All parties to this Decree may appear and present evidence at this hearing, and the interim evaluation shall be received into evidence. The State reserves all of its defenses as to any Court order for such funds in amounts greater than those provided in paragraph 47.

B. Any party may appeal the Circuit Court's ruling to the Court of Appeals of Maryland, but the *Bradford* Plaintiffs may appeal only if the Board appeals. The Circuit Court shall stay any order pending appeal, and all parties shall jointly request expedited consideration of the matter by the Court of Appeals. The partnership legislation shall include statutory authority providing for direct review by the Court of Appeals of Maryland and requesting that the Court of Appeals of Maryland issue a decision within 60 days after briefing is completed.

54. The State shall provide the additional funds described in paragraph 47 notwithstanding any dispute regarding the provision of funds in amounts greater than the amounts enumerated in that paragraph.

Transition From Current Governance of BCPS

55. Upon entry of this Decree, the Governor, the Mayor, and the State Board each shall designate one representative to serve on a Transition Committee. The Transition Committee shall

(1) solicit and receive recommendations for the initial new Board members, and forward the recommendations to the State Board; and (2) identify and collect data and information necessary for the new Board to examine upon its establishment. Representatives of the *Bradford* and *Vaughn G.* Plaintiffs may attend meetings of the Transition Committee. This Decree does not constitute a determination that Plaintiffs or their representatives are entitled to compensation for such attendance.

56. Within 60 days after entry of this Decree, the State Board shall submit a list of candidates to the Governor and the Mayor for appointment to the new Board. The terms of the current Board of School Commissioners shall end upon the later of: (a) the date upon which the Governor signs the partnership legislation described in paragraph 2; or (b) the date of enactment of the Budget Bill containing the appropriations for Fiscal Year 1998 described in paragraph 47. The terms of the Members of the new Board shall begin on the same date, and the Transition Committee shall dissolve on the same date.

57. The Board may appoint an interim CEO if it is not feasible or desirable for the Board to hire a CEO promptly. Any interim CEO shall not be eligible for appointment as the CEO.

58 The parties to this Decree shall take no actions so as to impede the ability of the new Board to implement the educational and management reforms contemplated by this Decree. Before appointment of the new Board, neither the current Board of School Commissioners, nor any party to this Decree, may (1) enter into contracts, make expenditures, dispose of property, or incur liabilities on behalf of BCPS, except in the ordinary course of business; or (2) increase the compensation of or award bonuses to officers, employees or agents of BCPS, except as provided in current employment contracts.

Modifications Relating to Special Education

59. Upon the effective date of appointment of the new Board, the operation of the Management Oversight Team ("MOT") established pursuant to the April 4, 1994 Stipulation and Order of the United States District Court in *Vaughn G.* at paragraph 5 shall be modified as follows: Actions of the MOT shall be effective unless the Administrator for Special Education objects to the action. Either the State Superintendent or the Plaintiffs may seek judicial review of any dispute in the United States District Court under the standard set out in paragraph 5 of the April 4, 1994 Stipulation and Order. If judicial review is not sought, the decision of the Administrator, with regard to the disputed matter, is final.

60. Upon the appointment of a CEO or an interim CEO by the Board, the Administrator of Special Education's position shall be abolished and the MOT shall be eliminated. All other provisions of paragraph 3 of the April 4, 1994 Stipulation and Order shall remain in effect.

61. In April 1997, the parties to the *Vaughn G.* litigation shall determine whether the extent of BCPS' progress toward meeting its compensatory awards obligations is such that the Monitor's functions pursuant to the September 24, 1996 orders relating to compensatory awards should be terminated upon the conclusion of the 1996-97 school year, or whether the Monitor's functions should be extended, or modified. If the parties cannot agree that the Monitor's functions should be extended modified, or terminated, the parties shall submit the issue to the United States District Court for resolution.

62. Upon the appointment of a CEO or an interim CEO:

A. A new Monitor shall be selected by agreement of the parties in the *Vaughn G.* case. If the parties cannot agree on the selection of a new Monitor within 30 days after the

effective date of appointment of the CEO or interim CEO, the nominees shall be submitted to the United States District Court, which shall select the new Monitor.

B. If the Monitor's functions relating to compensatory awards are to continue past the conclusion of the 1996-97 school year, the role of the Monitor will be modified as follows:

(i) The current Monitor will be designated the "Remedial Monitor" and will continue to arrange for compensatory awards and will continue to conduct mediation/arbitration conferences to resolve individual students' disputes concerning temporary education plans and compensatory services; and

(ii) The new Monitor will be designated the "Reporting Monitor" and will assume all functions assigned to the Court Monitor under the *Vaughn G.* orders other than those described in paragraph 62.B.(i) above. However, if, on the date that the CEO or interim CEO takes office, fewer than 90 days remain before the Monitor's next semi-annual report is due, the Remedial Monitor will complete that report.

C. If the Monitor's functions relating to compensatory awards are to be terminated upon the conclusion of the 1996-97 school year, the parties will select an Arbitrator to resolve individual students' disputes concerning temporary education plans and compensatory services. If the parties cannot agree on the selection of an Arbitrator within 30 days of the conclusion of the 1996-97 school year, the nominees shall be submitted to the United States District Court, which shall select the Arbitrator. If no Arbitrator is in place upon the termination of the current Monitor's term, the current Monitor will continue to perform the mediation/arbitration function until the Arbitrator is in place.

63. When the new CEO takes office, the *Vaughn G.* Plaintiffs will select a new Plaintiffs' representative. All existing obligations of BCPS with respect to the *Vaughn G.* Plaintiffs' representative shall continue in accordance with all orders entered in the *Vaughn G.* case. If, at the time the new CEO takes office, the Long Term Compliance Plan for special education has not yet been completed or approved by the United States District Court, the current *Vaughn G.* Plaintiffs' representative shall serve as a consultant to Plaintiffs for the purpose of participating in the completion of the plan and BCPS will continue to pay his reasonable fees and expenses until the plan has been completed and approved by the United States District Court.

64. After the MOT is eliminated, the *Vaughn G.* Plaintiffs shall be provided with reasonable advance notice of proposed actions or decisions affecting compliance with the orders entered in *Vaughn G.* After the appointment of a CEO or an interim CEO, the CEO or interim CEO shall meet with the *Vaughn G.* Plaintiffs' representative to establish procedures for such reasonable advance notice. For purposes of this Decree, items "affecting compliance" include but are not limited to the special education tracking system, development and implementation of the Long Term Compliance Plan, the operation of the departments with responsibility for implementing the Long Term Compliance Plan, and the operation of the Office of Special Education Monitoring and Compliance. If Plaintiffs object to a proposed action or decision, BCPS agrees not to implement the proposed action or decision for ten days or such other period of time agreed to by the parties, in order that review by the Court may be sought pursuant to the April 4, 1994 Stipulation and Order. If there is disagreement regarding whether a proposed action or decision affects compliance, the dispute will be resolved by the United States District Court.

65. The *Vaughn G.* Plaintiffs may present problems relating to compliance with IDEA or

the *Vaughn G.* orders to the CEO or interim CEO for resolution. Plaintiffs may seek judicial resolution of such problems in federal court pursuant to the April 4, 1994 Stipulation and Order if BCPS' action or failure to act violates or may violate the terms of the *Vaughn G.* consent decree or if BCPS' action or failure to act has resulted or may result in a violation of a free and appropriate public education to eligible students.

66. If, after the CEO has been in place for one year, the *Vaughn G.* parties agree or the United States District Court finds, based upon school audits, reports by the Monitor and consultant, and school tours by Plaintiffs' expert, that the Long Term Compliance Plan is being implemented and substantial progress toward compliance is being made, then paragraph 64 will be modified to change the requirement of advance notice to Plaintiffs prior to implementation of an action or decision affecting compliance to a requirement of reasonable consultation with plaintiffs regarding actions or decisions affecting compliance. The parties will, at the time such modification goes into effect, determine whether further modifications to the terms of this Decree and any other Orders or Decrees in the *Vaughn G.* case shall be made in the event that the long term plan continues to be implemented and substantial progress toward compliance continues to be made for another year.

67. Court orders entered in *Vaughn G.* are modified only to the extent necessary to effectuate the above enumerated changes. The United States District Court for the District of Maryland retains exclusive jurisdiction to enforce those orders and to resolve disputes brought to the Court by the parties pursuant to the process established in the April 4, 1994 Stipulation and Order at paragraph 5.

Term of the Decree

68. This Decree shall be in effect through June 30, 2002, unless the Court extends the

term upon timely motion of one of the parties and upon a showing of good cause to extend the Decree.

69. The Court retains continuing jurisdiction during the term of this Decree to monitor and to enforce compliance with the terms of this Decree. Except as expressly provided otherwise, any party to this Decree may seek to enforce the terms of this Decree. Notwithstanding termination of this Decree, the Court shall retain jurisdiction to resolve any disputes that may have arisen during the term of this Decree.

Having approved the terms of this Consent Decree, signed by all parties as set forth below, it is hereby ORDERED on this 26th day of November, 1996.

Joseph H. H. Kaplan
Administrative Judge
Circuit Court for Baltimore City

Consent of the Parties:

Susan Goering
ACLU Foundation of Maryland
2219 St. Paul Street
Baltimore, Maryland 21218

Dr. Nancy S. Grasmick
State Superintendent of Schools

William L. Webber
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Christopher T. Cross
President
Maryland State Board of Education

Louis M. Bograd
ACLU Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20002

Counsel for Plaintiffs Keith A. Bradford, *et al.*

Arnita Hicks McArthur
~~Acting~~ President
Baltimore City Board of
School Commissioners

Phillip Farfel

Otho M. Thompson
Acting City Solicitor

Counsel:

For Plaintiffs Keith A. Bradford, *et al.*:

Susan Goering
Malissa Ruffner
ACLU Foundation of Maryland
2219 St. Paul Street
Baltimore, Maryland 21218

William L. Webber
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Louis M. Bograd
ACLU Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20002

For Third-Party Defendants Board of School Commissioners of Baltimore City, *et al.*:

Abbey G. Hairston
Alexander, Bearden, Hairston & Marks
Lee Plaza, Suite 805
8601 Georgia Avenue
Silver Spring, Maryland 20910

Paul Mark Sandler
Freishtat & Sandler
1500 One Calvert Plaza
201 E. Baltimore Street
Baltimore, Maryland 21202

Wilbur D. Preston
Whiteford, Taylor, Preston, LLP
Seven Saint Paul Street
Baltimore, Maryland 21202

Otho Thompson
Acting City Solicitor
City Law Department
165 City Hall
Baltimore, Maryland 21202

For Defendants and Third-Party Plaintiffs Maryland State Board of Education, *et al.*:

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

Evelyn O. Cannon
Margaret Ann Nolan
Lawrence P. Fletcher-Hill
Valerie Cloutier
Assistant Attorneys General
200 Saint Paul Place
Baltimore, Maryland 21202

EXHIBIT F

KEITH BRADFORD, et al.	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION et al.,	*	BALTIMORE CITY
Defendants.	*	CASE NO.: 94340058/CE 189672

* * * * * * *

BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY et al.,	*	
Plaintiffs,	*	CASE NO. 95258055/CL20251
v.	*	
MARYLAND STATE BOARD OF EDUCATION et al.,	*	
Defendants.	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION

INTRODUCTION

A. Background

Six years ago, the Bradford Plaintiffs and the City plaintiffs filed two separate suits in this Court, both alleging that the State was failing to provide the students of Baltimore City with the constitutionally required "thorough and efficient" education. The Bradford Plaintiffs are parents of children attending Baltimore City public schools who are "at risk" of educational failure, meaning that they live in poverty or otherwise are subject to economic, social, or educational circumstances increasing the odds that they will not receive an adequate education. The Bradford Plaintiffs sued the Maryland State Board of Education, the Governor, the State Superintendent of

Schools, and the State Comptroller of the Treasury on December 7, 1994. The City case, filed on September 15, 1995, was brought by the Mayor, the City Council of Baltimore, and the Board of School Commissioners of Baltimore City and its President against the same State defendants. The Governor and the Comptroller of the Treasury were dismissed from both suits after the Court found that "relief can be granted without the Governor being a party to the litigation." (Transcript of Apr. 4, 1995, at 12). The suits were consolidated for trial.

On October 18,1996, this Court entered partial summary judgment for the City and for the Bradford Plaintiffs and held that BCPSS schoolchildren were not receiving the constitutionally required "thorough and efficient" education. The Court first affirmed the relevant legal standard, holding that the "thorough and efficient" language of Article VIII requires that "all students in Maryland be provided with an education that is adequate when measured by contemporary standards." (10/18/96 Order ¶ 1). Next, this Court held:

> There is no genuine material factual dispute in these cases as to whether the public school children in Baltimore City are being provided with an education that is adequate when measured by contemporary educational standards. This Court finds, based on the evidence submitted by the parties . . . that the public schoolchildren in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards.

(Id. ¶ 2).

The Court's partial summary judgement decision did not resolve the parties' disputes over the cause of that inadequate education and the appropriate remedy. During the 1996 proceedings, the State contended that the City was to blame for failing to manage the BCPSS adequately. The City contended that the State was not providing funding sufficient to support a constitutionally adequate educational system. The Bradford Plaintiffs contended that a combination of factors

was involved, and that a remedy would need to address both inadequate funding and management problems. The Court set the case for trial to resolve these issues.

After numerous court-assisted negotiations, the parties reached a settlement and signed the five-year Consent Decree, which imposed two primary obligations on the parties. First, it addressed the State's concerns with management of the Baltimore City schools by setting up the "City-State Partnership," embodied in the New Board of School Commissioners jointly appointed by the Governor and the Mayor, to manage the schools. Second, it provided additional funds for the schools, $30 million in Fiscal Year 1998 and $50 million in each of Fiscal Year 1999 through 2002 for operating funds, plus $10 million annually for capital improvements. (Consent Decree ¶¶ 47-48). In April 1997, the General Assembly of Maryland codified the principal terms of the Decree at S.B. 795. See S.B. 795, 1997 Reg. Session (Md. 1997).

Because the parties were aware in 1996 that $230 million over five years was not enough to provide an adequate education to Baltimore City's unique population of disadvantaged children, the Consent Decree provides a mechanism for the New Board to request additional funds from the State throughout the term of the Decree. It also provides that, after June 1, 2000, if the State fails to satisfy the New Board's request for additional funds, the New Board may go back to Court for a determination of whether additional funding is needed in order for the BCPSS to provide a Constitutionally Adequate Education.

Thus, in any year during the Decree's five-year term (from Fiscal Year 1998 through 2002), the New Board may ask the State for additional funds necessary to run the schools. If the Board presents the State with a detailed plan setting out why it needs more money and what it

will be used for, the State has an obligation to use its "best efforts" to satisfy the New Board's request for additional funds, subject only to the availability of funds. (Consent Decree ¶ 52).

For its last two years, FY 2001 and 2002, the Decree provides an additional mechanism for the New Board to ask for funds after an "interim evaluation" of the schools has occurred, and authorizes a return to Court if the funds are not forthcoming. To implement this interim evaluation, the Decree requires the State and New Board jointly to hire an independent consultant halfway through the five-year term to assess the schools' performance and needs. (Consent Decree ¶¶ 40, 41). "The consultant must assess, among other things, the sufficiency of additional funding provided by the State." (Id. ¶ 41). The parties also agreed that the consultant could make recommendations concerning "the need for funding in excess of the amounts provided herein in order for the BCPSS to provide its students with an education that is adequate when measured by contemporary standards." (Id.)

Once the independent expert has issued the interim evaluation, the Decree permits the New Board to request additional funds from the State based on the results of the evaluation. (Consent Decree ¶ 53). The independents expert's report was due on February 1, 2000. (S.B. 795, § 6). The State and the New Board jointly chose and hired Metis as an expert to perform the interim evaluation required by the Consent Decree. The Metis Report was issued on Febraury 1, 2000, and it confirms the need for substantial additional funding. The State and New Board had until June 1, 2000 to negotiate over the request. On June 9, 2000 the New Board and the Bradford Plaintiffs filed with this Court a Petition For Further Relief Pursuant to the Consent Decree. In this petition the Plaintiffs are seeking additional funding from the State.

This Court held a hearing on the New Board and the Bradford Plaintiffs' Petition For Further Relief Pursuant to the Consent Decree on June 26,2000. All of the evidence presented by counsel for the Plaintiffs' and Defendants' during the hearing was admitted by agreement of counsel for all parties.

THE COURT'S FINDINGS OF FACT

Based on the evidence presented, this Court makes the following factual determinations:

A. The Negotiation Process Between the New Board, the Bradford Plaintiffs and the State on the Plaintiffs' Request for Additional Funding

According to the undisputed evidence presented, this Court finds the following events occurred regarding the negotiation process. On May 19, 1999, Abbey Hairston, Special Counsel and J. Tyson Tildon met with Louis Bograd and Bebe Verderey, representing the American Civil Liberties Union, concerning paragraph 53 of the Consent Decree Bradford v. Maryland State Board of Education, et al, which allows the Board to request from the State funding in amounts greater than those identified in Paragraph 47 of the Consent Decree in fiscal year 2001 and 2002.

A workgroup consisting of J. Tyson Tildon; Commissioners Colene Daniel and C. William Struever; Judith Donaldson, Board Executive; Dr. Elizabeth Morgan, Chief Academic Officer; Roger Reese, Chief Financial Officer; Gail Amos, Special Education and Support Services Officer; Monzella Owings, General Counsel; Abbey Hairston, Special Counsel; Bebe Verderey, ACLU Representative; Louis Bograd, ACLU Representative; Susan Goering, ACLU Representative; and Beth McCallum, Bradford Plaintiffs' Representative; was convened on June 3, 1999 to develop a plan identifying the programs and funding required in order to provide a constitutionally adequate education for the children of Baltimore City.

The Board hired Pamela Shaw, a consultant, on June 15, 1999 to facilitate the development of a case statement to support the appropriation of additional State funding to the Baltimore City Public School System.

On, or about, June 11, 1999, J. Tyson Tildon contacted Senator Barbara Hoffman, Chairperson of the Senate Budget and Taxation Committee; Senator Clarence Blount, Chairperson of the Economic and Environmental Affairs Committee; and Delegate Howard P. Rawlings, Chairperson of the House Appropriations Committee; to advise them of paragraph 53 of the Consent Decree, the development of the plan and case statement to support additional funding and the Board's intent to pursue additional State funding.

On, or about, June 11, 1999, J. Tyson Tildon contacted Dr. Nancy Grasmick, State Superintendent of Schools, to advise her concerning the provisions of Paragraph 53 of the Consent Decree, development of the plan and case statement, and the Board's intent to pursue State funding, and to invite John Sarbanes, Special Assistant to Dr. Grasmick, to join the workgroup.

On, or about, June 11, 1999, Commissioner C. William Struever contacted Kathleen Kennedy Townshend, Lt. Governor, to advise her concerning the provisions of paragraph 53 of the Consent Decree, the development of the plan, and case statement to support additional funding, and the Board's intent to pursue additional State funding.

On June 28, 1999, Pam Shaw, Consultant, conducted a meeting with representatives of educational organizations, advocates, and foundations to solicit detailed input into the case statement to support the appropriation of additional State funding.

Between June 1999 and September 24, 1999, the workgroup researched, developed, and refined the case statement and plan to support the request for additional State funding.

On July 7, 1999, Ms. Aubrey Block, Ms Katerina Kaler, Ms. Syvilla Woods, and Mr. Seth Harris, teachers for the Baltimore City Public School System, were hired to assist Pam Shaw in researching and documenting educational issues to support the additional state funding.

On September 24, 1999, the Board directed that a detailed Executive Summary be created and that the Board's top ten funding priorities be identified within the Executive Summary.

On August 14, 1999, John Sarbanes, special assistant to Dr. Nancy Grasmick, State Superintendent of Education, was provided with a copy of the working draft of the Integrated Reform Plan.

On October 6, 1999, the Board issued the final draft of its case study and plan to support additional State funding. The final draft requested total funding of $265 million and highlighted $48.2 million annually for ongoing funding support for the ten highest priority initiatives.

On October 6, 1999, Dr. Robert Booker, Commissioners Bill Struever and J. Tyson Tildon met with Dr. Grasmick, State Superintendent of Schools, and presented the final draft of the Remedy Plan - Building On Success, dated October 5, 1999, and the Integrated Reform Plan, dated October 6, 1999.

On October 28, 1999, Commissioner Bill Struever, Roger Reese, Chief Financial Officer, and J. Tyson Tildon met with Major Riddick, the Governor's Chief of Staff, to discuss the Baltimore City Public School System's capital budget request, and the Remedy Plan - Building On Success, dated October 5, 1999, and the Integrated Reform Plan, dated October 6, 1999. Major Riddick advised the Board that a realistic expectation of funding for capital improvements would

approximate $40 million and that any realistic request for additional State operating funds should approximate the capital funding request.

On November 4, 1999, Dr. Robert Booker and J. Tyson Tildon, met with Dr. Nancy Grasmick, State Superintendent of Schools, to solicit support for the Remedy Plan and Integrated Reform Plan, and to advise Dr. Grasmick concerning the meeting with Major Riddick. Dr. Grasmick advised the Board to limit its funding request to the top ten priorities and to link the priorities to the Maryland State Department of Education Initiatives.

On November 10, 1999, Dr. Robert Booker and J. Tyson Tildon, met with Senator Barbara Hoffman to solicit support for The Remedy Plan, dated October 5, 1999 and the Integrated Reform Plan, dated October 6, 1999. Senator Hoffman advised the Board to restrict its funding request to the top ten priorities and to link the priorities to the Maryland State Department of Education Initiatives.

On November 13, 1999, John Sarbanes, Special Assistant to Dr. Grasmick, State Superintendent of Schools, called Jude Pasquariello, Executive Assistant to Dr. Robert Booker, to discuss the reformatting of the Remedy Plan to include intent, rationale, budget assumptions, and MSDE linkages.

On November 13, 1999, John Sarbanes, Special Assistant to Dr. Nancy Grasmick, State Superintendent of Schools, met with Judith Donaldson, Board Executive, and Jude Pasquariello, Executive Assistant to Dr. Robert Booker, and offered suggestions concerning the basic structure of the plan and specific language for the opening section and the priorities.

On December 9, 1999, the Board and Dr. Robert Booker issued Building On Success: A Remedy Plan to Address Continuing Funding Needs of the Baltimore City Public School System.

The final Remedy Plan requests additional funding of $49.7 million for the top ten academic initiatives of the Baltimore City Public School System.

On December 9, 1999, Dr. Robert Booker, Commissioner Struever, Roger Reese, Chief Financial Officer, and J. Tyson Tildon met with Fred Puddester, Secretary of the Maryland State Department of Budget Management, to request the State's inclusion of the funding request in the Fiscal Year 2001 budget.

On December 9, 1999, Dr. Robert Booker and the Board presented the Remedy Plan to the Baltimore City delegation to the General Assembly. The Board asked the delegation to support the Remedy Plan and to request the Governor to fully fund the Remedy Plan in the Fiscal Year 2001 budget.

On December 10, 1999, Dr. Robert Booker and J. Tyson Tildon met with Baltimore City Mayor Martin O'Malley to solicit his support for the Remedy Plan and to request that he include full funding of the Remedy Plan as a top priority of his administration and that he request the Governor to fully fund the Remedy Plan in the Fiscal Year 2001 budget.

On December 11, 1999, Dr. Robert Booker and J. Tyson Tildon met with Baltimore City Deputy Mayor, Jeanne Hitchcock, to solicit her support for the Remedy Plan and to request that the O'Malley Administration work with the State to assure full funding of the Remedy Plan in the Governor's Fiscal Year 2001 budget.

On December 13, 1999, Governor Parris Glendening visited Mount Royal Elementary/Middle School with Senator Clarence Mitchell, IV. Also present were Dr. Robert Booker and J. Tyson Tildon. Senator Mitchell discussed with the Governor the great needs of the children of Baltimore City. Dr. Booker and J. Tyson Tildon advised the Governor that the Board

was requesting an additional $49.7 million in funding for Fiscal Year 2001 and that the request had been shared with Dr. Grasmick, Mayor O'Malley, and Secretary Puddester. The Governor was further advised that the Board was scheduled to meet with him on December 23, 1999 to further discuss funding of the Remedy Plan. The Governor's office canceled the meeting of December 23, 1999, and rescheduled the meeting for January 6, 2000.

On January 6, 2000, Governor Glendening, Major Riddick, Chief of Staff, and Karen Johnson, Deputy Chief of Staff met with J. Tyson Tildon, Dr. Robert Booker, and Commissioner Struever to discuss funding for the Remedy Plan. Governor Glendening indicated that the original budget submission had been finalized and that he would consider funding for the Remedy Plan during the supplemental budget process.

On January 7, 2000, Dr. Robert Booker met with the Baltimore City Council to solicit their support for the Remedy Plan and to request the Council to work with Mayor O'Malley's Administration to assure full funding of the Remedy Plan in the Governor's fiscal Year 2001 budget.

On January 10, 2000, Dr. Robert Booker, Roger Reese, Commissioner Struever, Judith Donaldson and J. Tyson Tildon met with the House of Delegates Speaker Casper Taylor to explain the components of the Remedy Plan and to solicit his support for full funding of the Remedy Plan in the Fiscal Year 2001 budget.

On January 17, 2000, Judith Donaldson and Mindy Binderman, legislative consultant, met with Delegate Salima Marriott, Chairperson of the Baltimore City delegation to the House of Delegates, to explain the components of the Remedy Plan and to solicit the delegation's support for full funding for the Remedy Plan in the Fiscal Year 2001 budget.

On January 21, 2000, Roger Reese, Judith Donaldson and Mindy Binderman met with Delegate Howard P. Rawlings, chairperson of the House Appropriations Committee to explain the components of the Remedy Plan and to solicit his support for full funding for the Remedy Plan in the Fiscal Year 2001 budget.

In January 2000, Senators Hoffman and McFadden sent a letter to Governor Glendening requesting full funding for the Remedy Plan in the Fiscal Year 2001 budget.

On February 2, 2000, Dr. Booker, Dr. Grasmick and J. Tyson Tildon briefed the House Ways and Means Committee concerning the recommendations and conclusions of the interim evaluation conducted by Metis Associates, Inc.. As a part of this briefing, the recommendations and conclusions were linked to the Remedy Plan and the additional funding request for the Fiscal Year 2001 budget. Dr. Booker, Dr. Grasmick and J. Tyson Tildon supported full funding for the Remedy Plan in the Fiscal Year 2001 budget.

On February 16, 2000, Dr. Booker, Dr. Grasmick and J. Tyson Tildon briefed the House Appropriations Committee concerning the recommendations and conclusions of the interim evaluation conducted by Metis Associates, Inc.. As part of this briefing, the recommendations and conclusions were linked to the Remedy Plan and the additional funding request for the Fiscal Year 2001 budget. Dr. Booker, Dr. Grasmick and J. Tyson Tildon supported full funding for the Remedy Plan in the Fiscal Year 2001 budget.

On February 23, 2000, Mindy Binderman met with Senators Nathaniel McFadden and Clarence Blount to solicit support for the Remedy Plan and to request their assistance in requesting full funding for the Remedy Plan in the Fiscal Year 2001 budget.

On February 23, 2000, the Baltimore City Senators signed a letter to Governor Parris N. Glendening requesting that the Baltimore City Public School System receive an additional $49.7 million as part of the supplemental budget.

On March 3, 2000, Dr. Booker, Commissioner Struever, Roger Reese, Judith Donaldson, and Mindy Binderman met with State Department of Budget and Management Secretary Fred Puddester to discuss progress in achieving full funding for the Remedy Plan. Secretary Puddester was advised that failure to fully fund the Remedy Plan could result in the Board going back to court pursuant to paragraph 53 of the Consent Decree. Secretary Puddester advised that he and the Governor were aware of the provisions of the Consent Decree and that they were working to achieve maximum funding for the Remedy Plan.

On March 13, 2000, Dr. Booker, Commissioner Struever and J. Tyson Tildon met with Senator Hoffman to discuss progress in achieving full funding for the Remedy Plan and to solicit her assistance in achieving full funding for the Remedy Plan in the Fiscal Year 2001 budget.

On March 15, 2000, Dr. Booker, Commissioner Struever, and Judith Donaldson met with Governor Glendening to discuss progress toward fully funding the Remedy Plan and to offer suggestions for possible funding sources. The Governor was advised that failure to fully fund the Remedy Plan could result in the Board returning to court to seek appropriate funding. Governor Glendening indicated that he had been made aware of the provisions of the Consent Decree and that he was working with his staff to maximize funding for the Remedy Plan.

Subsequent to the March 15, 2000 meeting, when the Governor released his Supplemental Budget #2, $8 million was targeted specifically to fund the Baltimore City Remedy Plan.

On April 6, 2000, Fred Puddester, Secretary of the Department of Budget and Management, provided the Board with a list of educational initiatives funded during the 2000 general assembly session and the specific funds that would accrue to Baltimore City Public Schools. That list contained funding in the amount of $30.7 million.

On April 24, 2000, Dr. Booker, Roger Reese, Judith Donaldson, Commissioner Struever and J. Tyson Tildon met with Fred Puddester, Secretary of the Department of Budget and Management to discuss the total amount of funding that Baltimore City would receive under the Remedy Plan. Secretary Puddester was asked to review the $30 million and to remove any monies that would not align with the Remedy Plan. The Board also discussed the need to begin the process of negotiation under paragraph 53 of the Consent Decree.

Subsequent to the April 24, 2000 meeting, Secretary Puddester sent the Board a revised listing of educational initiatives aligned with the Remedy Plan and the corresponding funding for Baltimore City Public Schools. The total funding under this listing was $27.4 million.

On May 22, 2000, the New Baltimore City Board of School Commissioners met with Major Riddick, the Governor's Chief of Staff; Karen Johnson, Deputy Chief of Staff; T. Eloise Foster, Secretary for the Department of Budget and Management; and MaryEllen Barbera, Counsel to the Governor, to negotiate for full funding for the Remedy Plan under the conditions of the Consent Decree. Major Riddick stated that the Governor had agreed to fund, at a minimum, an additional $3 million to support after school programs or summer school programs and an additional $3 million to be obtained from State agency budgets.

B. The findings and Recommendations of the Metis Report

1. Overall Conclusions of the Metis Report

This Court also finds and adopts the overall conclusions of the Metis Report as its findings. The Metis report concluded that :

> 1. The City-State Partnership created by the Maryland General Assembly in 1997 has played a key role in the System's reform effort. The impact of the Partnership is seen not only in the availability and utilization of funds, but also in contributions to policy issues.
>
> 2. During its brief history, the New Baltimore City of School Commissioners has taken meaningful and essential steps to improve the BCPSS.
>
> 3. BCPSS has made progress in improving management, including reorganizing the human resources function and overhauling the management information systems (MIS).
>
> 4. BCPSS has made meaningful progress in implementing instructional initiatives at the elementary grade levels, recruitment and retention initiatives, and professional development initiatives.
>
> 5. BCPSS has demonstrated mixed results in improving student achievement but that is a reasonable expectation at such an early stage in a multi year reform effort.
>
> 6. Although in need of some design changes, overall the Master Plan provides a strong focus and structure for reform. It includes most of the kinds of strategies that are believed to promote successful student outcomes, and is tailored to specific problems that have been identified in the System, such as high rates of teacher turnover and large class sizes
>
> 7. Overall financial resources available to BCPSS are not adequate. On the basis of the analysis conducted by the Council of the Great City Schools, an additional $2,698, resulting in a total per pupil expenditure of $10,274, is necessary for adequacy.
>
> 8. Metis has identified certain specific strategies in the Master Plan that require specific funding: full day pre-kindergarten and kindergarten, middle and highschool

initiatives, extended learning opportunities for all eligible students, teacher and principal recruitment, mentoring, coaching and ongoing school-based professional development, alternative learning settings, additional classroom technology, and school facilities improvement. Metis notes that BCPSS has developed a Remedy Plan (December 9, 1999) that includes most of these initiatives.

9. In order for BCPSS to be effective in building support for identified adequacy levels, it will need to go beyond the partial programmatic budget it has created for certain key "driver" actions in the Master Plan and develop a System-wide budget that is grounded at the school level and incorporates the initiatives that the System must take to reach its goals.

2. Specific conclusions and recommendations of the Metis Report

This Court also finds and adopts the specific conclusions and recommendations of the Metis Report as its findings.

Sufficiency of Funding for BCPSS

The Metis Report made the following specific conclusions and recommendations on the issue of sufficiency of funding for BCPSS :

1. Based on a model that ties academic standards to resources needed to attain them, the Council of Great City Schools concludes that the overall resources available to the BCPSS are not adequate, and that adequate resources would equal $10,274 per pupil, an amount $2,698 higher than the current per pupil expenditure of $7,576.

Recommendation: Seek increased funding to bring BCPSS up to the level of adequacy identified by the Council of Great City Schools.

2. An analysis of spending patterns comparing BCPSS expenditures by category with those of the average large city school system and the national average, found that Baltimore schools spend their resources in about the same way that other school systems spend theirs.

3. Several critical strategies are not included as priority initiatives in the Master Plan, (e.g., early childhood -

full day pre-kindergarten and kindergarten - and middle and high school initiatives).

4. Other strategies are not funded at a level that would fully meet the need (e.g., extended learning opportunities for all eligible students; additional strategies that would improve the System's competitive position in teacher recruitment and retention; expanded teacher and principal mentoring, coaching, and ongoing school-based professional development; additional alternative learning settings; additional technology in the classroom; and school facilities improvements).

Recommendation: Additional funds should be used for the following:

full-day pre-kindergarten;
middle and high school initiatives;
extended learning opportunities for all eligible students;
strategies to improve the BCPSS' competitive position for teacher recruitment and retention;
additional opportunities for teacher and principal mentoring, coaching, and ongoing school-based professional development;
additional alternative learning settings;
technology in the classroom; and
school facilities improvements.

5. BCPSS reports, by Master Plan objective and strategies, only the additional amounts to fund "Driver Actions/Key Priority Initiatives". Total BCPSS budget and expenditures are reported according to functional categories.

Recommendation: Align the System's total budget and expenditures by Master Plan objective and strategy, and develop a programmatic budget for all funds so that the amount of total funding for programmatic initiatives is clear and so that student outcomes can be measured against levels of investment."

C. The Findings and Recommendations of the New Board's Remedy Plan

This Court also finds that in accordance with the provisions of the Consent Decree the New Board has submitted a detailed remedy plan requesting $265 million annually for

instructional programs and $133 million annually for capital improvements (including wiring projects).

At the State's request, the New Board also submitted a plan entitled Building on Success A Remedy Plan to Address Continuing Funding Needs of the Baltimore City Public School System. This plan, submitted on December 9, 1999 identified BCPSS's most pressing immediate needs for additional instructional programs in FY 2001. At the State's request, the New Board limited that FY 2001 funding request to an increase of no more than $50 million, ultimately seeking $49.7 million in additional funding for instructional programs. This December 1999 remedy plan asked for a downpayment of $49.7 million for the critical priorities the Board identified for FY 2001.

The New Board's Remedy Plan submitted on December 9, 1999 listed the ten most pressing priorities for which the New Board was requesting State funding totaling $49.7 million. These priorities include:

1. Recruiting/Retaining Quality Teacher; seeking $4,200,000 in additional State funding.
2. Professional Development; seeking $3,200,000 in additional State funding.
3. Student Academic Interventions (Extended Year/Extended Day); seeking $12,000,000 in additional State funding.
4. Ready to Learn (Expanding pre-kindergarten and full-day kindergarten programs); seeking $5,000,000 in additional State funding.
5. High School Reform to Prepare for High School Assessments; seeking $5,400,000 in additional State funding.
6. Middle School Reform; seeking $3,600,000 in additional State funding.

7. Student Support Services; seeking $4,500,000 in additional State funding.

8. Instructional Leadership; seeking $950,000 in additional State funding.

9. Enriched Instructional Curriculum

a. Arts and Physical Education in Schools; seeking $3,000,000 in additional State funding.

b. Gifted and Talented Programs; seeking $1,750,000 in additional State funding.

c. Modern and Classical Languages; seeking $2,000,000 in additional State funding.

10. Instructional Technology; seeking $4,100,000 in additional State funding.

D. The Maryland State School Superintendent's Response to The Metis Report and the New Board's Remedy Plan

This Court further finds that Dr. Grasmick, The Maryland State Superintendent of Schools, in her February 24, 2000 letter to Senator Blount, Chairman of the Senate Economic and Environmental Affairs Committee; Delegate Hixson, Chairman of the House Ways and Means Committee; Senator Hoffman, Chairman of the Senate Budget and Taxation Committee and Chairman of the Senate Spending and Affordability Committee; and Delegate Rawlings, Chairman of the House Appropriations Committee, commented on BCPSS's progress and, in doing so, made observations on the Metis report. Dr. Grasmick stated in this letter that, "we concur with the Independent Evaluator that the City-State Partnership continues to be a viable and important structure for driving reform across the system."

In commenting on the issue of sufficiency, Dr. Grasmick in her letter stated:

> we are not surprised by the observations and the Council of Great City Schools on the sufficiency of the overall funding for BCPSS. While the specific levels of funding recommended are subject to debate, there is no question that the high concentration of poverty and high percentages of special needs

> children in Baltimore City place a heaver burden on the schools and justify calls for increased resources. We agree with Metis that increased funding for certain specific strategies in the BCPSS Master Plan is warranted and note that many of the strategies identified by Metis are ones BCPSS has addressed in its Remedy Plan.

Dr. Grasmick concluded the letter by stating:

> Finally, the System should continue to make the case for additional funding in certain key areas. The Building on Success Remedy Plan (dated December 9, 1999) presents BCPSS' request for additional State funding of ten key priorities in FY 2001. The Remedy Plan is the product of hard thinking about where new monies can have most sufficient impact on the achievement of the Baltimore City Students. The Plan deserves careful consideration in the current legislative session. Please note that the State Board of Education recently endorsed the Remedy Plan as an important and strategic response to the ongoing needs of BCPSS.

E. Senator Hoffman and Delegate Rawlings Recommendation Regarding the State's Efforts to Fund the BCPSS Remedy Plan

This Court also finds that Senator Hoffman, Chairman of the Senate Budget and Taxation Committee and Chairman of the Senate Spending and Affordability Committee; and Delegate Rawlings, Chairman of the House Appropriations Committee; asserted their recommendation to Governor Paris Glendening on the issue of funding the BCPSS Remedy Plan in a letter to the Governor dated January 26, 2000. In this letter Senator Hoffman and Delegate Rawlings state:

> As Baltimore City representatives on the Budget and Taxation Committee, and after reviewing the budget submission for FY 2001, we felt impelled to write about our sense that Baltimore City was poorly served. In the midst of a year of plenty, Baltimore City is like the starving Little Match Girl, with her nose pressed up against the window of

the grocery store. The proprietor (Governor) is cheerfully doling out goodies to the mostly prosperous, while the destitute (Baltimore City) sinks further into despair. The FY 2001 budget looks like the state of our economy - prosperous, cheerful and full of good news, but like our economy, the budget is sadly lacking support for the neediest counties, especially Baltimore City.

This budget should be adjusted to provide a more balanced approach to the range of needs of the state. Allow us to make some suggestions:

Fund, on a one-time basis, a total of $25 million for wiring the Baltimore City Public Schools for the Internet. This can be done over two years. Currently only 41 of the 181 schools are wired. The goal of making Maryland a technology leader is a sham when the larger urban area is left out. The Internet and technology have the potential of leveling the playing field for children born into poverty. Allowing the "digital divide" to widen is unconscionable.

While we are grateful for an increase in school construction funds, the Baltimore City Public Schools has an even greater need for an increase in their operating budget. SB 795 which created the City/State partnership for the schools, allows the BCPS to request additional funding from the state for specific purposes of their master plan. This year BCPS asked the state for $50 million to help them fund the master plan. As far as we can tell, there is no money in the budget at all in this category. We're sure that you remember that under the terms of the bill and the court settlement, it is likely that we will find ourselves back in court if the state does not attempt to meet some of these needs since the bill says that the state should attempt to meet the needs of the school system if it has the resources. Obviously, we have the resources, but somehow the special situation of the Baltimore City Public Schools has been ignored. The school system is making progress and deserves to be assisted to continue in this path.

Not too long ago some of us met with representatives of the Annie E. Casey Foundation to talk about Maryland's children and families. Doug Nelson made a cogent point that should be remembered. When a state

> reviews its situation and finds that there is a concentration of problems in one area, the right thing to do is focus resources to solve those problems, and not worry so much about spreading money around to everyone. Realistically we know that is hard to do, so we don't expect you to have a budget that is totally tilted towards the needy. But this budget, Governor, is much too tilted in the other direction. We implore you to focus some of your attention and resources to those that need it the most ..... the children and families of Baltimore.

F. The Reconstitution of Three Baltimore City Public Schools

This Court finds that the disadvantages which affect the students of the reconstituted schools in Baltimore City are mirrored by students in the rest of the BCPSS population. This Court further finds that in the second Affidavit of Howard Linaburg, the Director of Budget Services for the Baltimore City Public Schools, dated June 25, 2000, Mr. Linaburg evaluates the cost of funding three reconstituted schools in Baltimore City. Mr. Linaburg in his second affidavit shows that the per pupil amount that the State proposes to pay to Edison, Inc. to operate the reconstituted schools exceeds the BCPSS' own actual costs of operating those schools. The evidence specifically shows based on the total cost of operating the three reconstituted schools, Montebello Elementary School would have received $5,025.17 per pupil; Gilmor Elementary School would have received $5,229.15; and Furman Templeton would have received $6,485.56 per pupil- for a weighted average of $5,513.74 per pupil.

Howard Linaburg's second Affidavit also shows that under the Edison contract, Edison will receive $2,436.83 more per pupil to manage and operate Montebello Elementary School; $2,232.85 more per pupil to manage and operate Gilmor Elementary School; and $976.44 more

per pupil to manage and operate Furman Templeton Elementary School- for a weighted average of $1,948.26 per pupil.

In his second Affidavit Linaburg concludes and this Court adopts as its findings that if State funding for all Baltimore City Public Schools was increased by the same $1,948.26 per pupil figure, State support for BCPSS would increase by $190,257,330.

Applicable Law and Discussion

I. The Maryland State Statutory Requirement of Best Efforts

According to the evidence presented, the Consent Decree, paragraph 52, sets out the procedure by which the Board may request funds greater than those described in paragraph 47 of the Consent Decree. Paragraph 47 states that: "The State shall provide to the Baltimore City Public Schools the following additional funds, subject to appropriation by the General Assembly:

FY 1998 $30 million
FY 1999 $50 million
FY 2000 $50 million
FY 2001 $50 million
FY 2002 $50 million."

(Consent Decree ¶ 47).

"For Fiscal years 2001 and 2002 the Board may request funds in amount greater than those described in paragraph 47 from the State through the currently established State budget process, if the Board presents a detailed plan showing why such funds are needed and how they would be spent. The State will use best efforts to satisfy any such request, subject to the availability of funds." (Consent Decree ¶ 52).

A. The State's Efforts To Fund the Ten Most Critical Priorities in the BCPSS' $49.7 Million Remedy Plan

According to the evidence presented to this Court, the State has provided to the BCPSS a list of State funds for fiscal year 2001 and 2002 that the State asserts are directly tied to the BCPSS' $49.7 million Remedy Plan for fiscal year 2001. In examining this list, the Court declares that there are items in this list that cannot be expended on the Remedy Plan in either fiscal year 2001 or fiscal year 2002. These funds cannot be counted toward the Remedy Plan because BCPSS does not meet requirements to qualify for these funds.

The evidence presented to this Court indicates that $1.1 million of the $33.8 million promised by the State can not be expended on BCPSS' $49.7 million Remedy Plan for fiscal year 2001 because BCPSS does not meet requirements to qualify for these funds and $12.8 million is the funding BCPSS would have otherwise received. Therefore, this Court declares that the State is only providing $19.9 million in additional funding that will be able to be used to fund the $49.7 million Remedy Plan in 2001.

Based on the evidence presented, this Court further declares that of the $49.7 million that the State asserts is to be allocated to the Remedy Plan for fiscal year 2002, $1.1 million cannot be expended on the Remedy Plan and $24.7 million would have otherwise been received by the BCPSS. Therefore, this Court declares that the State is only providing $23.9 million in additional funding that will be able to be used to fund the Remedy Plan in 2002.

B. The Court's Determinations on the State's Best Efforts to Fund BCPSS

Based on the evidence presented, this Court must declare that in light of the Constitutional mandate of "thorough and efficient" education the allocation of $19.9 million for 2001 and the

allocation of $23.9 million for 2002 out of a $940 million budget surplus in Fiscal Year 2001 is not making a "best effort"out of the available funds.

II. The Maryland State Constitutional Requirement of Educational Adequacy

As this Court recognized in 1996 during proceedings on Plaintiffs' motion for partial summary judgment, an education is not only of paramount importance to children and society, it is also a constitutional right of every Maryland schoolchild. This conclusion is mandated by the Maryland Court of Appeals' direction in Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 638-39 (1983). In Hornbeck the Court of Appeals held that the right to an adequate education is guaranteed by Article VIII of the Maryland Constitution. Article VIII of the Maryland Constitution provides:

"The General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of free Public Schools; and shall provide by taxation or otherwise, for their maintenance." Md. Const. Art. VIII § 1 . Consistent with Hornbeck, this Court previously held in this Court's Order of October 18, 1996 filed in the instant cases that "the thorough and efficient language of Article VIII requires that all students in Maryland's public schools be provided with an education that is adequate when measured by contemporary educational standards."

In granting partial summary judgment to the Bradford plaintiffs and the City, this Court in its Order of October 18, 1996 filed in the instant cases, determined that the State's own educational standards, as well as, other contemporary education standards, established that Baltimore City schoolchildren were not receiving a constitutionally adequate education.

The Court's Determination on The Maryland State Constitutional Requirement of Educational Adequacy

In examining the evidence presented to this Court at the hearing held on June 26, 2000 this Court declares that, although the management changes and new funding brought about by the Consent Decree have resulted in improvements to both the management and instructional programs of the Baltimore City public schools, the public schoolchildren in Baltimore City still are not being provided with an education that is adequate when measured by contemporary educational standards. They still are being denied their right to a "thorough and efficient" education under Article VIII of the Maryland Constitution.

This Court also declares that additional funds provided for the Baltimore City public schools in the State budget for Fiscal Year 2001 fall far short of these levels and will not enable the New Baltimore City Board of School Commissioners to provide the City's schoolchildren with a Constitutionally Adequate Education when measured by Contemporary Educational Standards during Fiscal Years 2001 and 2002. The level of new operating funds provided by the State budget also falls substantially short of the $49.7 million sought by the New Board as an initial first step in implementing its comprehensive remedy plan. Given the substantial budget surplus and new sources of revenue available in Fiscal Year 2001 the State has not made its "best efforts" to fund the $49.7 million Remedy Plan and to make a reasonable downpayment on the additional funding of approximately $2,000 to $2,600 per pupil that is need in order for students of Baltimore City Public School to receive a Constitutionally Mandated Adequate Education when measured by Contemporary Educational Standards.

CONCLUSION

Upon examination of all of the evidence presented at the June 26, 2000 hearing and for the reasons stated in this Opinion, this Court declares that additional funding is required to enable the Baltimore City public schools to provide an adequate education measured by contemporary educational standards. The amount of additional funding required cannot be determined with absolute precision. The Court determines, however, that the Baltimore City public schools need additional funding of approximately $2,000 to $2,600 per pupil for educational operating expenses for Fiscal Years 2001 and 2002, based on: (a) the findings of the independent evaluator jointly hired by the Maryland State Board of Education and the New Baltimore City Board of School Commissioners; (b) the comprehensive Remedy Plan developed by the New Board; (c) the amount the funds the State has provided to Reconstitute the three Baltimore City Schools, discussed previously; and (d) all of the other evidence presented by the parties.

Having determined and declared that the State is not fulfilling its obligations under Article VIII of the Maryland Constitution, as well as under the Consent Decree, the Court trusts that the State will act to bring itself into compliance with its constitutional and contractual obligations under the Consent Decree for the Fiscal Years 2001 and 2002 without the need for Plaintiffs to take further action.

DATED: June 30, 2000

Joseph H. H. Kaplan,
[redacted] Judge
Circuit Court for Baltimore City
Signature Appears on the Original Document
Judge

EXHIBIT G

IN THE
CIRCUIT COURT FOR BALTIMORE CITY

KEITH A. BRADFORD, et al.,	*	
Plaintiffs,	*	
v.	*	Case No. 94340058/CE 189672
MARYLAND STATE BOARD OF EDUCATION, et al.,	*	
Defendants.	*	

* * * * * * *

BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY, et al.,	*	
Plaintiffs,	*	
v.	*	Case No. 95258055/CL 202151
MARYLAND STATE BOARD OF EDUCATION, et al.,	*	
Defendants.	*	

* * * * * * * * * * * *

STATE DEFENDANTS' OPPOSITION TO JOINT MOTION FOR EXTENSION OF JUDICIAL SUPERVISION

The Maryland State Board of Education and the State Superintendent of Schools, by their undersigned counsel, file this Opposition to the Joint Motion of the Board of School Commissioners and the *Bradford* Plaintiffs for Extension of Judicial Supervision and in support thereof state as follows:

1. The State has more than fully complied with all of the terms of the Consent Decree.

2. Plaintiffs have made no showing of cause that is legally sufficient for extension of the Consent Decree.

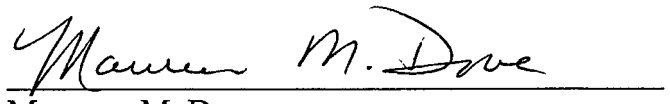
3. The State reserves all defenses previously raised in this case.

4. A memorandum setting forth points and authorities accompanies this Opposition.

For these reasons, the State Defendants respectfully request this Court to deny the Joint Motion for Extension of Judicial Supervision of the Consent Decree.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL OF MARYLAND



Maureen M. Dove
Valerie V. Cloutier
Dana H. Murray
Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6465

Attorneys for Maryland State Board of Education
and State Superintendent of Schools

G:\DOVEM\WPDATA\Bcpss\Opposition 6-02

IN THE
CIRCUIT COURT FOR BALTIMORE CITY

KEITH A. BRADFORD, et al.,	*	
Plaintiffs,	*	
v.	*	Case No. 94340058/CE 189672
MARYLAND STATE BOARD OF EDUCATION, et al.,	*	
Defendants.	*	
* * * * * * * * * * * *		
BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY, et al.,	*	
Plaintiffs,	*	Case No. 95258055/CL 202151
v.	*	
MARYLAND STATE BOARD OF EDUCATION, et al.,	*	
Defendants.	*	
* * * * * * * * * * * *		

STATE DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION FOR EXTENSION OF JUDICIAL SUPERVISION

The Consent Decree cannot be extended unless the Plaintiffs prove "good cause" for the Court to retain jurisdiction over the matter. Decree, ¶68. Plaintiffs have not and cannot meet their burden of demonstrating good cause, because the State has more than fully

complied with all of the terms of the Consent Decree. Indeed, Plaintiffs concede that "significant educational and management reforms" have occurred in the Baltimore City Public School System (BCPSS). Joint Motion, ¶ 4.

Plaintiffs also concede that "sweeping revisions" have been enacted by the Maryland General Assembly to establish "Maryland's statewide school funding formula, which will provide millions of dollars in aid to Maryland students who live in poverty or have other special educational needs." *Id.*, ¶ 5. Under this new funding formula, the per pupil State aid for Baltimore City students will nearly double from $5,999 in fiscal year 2002 to $11,381 in fiscal year 2008. This increase in mandatory State aid of $5,382 is approximately double the $2,000 to $2,600 suggested by this Court in its Order issued on June 30, 2000. Because plaintiffs have made no showing of cause that is legally sufficient to provide a basis for extension of the Court's jurisdiction, this Court must deny their request to extend the term of the Decree.

I. BACKGROUND

A. Consent Decree.

In December, 1994, the *Bradford* Plaintiffs sued the Maryland State Board of Education and the State Superintendent of Schools alleging that the State failed to provide the students in the Baltimore City Public School System with an adequate education as measured by contemporary standards. Plaintiffs sought a court order directing that the State Board and State Superintendent work with plaintiffs and Baltimore City to develop a plan to improve the delivery of education in the City's public schools.

In September, 1995, the Baltimore City Board of School Commissioners sued the State Board and the State Superintendent alleging that BCPSS was unable to meet contemporary educational standards established by the State because the State had failed to provide BCPSS with the resources and assistance necessary for a basic public school education. The City School Board sought an order directing that the State design an enhanced system of school finance and provide BCPSS with additional resources.

In October, 1995, the State Board and State Superintendent filed a third-party complaint against BCPSS, alleging that any inadequacies in the education of students in the BCPSS were attributable to BCPSS' mismanagement of available resources. The State sought an order directing substantial and immediate restructuring of BCPSS to correct deficiencies and to reform the functions of school management and accountability, financial management and budgeting, administration and personnel, management information systems, and curriculum and instruction.

In November, 1996, after protracted negotiations and written acknowledgment that differing claims remained as to the causes of and appropriate remedies for the failure of BCPSS to provide public school children in the City with an adequate education, the parties reached settlement and signed a Consent Decree with a term of five years. The State has more than fully complied with each of the requirements in the twelve major areas addressed by the Decree, which are:

Effective Dates of Decree, ¶ ¶ 4-7: On April 9, 1997, the Governor signed SB 795

(Ch. 105, Acts 1997), the City-State Partnership legislation,[1] and the State Budget for FY 1998 was approved with the additional funds required by the Decree, making the Decree fully effective and the transition provisions operative.

Establishment of the New Board of School Commissioners, ¶¶ 8-20: The General Assembly enacted § 3-108.1 of the Education Article in its 1997 Session, and established the New Board of School Commissioners consistent with the Decree requirements. In its 2002 Session, SB 866/ Ch. 288, Acts 2002, repealed and reenacted § 3-108.1 with an amendment removing the term "New" before "Board of School Commissioners."

Management Structure, ¶¶ 21-26: The General Assembly enacted Education Article, §§ 4-304, 4-305, 4-306, and 4-308, which established respectively the Chief Executive Officer, the Chief Academic Officer, the Chief Financial Officer, and the Parent and Community Advisory Group. Those positions were filled in a timely manner, and the responsibilities of each are being performed in a competent manner.

Transition Plan, ¶¶ 27-28: The Transition Plan of the New Baltimore City Board of School Commissioners established five goals for student achievement and management system reforms; it was submitted to and approved by the State Board and State Superintendent in August, 1997.

---

[1]The Decree provided that if legislation were enacted at any time prior to the expiration of the Decree that was at variance with the terms of the Decree, any party could file a motion with the Court to determine whether the variance affected the party's substantive rights. Although the General Assembly has enacted three bills during the five-year term of the Decree that relate to provisions of the Decree – SB 795/1997 Session, SB 856/2002 Session, and HB 853/2002 Session - no party has filed a motion alleging any variance.

Master Plan, ¶¶ 29-34: The State Board approved the BCPSS Master Plan in July, 1998; the plan's two major goals and six objectives remained constant during its four year time frame. The Plan emphasized accountability and incorporated critical reform strategies. Certain initiatives were revised through annual Plan updates. The General Assembly enacted HB 853/Ch.545, Acts 2002, in 2002, amending certain statutory requirements of the Master Plan and requiring that a five-year comprehensive plan be submitted for approval to the State Board by July 30, 2002, and updated annually. In addition to the emphasis on student achievement, management efficiency, and accountability, the statutory amendments call for full integration of special education and general education, an effective system of teacher input regarding school reform initiatives, curriculum, instruction, and professional development, and the creation of a principal development initiative to match distinguished principals from outside BCPSS as mentors with principals in training in BCPSS. Educ. §§ 4-309 and 4-309.1.

Personnel and Procurement, ¶¶ 35-38: The General Assembly enacted Educ. § 4-310, which requires the City Board to adopt rules and regulations governing procurement of goods and services by BCPSS; the City Board adopted such rules and regulations on July 1, 2000. Educ. § 4-311 requires the City Board to establish a personnel system including a performance-based evaluation system for teachers, principals, and administrators. The BCPSS personnel system and the Performance-Based Evaluation System for Teachers and one for principals were approved by the City Board in December, 1997.

Reporting, ¶ 39: BCPSS has issued a public report annually, beginning in December,

1997.

Review and Evaluation, ¶¶ 40-42: The State Board and the New Board contracted with Metis Associates, Inc. to evaluate interim progress; its *Interim Evaluation of the Baltimore City Public School System* was issued in February, 2000. The State Board and the New Board contracted with Westat to perform a final comprehensive review and evaluation of the City schools; its *Report on the Final Evaluation of the City-State Partnership* was issued in December, 2001. Plaintiffs' Exhibits 5 and 12.

Financial Resources, ¶¶ 43-54: The State has fully complied with the appropriations required by the Consent Decree for the City-State Partnership. In accordance with ¶ 47 of the Decree, the State appropriated an additional $30 million for FY 1998 and an additional $50 million for each of fiscal years 1999 through 2002. Further, the State provided an additional $8 million in FY 2001 and an additional $20 million in FY 2002 as BCPSS Remedy Grants. *See* Affidavit of Tina Bjarekull, Defendants' Exhibit 1.

In capital funding, the State exceeded the requirements of the Consent Decree by providing a total of $145,958,000 in public school construction funds to BCPSS from FY 1998 through FY 2002. The General Assembly approved legislation increasing the State's obligation to provide school construction funds to $20 million in FY 2002, and $13,840,000 in FY 2003. *See* Affidavit of Yale Stenzler, Defendants' Exhibit 2.

Transition From Current Governance of BCPSS, ¶¶55-58: Beginning on January 7, 1997, a Transition Committee consisting of the Honorable Harry Cole, Reverend Arnold Howard, and Walter Sondheim, Jr. solicited and forwarded to the State Board

recommendations for the initial New BCPSS Board members, and identified and collected data and information for the New BCPSS Board to examine upon its establishment. On February 26, 1997, in accordance with the extended stipulated deadline, the State Board forwarded to the Governor and to the Mayor of Baltimore a list of capable and qualified candidates for the New BCPSS Board. On May 27, 1997, the Governor and the Mayor announced the New BCPSS Board appointments. Subsequent vacancies have been filled in a timely manner by the Governor and the Mayor from a list of nominees submitted by the State Board.

The New Board appointed Robert Schiller as Interim CEO for the 1997-98 school year and subsequently appointed Robert Booker as permanent CEO, who served for the 1998-1999 and the 1999-2000 school years, and Carmen V. Russo, the current CEO, who began serving in this capacity for the 2000-2001 school year.

Modifications Relating to Special Education, ¶¶ 59-67: In October, 1997, the New BCPSS Board appointed Gayle Amos to lead the special education efforts in the school system replacing the Court-appointed Administrator. Felicity Lavelle, the Court Monitor, was initially replaced by Grace Lopes as the Special Master; Ms. Lopes was succeeded by Amy Totenberg. On May 3, 2000, the parties in *Vaughn G., et. al., v. Mayor and City Council, et al.,* signed the Consent Order Approving Ultimate Measurable Outcomes that replaced the Long Range Compliance Plan for Special Education. In the past two years BCPSS has made significant gains in achieving a number of the ultimate outcomes. Once all have been satisfied, the federal lawsuit will be dismissed.

The State defendants have acted in utmost good faith and, as set forth above, have complied with each and every term of the Consent Decree.

B. June 30, 2000 Court Order.

In June, 2000, pursuant to ¶ 53 of the Decree, plaintiffs requested that the State provide funds additional to those agreed to in the Decree. In its Memorandum Opinion issued on June 30, 2000, this Court found that the State had not used its best efforts to provide a reasonable portion of the additional $2,000 to $2,600 per pupil this Court found was necessary to provide a constitutionally adequate education to the children of the Baltimore City Public Schools. This Court concluded that the State was "not fulfilling its obligations under Article VIII of the Maryland Constitution, as well as under the Consent Decree," and that "the Court trusts that the State will act to bring itself into compliance with its constitutional and contractual obligations under the Consent Decree for the Fiscal Years 2001 and 2002 without the need for Plaintiffs to take further action." *Memorandum Opinion* at 26.

Although the State did not fund that large amount per pupil in Baltimore City in fiscal years 2001 and 2002, it embarked, through the Executive and the General Assembly, on a thoughtful and deliberative approach to revising the formula for State aid to education, in order to provide constitutionally adequate funding for all students in the public schools throughout the State, the results of which are now coming to fruition.

1. The Thornton Commission.

In 1999, the General Assembly enacted legislation that created the Governor's Commission on Education Finance, Equity, and Excellence ("Thornton Commission"). The

Commission was charged with studying, evaluating, and making recommendations to create an education funding system that would:

(1) ensure adequacy of funding for students in public schools;

(2) ensure equity in funding for students in public schools;

(3) ensure excellence in school systems and student performance;

(4) provide for a smooth transition when current educational funding initiatives sunset at the end of fiscal 2002;

(5) use the most effective method of providing additional State aid, whether in the form of targeted grants or by increasing funding through the base formula; and

(6) ensure that local property tax policies do not affect the equitable allocation of funding for students in public schools.

The Commission worked diligently for two years to implement its broad statutory charge.

Throughout its deliberations, the Commission was cognizant of the high priority of public education among the many responsibilities of State government, as reflected in Article VIII, Section 1 of the Maryland Constitution. The Commission received presentations from two of the leading national experts on school adequacy funding: John Augenblick, Ph.D., President, Augenblick & Myers, Inc., and James W. Guthrie, Ph.D., President, Management Analysis & Planning, Inc.[2] Plaintiffs' Exhibit 7 at 149 *et seq.*

The Commission's final report recommended substantial enhancements to Maryland's school finance and accountability systems that reflect the constitutional priority of public

[2]If the consolidated cases had gone to trial, both the State Defendants and the *Vaughn G.* Plaintiffs intended to call Dr. Guthrie as an expert witness on educational management and the effective utilization of resources. *See* Joint Pretrial Statement at pp. 91-92.

education in Maryland, as well as the Commission's belief that the State's economic health, regional and national competitiveness, and political and social development relate directly and uniquely to the quality of the State's public school system.

The Commission proposed an equitable and adequate education finance system that creates a solid financial foundation to support the State's nationally recognized high academic performance standards. In total, the Commission's proposal called for an increase in State aid of $1.1 billion by fiscal 2007. The Commission recognized during the 2002 session of the General Assembly that the declining economy was adversely impacting the State's fiscal condition and that the fiscal outlook for the short term was not positive. Nevertheless, the Commission believed that implementation of its recommendations to achieve adequate funding of Maryland's public schools was critically important and should be undertaken now regardless of the fiscal condition of the State. The Commission urged the Governor, the President of the Senate, the Speaker of the House, and other members of the General Assembly to make every possible effort to re-prioritize appropriations in the fiscal year 2003 State budget in order to begin implementation of the Commission's recommendations in fiscal year 2003. The Commission also recommended that the State consider establishing new sources of revenue to provide additional funding to assist in implementing the Commission's proposal in subsequent years. Plaintiffs' Exhibit 7 at iii-iv.

2. Bridge to Excellence in Public Schools Act.

The Maryland General Assembly accepted the challenge posed by the Thornton Commission and on April 4, 2002, enacted Senate Bill 856, the *Bridge to Excellence in Public Schools Act.* 2002 Laws of Maryland Ch. 288; Plaintiffs' Exhibit 2. This Act restructures Maryland's public school finance system and increases annual State aid to public

schools by amounts that grow to $1.3 billion in fiscal year 2009. *See* Defendants' Exhibit 3, SB 856 Fiscal Note, Exhibit 8. The General Assembly adopted a funding formula that is $200 million more annually than was recommended by the Thornton Commission, and ensures equity and adequacy for Maryland's public school systems by linking resources to the needs of students and by distributing 76% of State education aid inversely to local wealth. *Id.*, at Exhibit 7. The new finance structure sets up a standards-based system of public school financing in which the State will set academic performance standards, ensure that schools and students have sufficient resources to meet those standards, and hold schools and school systems accountable for student performance. Educ. Art. §§5-202 - 5-210, as amended by 2002 Laws of Maryland Ch. 288.

The basic structure of the new finance system is identical to the Thornton Commission recommendations. The system:

1. Establishes a foundation funding program that will provide State and local aid to school systems based on the system's general enrollment and a state-wide "base cost" per student. This base cost reflects the "cost of adequacy" as determined through the analyses conducted by the Thornton Commission. When fully phased in, each local school system will receive a minimum per–pupil foundation grant of 15% of the base cost per student, and all kindergarten students will be counted as full-time equivalent students. Educ. §5-502(a)(12), as amended by 2002 Laws of Maryland Ch. 288.
2. Establishes additional funding for local school systems in categorical programs for 1) students with special education needs; 2) students with limited English proficiency; and 3) students from circumstances of economic disadvantage. These categorical funding adjustments reflect the cost to adequately serve students with special needs

as determined by the Thornton Commission. Educ. §§ 5-207, 5-208, 5-209, as amended by 2002 Laws of Maryland Ch. 288.

3. Establishes a Guaranteed Tax Base Program as an incentive to encourage low-wealth jurisdictions to maintain and increase local education tax efforts. The program will distribute State grants to local jurisdictions with wealth-per-pupil below 80% of the State average wealth-per-pupil, *if* the jurisdiction provides funding for public education over and above the local share required under the Foundation Program. Per-pupil Guaranteed Tax Base grants are limited to a maximum of 20% of the per-pupil Foundation Level, regardless of local wealth and effort. Educ. §5-210, as amended by 2002 Laws of Maryland Ch. 288.

4. Increases State aid for pupil transportation in fiscal 2004 for the 15 jurisdictions that experienced increased enrollment from fiscal 1981 to 1996; these enrollment adjustments were never captured by the existing transportation formula. In addition, among other positive adjustments to transportation funding, the State grant for students who require special transportation services will increase from $500 per rider to $1,000 per rider by fiscal 2008. Educ. §5-205, as amended by 2002 Laws of Maryland Ch. 288.

In fiscal 2004, the State will eliminate twenty-three existing State aid programs and begin to phase out four other existing programs, while at the same time beginning to phase in the new finance structure. By fiscal 2008, the funding model will reflect the Thornton Commission recommendations, with the following adjustments:

- The General Assembly increased the State share of the Foundation Level to 50% for the entire program; the Thornton Commission recommended that the State pay 50%

of the first $4,124 of the Foundation Level, but only 45% of any additional Foundation Level. This adjustment will increase State aid to every local school system. Educ. §5-202(a)(13), as amended by 2002 Laws of Maryland Ch. 288.

- The General Assembly established a minimum per-pupil State grant for students with special needs. The minimum per-pupil grant is equal to 40% of the base cost per-pupil for students with special education needs, limited English proficiency, and economic disadvantages. This adjustment increases State aid to Baltimore City and to seven counties: Anne Arundel, Howard, Kent, Montgomery, Queen Anne's, Talbot, and Worcester. Educ. §§ 5-207, 5-208, 5-209, as amended by 2002 Laws of Maryland Ch. 288.
- The General Assembly elected to use prior-year enrollment counts to calculate State aid for the three categorical programs, rather than the second prior year, as recommended by the Thornton Commission; this is more current and favorable to local school districts with growing enrollment. However, in fiscal 2004, the State will use second-prior-year enrollment counts for school systems with declining student enrollment, which will increase State aid to jurisdictions with growing enrollment, but will not reduce State aid to jurisdictions such as Baltimore City with declining enrollment. *Id.*
- The General Assembly adopted a geographic cost of living adjustment in fiscal 2004 for four high-cost jurisdictions: Anne Arundel, Baltimore City, Howard, and Montgomery. In fiscal 2005 the State must implement a revised geographic cost of living index based on an independent study by a private contractor. Educ. §5-202(f), as amended by 2002 Laws of Maryland Ch. 288.

- Three high-wealth counties -- Montgomery, Talbot, and Worcester -- are required to set their local education tax effort equal to at least 80% of the State average tax effort, in order to be eligible for full-funding in fiscal 2003. Montgomery County will qualify for full-funding with no additional local appropriation, because it meets or exceeds the 80% requirement. Talbot and Worcester counties must increase their local appropriations in order to receive full funding. 2002 Laws of Maryland Ch. 288, Sec. 11(b).
- Despite the fact that the General Assembly cut more than $370 million from the Governor's proposed fiscal 2003 budget, it adopted a bridge funding proposal for public school systems for fiscal 2003 that enhances educational funding in these ways:
  (1) $64.7 million in unrestricted grants to the 24 local school systems (2002 Laws of Maryland Ch. 288, Sec. 11);
  (2) $10 million for the Prince George's County Public School System, contingent on the approval of a comprehensive master plan for the system (*id.* at Sec. 12);
  (3) $4.8 million for the Infants and Toddlers Program (*id.* at Sec 13);
  (4) $1.1 million for adult education (*id.* at Sec. 14); and
  (5) $11.9 million to provide "disparity grants" to eight low-wealth jurisdictions, including Baltimore City, provided that the grants are used to increase local aid for public schools in excess of the maintenance of effort requirements. *Id.* at Sec. 19.
- Most of the fiscal 2003 appropriations identified in Senate Bill 856 are funded with a 34 cent increase in the cigarette tax per pack. This tax is expected to yield $101.4

million in fiscal 2004, the first $80.5 million of which will be used to fund this Act. *Id.* at Sec.16-18. The $11.9 million "disparity grants" are funded in the Fiscal Year 2003 Budget Bill.

Every one of the programmatic recommendations of the Thornton Commission was adopted into law. These recommendations include (1) the mandatory implementation of full-day kindergarten for all students and pre-kindergarten programs for all at-risk students by 2008; (2) requiring a study to develop a Maryland specific geographic cost of education index as well as a study of enrollment collection trends, to make recommendations to address problems relating to school systems with declining enrollments; (3) continuing maintenance of effort requirements; (4) authorizing local governments to override charter tax limitations to increase education funding; and (5) establishing a task force to study public school facilities and to make recommendations concerning the equity and adequacy of the public school construction program. *See* Appendix A.

The increase of funding to Baltimore City as a result of this legislation is enormous. The total local, State and federal per pupil appropriation for BCPSS in FY 2002 was $9,727. The estimated total per-pupil appropriation in FY 2008 (when the mandatory funding formulae are fully phased-in) is $15,945. This reflects an overall increase of aid per pupil of $6,218, of which the State aid of $5382 is more than twice the amount suggested by this Court's Order of June, 2000. *See* Defendants' Exhibit 1.

An editorial in the *New York Times* on April 30, 2002, lauded Maryland for its visionary school financing legislation. *See* Defendants' Exhibit 4. The editorial noted that more than 40 states have been sued for failing to provide poor districts with enough money to educate children up to the standards articulated in their own laws, and that many states

dragged their feet forcing "bitter confrontations with the courts that waste time and money and pit one part of the electorate against another." *Id.* The article observed that, although the Thornton Commission proposal to boost state funding for public schools by more than $1 billion per year seemed dead on arrival after the economy slowed last year, Maryland focused more money on economically disadvantaged and special needs children. It concluded:

> Instead of fighting it out in court, Marylanders have decided to level the public school playing field as quickly as possible – so that all of the state's children have a chance at decent lives. Other states, including New York and California, could learn from this enlightened example.

Id.

In light of the bold steps taken by the General Assembly to ensure adequacy of funding for public schools throughout the State, as well as the significant improvements in management and student achievement made by the New Board through the City-State Partnership, there is simply no scintilla of cause to justify an extension of the Consent Decree beyond its term of June 30, 2002.

C. The Positive Effects of the City/State Partnership and its Funding under the Consent Decree.

The influx of technical assistance and funding that flowed from the Consent Decree has resulted in gains in all major aspects of BCPSS. The statute implementing the Consent Decree, SB 795, directed that City-State Partnership funds should initially be spent on programs that would:

- have a direct and substantial impact on improving academic achievement;

- improve educational performance of schools having a high percentage of students living in poverty;

- improve the education performance in reconstitution-eligible schools and other schools that are failing to meet state standards and/or failing to make progress towards those standards;

- begin the implementation of a new performance-based evaluation plan for teachers, principals and administrators;

- make progress towards meeting teacher salary parity with Baltimore County, and

- implement other improvements that directly support improved classroom instruction, including technology enhancements, individual professional development and curriculum development. 1997 Laws of Md. Ch. 105, Sec. 28.

The Westat Final Evaluation found that BCPSS "respected the preliminary directives in allocating funds and has over the years, maintained a continuous investment in funds in the areas highlighted for attention." Plaintiffs' Exhibit 12 at p. 318. Specifically, Westat found that the City had invested:

- approximately $34 million in enhancing and reforming the curriculum, including establishing a city-wide curriculum and purchasing textbooks and instructional materials in support of that curriculum;

- $83 million in teacher salary enhancements and summer professional development opportunities;

- $42 million in class size reduction efforts;

- over $22 million in improving management services, including financial and management reporting;

- over $11 million in the development of alternative programs, and

- over $4 million to develop student assessments.

In addition to the City-State Partnership funds, BCPSS received additional funds based upon Remedy Plans submitted to the State in 2001 and 2002. Westat found that under the 2001 Plan, BCPSS expended $8 million on teacher recruitment and $10.3 million on student academic interventions, such as summer school and before- and after-school programs with State Remedy Plan funding. Nearly $1 million in funds from the 2001 Plan were spent on professional development, primarily for instructional staff. Building on those investments, nearly $20 million from the 2002 Plan were spent on teacher recruitment/retraining, including working towards salary parity with Baltimore County, and over $10 million were spent on student academic interventions. *Id.* at pp. 317-319. Table 1 shows Westat's outline of the expenditure of Partnership funds and Remedy Plan funds. Westat summarized BCPSS' progress as follows:

> With the support of MSDE, the New Board of School Commissioners has responded to every one of the requirements specified by the legislation and begun to establish a coherent administrative and management structure, based upon a set of clearly articulated goals and objectives. In 2001, the City-State Partnership is still intact and guided by the spirit of SB 795. Many new initiatives have been put into place..."

Id. at p. iv.

As to student achievement, BCPSS students have increased their overall performance using three different performance indicators. Review of the CTBS/5 scores, the MSPAP scores, and the Maryland Functional Test scores indicates that BCPSS have made gains in virtually every content area in every grade. Tables 2, 3 and 4.

Table 1
BCPSS' PROPOSED USES OF CITY-STATE REMEDY PLAN FUNDS (in $ thousands)

	City-State Partnership*				Remedy Plan	
	FY 1999	FY 2000	FY 2001	FY 2002	FY 2001	FY 2002
Objective 1						
Focus Area 1: Instructional Programs	$10,200	$11,000	$5,333	$9,824	$6,594	$11,560
Focus Area 2: Instructional Time	----	----	401	----	5,500	9,945
Focus Area 3: Assessment	790	1,360	1,360	704	350	400
Focus Area 4: Secondary Grades	1,405	1,970	1,479	1,519	10,984	10,165
Focus Area 5: Structural Supports for Achievement	10,000	4,240	8,682	9,467	350	—
Objective 2						
Focus Area 1: Recruitment and Retention	20,100	20,623	21,299	21,346	7,990	20,439
Focus Area 2: Development of Teachers and Principals	830	1,290	1,835	1,346	943	1,718
Focus Area 3: Evaluation of Teachers and Principals	500	449	193	----	----	----
Objective 4						
Focus Area 2: Information Technology Systems	4,825	5,991	7,503	----	----	----
Focus Area 3: Management Practices and Central Office Restructuring	1,150	1,527	1,762	----	----	----
Objective 5						
Focus Area 1: Parental, Family, Community, and Business Involvement	100	50	50	50	----	----
Other						
Professional Development capacity	100	100	103	595	----	----
Master Plan evaluation	----	400	----	----	----	----
Comprehensive rezoning	----	1,000	----	----	----	----

*FY 98 City-State Partnership monies are not categorized in the same way, as consistent objectives and strategies had not been developed.
SOURCE: Baltimore City Public School System.

Table 2

CTBS Results - National Percentile Rank

CTBS Results - National Percentile Rank				
	School Year 1997-1998	School Year 1998-1999	School Year 1999-2000	School Year 2000-2001
Grade 1				
Reading	25	34	42	54
Mathematics	24	23	37	51
Grade 2				
Reading	23	29	35	39
Mathematics	19	22	32	41
Grade 3				
Reading	25	26	36	42
Mathematics	21	18	32	41
Grade 4				
Reading	22	23	27	33
Mathematics	15	16	26	33
Grade 5				
Reading	16	16	35	41
Mathematics	15	15	28	34

Table 3

MSPAP Composite Results

MSPAP Composite Results	School Year 1996-1997	School Year 1997-1998	School Year 1998-1999	School Year 1999-2000
Grade 3	13.4	17.2	17.1	20.4
Grade 5	14.5	16.3	18.3	22.5
Grade 8	13.8	14.3	15.3	18.5
Total	13.9	16.1	17.0	20.5

Table 4

Maryland Functional Tests - Percent Passing

MARYLAND FUNCTIONAL TEST RESULTS - PERCENT PASSING				
Grade 9 Status	SY 1996-1997	SY 1997-1998	SY 1998-1999	SY 1999-2000
Reading	90.3	91.2	89.1	89.2
Mathematics	49.2	49.4	54.9	60.6
Writing	64.3	65.6	71.6	76.3
Grade 11 Status	SY 1996-1997	SY 1997-1998	SY 1998-1999	SY 1999-2000
Reading	98.4	97.8	97.9	98.3
Mathematics	79.5	77.3	78.9	83.2
Writing	89.7	88.9	91.0	92.7

The requirements of the Consent Decree, every one of which has been implemented, have given the BCPSS guidelines for meaningful reforms, many of which have already been accomplished. The additional funding that will come to BCPSS in the next six fiscal years can only accelerate the system's progress.

ARGUMENT

I. THERE IS NO BASIS IN FACT OR LAW TO EXTEND THE CONSENT DECREE.

This decree may only be extended upon a showing of good cause by the plaintiffs.[3] Although the Consent Decree does not define "good cause," there is no definition by which this Court could find good cause here, as the State has fully complied with all requirements of the Consent Decree approved by this Court and, through implementation and funding of the Thornton Commission recommendations, with this Court's June, 2000 Order. Thus no "good cause" exists for granting an extension to the Decree.

A. Discontinuation of Court Supervision Is Appropriate.

The Supreme Court has set out a three part test for determining when a court's supervision of a consent decree that has no term certain will be withdrawn or permitted to expire when requested by a defendant. The Court has said that discontinuation of court supervision is appropriate when a court finds that:

(1) there has been full and satisfactory compliance with the decree in those areas

---

[3] "This decree shall be in effect through June 30, 2002 unless the Court extends the term upon timely motion of one of the parties and upon a showing of good cause to extend the Decree." Consent Decree, ¶ 68.

where the court's supervision will be withdrawn;

(2) continued retention of judicial supervision is not necessary to facilitate achievement of compliance with the decree in the areas that will remain subject to the decretal terms; and

(3) good faith has been shown to the whole of the decree.

Freeman v. Pitts, 503 U.S. 467, 491 (1992); *Bobby M. v. Chiles* 907, F. Supp. 368, 372 (N.D. Fla.,1995). In this case, where the decree is to expire of its own terms, the State has met or exceeded each of these three requirements.

First, as set out in Part I-A above, the State is in full compliance with *all* terms of the Consent Decree, and plaintiffs do not contend otherwise. Courts have held that where there has been full compliance by a party to a consent order, the consent order can be terminated with respect to that party. *Bobby M. v. Chiles*, 907 F. Supp. 368 (N.D. Fla, 1995)(when two facilities are subject to the same provisions of consent decree, the decree requirements were lifted from the one facility that had attained substantial compliance with the decree). Moreover, "exact compliance is not the legal test for the termination of a consent decree. Rather, such a decree terminates if there has been 'substantial compliance' with its terms." *Lamphere v. Brown University*, 712 F. Supp. 1053, 1060 (D. RI, 1989)(court approved termination of consent decree even though goal of "full representation" of females in the faculty had not been reached.) *See also Freeman v. Pitts*, 503 U. S. at 489-93 (when a governmental defendant is "in compliance in one but not all areas [of the consent decree] the court in appropriate cases may return control to [the defendant] in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not

yet in full compliance with the decree"); *Joseph A. v. New Mexico Department of Human Services*, 33 F. 3d 1081 (10th Cir. 1995)(enactment of fair, reasonable and adequate procedures to effect long-term institutional reform would be substantial compliance.)

Second, there is simply no need for this Court to continue supervision of this decree. The decree contemplated improvement in the City schools, based on the creation of a new City-State partnership and the New School Board, specific increases in State funding, and State oversight, technical assistance, and other non-financial resources to assist the New Board. Each of these have been achieved. Because the State and the City School Board have both complied with all aspects of the Decree, there are no "unfulfilled" provisions that the court must oversee, and unlike the circumstances in *Freeman v Pitts*, for example, here there are no "areas in which court supervision is required to facilitate compliance with the decree."

In addition, the City's "New Board" has become the "Board" and is permanently in place, as is the system by which the State Board will continue to supervise progress in the City Schools. For example, the State must approve annually the BCPSS Master Plan, first required by ¶¶ 29 -34 of the Consent Decree, and will monitor BCPSS' progress on the goals of the Plan. The State Board and State Superintendent can use their powers to withhold or redirect funds if they find that adequate progress towards the goals of the Master Plan are not being made. *See* Educ. § 5-401(h)(i) and (j), as amended by 2002 Laws of Md. Ch. 288. In short, there is nothing left for this court to supervise.

Third, the State has shown good faith to the whole of the decree and has even done more than the Consent Decree requires. Although the State did not immediately provide the

additional funding urged by this Court in 2000, it responded to this Court's June, 2000 Order, and the recognized need of schools in other low wealth jurisdictions to have equal educational resources by establishing the Thornton Commission to review the funding methodology for public schools state-wide. That Commission's Report resulted in the passage of the "Bridge to Excellence in Public Education Act" (SB 856), which will provide an additional $1.3 billion annually to the State's public schools by 2008. Plaintiffs' Exhibit 2. Baltimore City will receive by far the greatest share of those dollars: $18.7 million in FY 2003; $28.1 million in FY 2004; $68.9 million in FY 2005; $125.5 million in 2006; $187.6 million in FY 2007 and $258.6 million in FY 2008. *Id.*; Defendants' Exhibit 3 at Exhibit 8. This commitment by the State clearly evidences its good faith to the terms of the Consent Decree as well as to its underlying intent and to the Order of this Court.[4]

B. The Alleged Constitutional Violation Is Purely Speculative.

Plaintiffs' arguments, that "good cause" exists to extend the Decree because there is a continuing "constitutional violation" and funding for SB 856 is uncertain, are flawed. As to the first contention, there has been no adjudication that any "constitutional violation" *currently* exists, or, if it does, the party liable. The Consent Decree provides no mechanism for making any finding as to constitutional adequacy at the end of the term of the Decree and "an unadjudicated allegation by one party is not a proper basis for extending a consent

[4] The State has further evidenced its commitment to the Decree and the school children of Baltimore City by the passage of HB 853. Under its terms, if funding for SB 856 is not available, the State has committed another $50 million annually to the City/State Partnership and another $55 million annually to the City's Remedy Plan. 2002 Laws of Maryland Ch. 545, Sec. 3.

decree." *Holland v. New Jersey Dep't of Corrections*, 246 F. 3d 267, 285 (3rd Cir. 2001)(court could not rule on extension of decree without findings of fact rather than mere allegations.)

Even plaintiffs concede that much progress has been made on many fronts. For example, plaintiffs state in their memorandum:

> . . . the consent decree has led directly to a better education for thousands of Baltimore's children. Under the Court's supervision, the Board has led the once-failing system to significant educational and management reforms. The Board has lowered class size, established whole-school reform programs, and set up a number of effective programs to address the special needs of students at risk of academic failure. Two independent expert evaluations have confirmed that student achievement, reflected by scores on the State's Maryland School Performance Program standards and other objective indicators of education performance has begun demonstrating significant gains, particularly in the elementary grades where the Board has focused much of its attention.

Plaintiffs' Joint Memorandum in Support, pp. 1-2.

Plaintiffs also concede that the State has acted in extreme good faith:

> This year, the General Assembly reformed Maryland's statewide funding system in a manner that — if all the planned increases are fully funded — substantially responds to the Court's June 2000 order. Evidencing a strong commitment to Maryland's future, the General Assembly demonstrated the importance it places on educating Maryland's children by enacting S.B. 856 . . . a wholesale revision of Maryland's school funding formula that provides for *$1.3 billion* in increased State aid to all Maryland's schools over the next six years, much of it aimed directly at improving education opportunities for Maryland's poorest children.

Id. at p. 2 (emphasis in original).

Finally, plaintiffs also concede that the Final Evaluation conducted by Westat, the independent expert jointly hired by the State and City Board as required by ¶42 of the

Consent Decree, found that the system was "tremendously improved." Plaintiffs Ex. 12, at xxiii. The Westat evaluation also noted that the BCPSS has "accelerated its rate of progress at the elementary grades where the vast majority of resources have been targeted" and in many areas, the rate of progress in Baltimore's schools has exceeded the progress of the State overall. *Id.*, at vi.

The Consent Decree specifically does not contemplate any determination of constitutional adequacy as demonstrated by test scores, nor did the State contract to be liable therefor. To the contrary, the parties agreed in the Consent Decree, at ¶ 8, that "the New Board . . . shall be held directly accountable for improving the academic achievement of Baltimore City school children. . . ." Furthermore, low test scores do not, in and of themselves, prove a constitutional violation. One court has recently ruled that:

> Academic failure as measured by performance on standardized tests does not, standing alone, establish a constitutional violation.... (citations omitted) There are myriad reasons for academic failure...poor test scores will not substantiate a claim for a violation of the Constitution."

J. G. v. Board of Education of the Rochester City School District, 193 F. Supp. 2d 693, 705 (W.D. N.Y. 2002)(court returning control to the schools after expiration of a consent decree, despite allegations of low test scores). Here, the Consent Decree was aimed at institutional reform, which must be measured by more than just test scores, and substantial institutional reform has been achieved.

Nevertheless, a review the areas to which BCPSS directed the additional resources provided as a result of this Consent Decree demonstrate that the BCPSS has accomplished major system reforms since the enactment of SB 795 and substantial educational progress.

See, e.g. Exhibit E-2,Westat Final Evaluation (Plaintiffs Ex. 21). For example, test scores in the lower grades, where the majority of the city's efforts were focused, have risen each year. As Westat reported: "on all three measures of achievement- the MSPAP, the CTBS/5 and the MFT (through 2000) - test scores has improved for both regular and special education students," and "progress in system-level achievements has been widely acknowledged both in official publications of MSDE and BCPSS and in the popular press." Plaintiffs' Exhibit 12, p. 21. *See also, e.g.* Student Achievement Tables at p.___, *infra.* Even in those areas that were not initially targeted for additional resources, there has been improvement – the drop out rates at the high schools, for example, has decreased from 13.78% in 1996 to 11.32% in 2000. *See* Defendants' Exhibit 5, Baltimore City Dropout Rate, 1993 - 2001.

Plaintiffs' argument that good cause exists to extend the Consent Decree because there is "uncertainty" regarding full funding of SB 856 must also fail. There is, in fact, very little uncertainty with regard to this funding of SB 856. Unlike other spending legislation, the Governor *is mandated* under Article 3, §52 (4) of the Maryland Constitution to include statutorily enacted funding for public schools in his annual Budget Bill. While the General Assembly must pass a joint resolution supporting the funding levels contained in SB 856 for future fiscal years, given the General Assembly's passage of SB 856 and its overwhelming support of the Thornton Commission's recommendations, it is highly unlikely that it would

not pass such a resolution.[5] As Ms. Bjarekull's states in her affidavit, the General Assembly used similar language when it enacted the current funding system, and although the State has had difficult fiscal periods during the period it has been in force, the General Assembly has never reduced the mandatory funding. Defendants' Exhibit 1 at ¶ 12.

The State did not contract in the Consent Decree to provide this extraordinary level of new funding and failure to provide it would not be a violation of the Decree; thus this is but one more attempt by plaintiffs to hoist a new obligation upon the State. Nonetheless, plaintiffs' allegations about the uncertainty of funding is mere speculation and does not constitute good cause to extend the decree.

> Because the suggested injury is speculative and may never occur, this Court must refrain from entertaining the claim on ripeness grounds. *See Abbott Laboratories v. Gardner* 387 U.S. 136, 148 (other citations omitted) If any constitutional violations do surface, those who are injured thereby will obviously have standing to file a new law suit at that time.

Bobby M. v. Chiles, at 371 n. 8.

Under plaintiffs' theory of good cause, this Court would have supervision over this case in perpetuity, to assure that funding remains at the level plaintiffs desire. However, "[c]onsent decrees which govern the provision of educational services to children in a statutorily and constitutionally acceptable manner 'are not intended to operate in perpetuity.'" *J. G. v. Board of Education of Rochester City School District,* 193 F. Supp. at

---

[5] In addition to the additional funding that would be provided to Baltimore City pursuant to SB 853 (n. 4 *supra*), SB 856 also provides that if the General Assembly fails to adopt a funding resolution by the fiftieth day of the 2004 legislative session, the State education aid to each school system will increase by 5% from fiscal 2004 to 2005 and by 5% to 6% annually from fiscal 2006 to 2008. SB 856, Fiscal Note, p. 7.

699, citing *Board of Education of Oklahoma City Public School v. Dowell,* 498 U.S. 237, 248 (1991). Nor should this one.

III. THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHAT IS CURRENTLY CONSTITUTIONALLY ADEQUATE.

The State agrees with plaintiffs that a consent decree is a contract among the various litigating parties. *United States v. ITT Continental Baking Co.*, at 236-237 (since consent decree and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts.) As such, the Decree's provisions must be viewed within the four corners of the decree itself. *United States v. Armour*, 402 U.S. 673, 681-2 (1971), followed in *United States v. ITT Continental Baking Co.,* 420 U.S. 223 (1975).

There is nothing within the four corners of this Decree that permits a review of current adequacy in the schools at the end of the term of the Decree. The parties did not enter into a consent decree settling an adequacy suit concerning the Baltimore City Public Schools with the intent that the adequacy issue would then be litigated at the end of the decree in the year 2002, in order to form a basis upon which the decree could be extended. Thus, this Court may not address the issue. "A court should interpret a consent decree as written and should not impose terms when the parties did not agree to those terms." *Holland v. New Jersey Dep't of Corrections*, 246 F. 3d 267, 285 (3rd Cir. 2001). *See also Halderman v. Pennhurst State Sch. & Hosp.* 901 F. 2d 311 (3d Cir. 1990). In fact, language proposed by the ACLU suggesting a procedure to quantify constitutional adequacy was specifically not adopted in

the final Consent Decree.[6] An allegation today that the schools are currently constitutionally inadequate is an entirely new cause of action, which plaintiffs are free to bring in the future. Its resolution now and in this procedural posture is not part of what the State contracted for or what the Court ordered.

As to any alleged past violations, the Plaintiffs bargained for the remedies set forth in the Consent Decree:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms...Naturally, the agreement reached normally embodies a compromise...and the resultant decree embodies as much...as the respective parties have the bargaining power and the skill to achieve. For these reasons the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purpose of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised...the instrument must be construed as it was written and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

Mahers v. Hedgepeth, 32 F. 3d 1273, 1275, (8th Cir. 1994), citing *United States v. Armour*, 402 U.S. 673, 681-2 (1971), followed in *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975). There is nothing "written" in this Consent Decree that permits a determination of whether current funding is constitutionally adequate, from which plaintiffs can bootstrap allegations of good cause to extend the Decree.

It is of course true, as plaintiffs state, that this Court has the inherent power and jurisdiction to enforce its own orders. Joint Memorandum at p. 23-24. However, that power

---

[6] *See* Opposition of Maryland State Board of Education to Plaintiffs' Petition for Further Relief, p. 19, fn. 8, June 23, 2000.

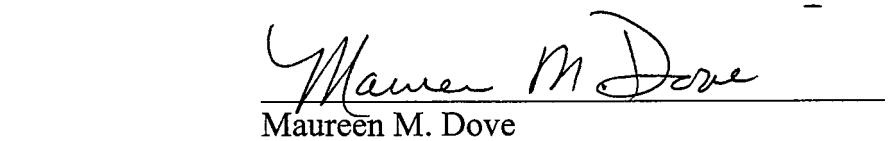
is not without limits; a court may not use its power to enforce consent decrees to enlarge or diminish the duties on which the parties have agreed and which the court has approved. *Johnson v. Robinson*, 987 F. 2d 1043, 1046, 1049 (4th Cir. 1993); *see also United State v. Michigan*, 940 F2d 143, 159 (6th Cir. 1991); *United States v. Western Elec. Co.*, 894 F. 2d 430, 435 (D.C. Cir 1990); *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 (1984) (district court has the authority to order the performance of duties contained with the 'four corners' of the consent decree); *Brewster v. Dukakis*, 687 F. 2d 495, 497 (1st Cir. 1982) This Court should not do so here.

IV. CONCLUSION

For the above reasons, the State respectfully requests that the Court deny the plaintiffs' request to extend the effective date of the Consent Decree to some unspecified time in the future and permit the Decree to expire as of June 30, 2002, as contemplated and agreed to by the parties.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL OF MARYLAND



Maureen M. Dove
Valerie V. Cloutier
Dana Murray
Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place
Baltimore, Maryland 21202

(410) 576-6465

Attorneys for Maryland State Board of Education and State Superintendent of Schools

EXHIBIT H

June 25, 2002

KEITH BRADFORD, et al.	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION et al.,	*	BALTIMORE CITY
Defendants.	*	CASE NO.: 94340058/CE189672
* * * * * * *	*	* * * * * * *
BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY et al.,	*	
Plaintiffs,	*	CASE NO. 95258055/CL20251
v.	*	
MARYLAND STATE BOARD OF EDUCATION et al.,	*	
Defendants.	*	
* * * * * * *	*	* * * * * * *

MEMORANDUM OPINION

BACKGROUND

On December 7, 1994, the Bradford plaintiffs filed suit against the Maryland State Board of Education, the Governor, the State Superintendent of Schools, and the State Comptroller of the Treasury (hereinafter collectively referred to as "MSBE") alleging that the State was failing to provide the students of the Baltimore City Public School System ("BCPSS") with the "thorough and efficient" education guaranteed by Article VIII of Maryland's Constitution.. The Bradford plaintiffs are parents of children attending the BCPSS who are "at risk" of educational failure, meaning that they live in poverty or otherwise are subject to economic, social, or educational circumstances increasing the odds that they will not receive an adequate education.

On September 15, 1995, the Board of School Commissioners of Baltimore City and its President, the Mayor, and the City Council of Baltimore ("hereinafter collectively referred to as "School

Commissioners") filed suit in this Court also alleging the failure of the MSBE to provide an adequate education for City students.[1] The suits were consolidated for trial.

On October 18,1996, this Court entered partial summary judgment for the School Commissioners and for the Bradford plaintiffs, holding that Article VIII, Section 1, of the Maryland Constitution requires that the General Assembly provide all students in Maryland's public schools with an education that is adequate when measured by contemporary standards and that the public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards. (October 18, 1996 Order).

On November 26, 1996, the parties reached a settlement and signed a five-year Consent Decree, which imposed two primary obligations on the parties. First, it addressed the State's concerns with management of the Baltimore City schools by setting up the "City-State Partnership," embodied in the New Board of School Commissioners (hereinafter "Board") jointly appointed by the Governor and the Mayor, to manage the schools. Second, it provided additional funds for the schools, $30 million in Fiscal Year 1998 and $50 million in each of Fiscal Year 1999 through 2002 for operating funds, plus $10 million annually for capital improvements. (Consent Decree ¶¶ 47-48).[2]

In June 2000, the Board and the Bradford plaintiffs sought additional funding, under a provision in the Decree that permitted the Board to return to Court based on an expert "interim evaluation" of the schools' progress.[3] Based on the evaluation and other evidence submitted, this Court found that the State

---

[1]The Governor and the Comptroller of the Treasury who were original parties, were dismissed from both suits after the Court found that "relief can be granted without the Governor being a party to the litigation." (Transcript of Apr. 4, 1995, at 12).

[2]In April 1997, the General Assembly of Maryland codified the principal terms of the Decree at S.B. 795. See S.B. 795, 1997 Reg. Session (Md. 1997).

[3]"For Fiscal years 2001 and 2002 the Board may request funds in amount greater than those described in paragraph 47 from the State through the currently established State budget process, if the Board presents a detailed plan showing why such funds are needed and how they would be spent. The State will use best efforts to satisfy any such request, subject to the availability of funds." (Consent Decree ¶ 52).

was still not providing a constitutionally adequate education to Baltimore public school students, and that approximately $2,000 to $2,600 per pupil in additional operational funding, annually was necessary to meet constitutional standards. (06/30/00 Memorandum Opinion and Order).

This Court's judicial supervision over the remedy established by the Consent Decree will terminate on June 30, 2002 unless this Court extends its supervision for "good cause."

On May 24, 2002, the School Commissioners and the Bradford Plaintiffs' filed a Joint Motion for Extension of Judicial Supervision until such time as the constitutional adequacy of the education provided by the BCPSS has been remedied. This Court held a hearing on Joint Motion on June 20, 2002.

DISCUSSION

In 1999, the General Assembly enacted legislation that created the Governor's Commission on Education Finance, Equity, and Excellence ("Thornton Commission" or "Commission"). The Commission was charged with studying, evaluating, and making recommendations to largely endeavor to support the outcomes embodied in the Consent Decree. After two years, the Commission proposed an education finance system. The Commission's proposal called for an increase in State aid of $1.1 billion by fiscal 2007 and it urged the Governor, the President of the Senate, the Speaker of the House, and other members of the General Assembly to make every possible effort to re-prioritize appropriations in the fiscal year 2003 State budget in order to begin implementation of the Commission's recommendations in fiscal year 2003.

The Maryland General Assembly accepted the challenge posed by the Thornton Commission and on April 4, 2002, enacted Senate Bill 856, the *Bridge to Excellence in Public Schools Act*. 2002 Laws of Maryland Ch. 288. This Act restructures Maryland's public school finance system and increases annual State aid to public schools. If all the planned S.B. 856 increases take effect, Baltimore City schools will receive approximately $258 million in increased state aid, annually, by FY 2008. The increases, however, are not certain to be fully funded because the General Assembly has not identified a revenue

source for the bulk of them, instead making such increases contingent on a joint legislative resolution affirming that the necessary revenue is available. The MSBE concedes this in the State Defendant's Memorandum in Opposition to Motion for Extension of Judicial Supervision when it stated, "While the General Assembly must pass a joint resolution supporting the funding levels contained in SB 856 for future fiscal years, given the General Assembly's passage of SB 856 and its overwhelming support of the Thornton Commission's recommendations, it is highly unlikely that it would not pass such a resolution." *Id.* at 29.

APPLICABLE LAW

The parties agreed in the Consent Decree that the Court may extend judicial supervision on a showing of "good cause." (Consent Decree, ¶ 68). Plaintiffs assert that "good cause" exists for two reasons: 1) The constitutional violation that this Court identified in 1996 and in 2000 is continuing, and 2) So that the Court may continue to monitor and enforce compliance with its June 2000 Order.

The Court does not need to address the merits of the first proposition, as the second proposition alone provides an adequate basis for extending jurisdiction. Wholly apart from the Consent Decree, this Court has the inherent power and jurisdiction to enforce its own orders. *See Reich v. Walker W. King Plumbing & Heating Contractor*, 98 F. 3d 147, 154 (4th Cir. 1996); *Virginia Panel Corp. v. MAC Panel Co.*, 139 F. Supp. 2d 753, 756 (W.D. Va. 2001); *Link v. Link*, 35 Md. App. 684, 688, 371 A.2d 1146, 1149 (1977). In the education funding arena courts regularly declare what the Constitution requires, and then retain jurisdiction to monitor actions the executive and legislative branches take to comply with constitutional mandates. *See, e.g., Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 337 (Wy. 1980) (directing the trial court to "retain jurisdiction until a constitutional body of [public school financing] legislation [was] enacted"); *Robinson v. Cahill*, 355 A.2d 129, 139 (N.J. 1976) (court retained jurisdiction to ensure the legislature complied with its order).

In June 2000, the Court declared that the State was not providing the children of BCPSS with a constitutionally adequate education and that approximately an additional $2,000 to $2,6000 per pupil was needed (June 30, 2000 Order). Now, two years have passed and the State has yet to comply with this Court's order, even though the State's own Thornton Commission identified funding needs substantially greater than those the Court recognized in June 2000. Although S.B. will arguably result in substantial compliance with the June 2000 order by 2008, it is uncertain that all the recommended increases will be funded. The State's lack of compliance to date with the June 2000 order, and the uncertainty over S.B. 856's funding stream, provide an independent basis for extending judicial supervision in this matter, as does the fact that the U.S. District Court for the District of Maryland's jurisdiction over the Special Education portion of the BCPSS will not end in all probability before fiscal year 2005.

CONCLUSION

Upon examination of all of the evidence presented at the June 20, 2002 hearing and for the reasons stated in this Opinion, this Court should, pursuant to paragraph 68 of the Consent Decree, retain jurisdiction and continue judicial supervision of this matter until such time as the State has complied with this Court's June 2000 Order.

June 25th 2002
DATE

JUDGE JOSEPH [illegible] KAPLAN
The Judge's signature appears on the original document.
CHIEF JUDGE

TRUE COPY
TEST
FRANK M. CONAWAY, CLERK

EXHIBIT I

August 20, 2004

KEITH BRADFORD, et al.	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION, et al.,	*	BALTIMORE CITY
Defendants.	*	CASE NO.: 94340058 / CE189672

* * * * * * * * * * * * * *

BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY, et al.,	*	
Plaintiffs	*	
v.	*	
MARYLAND STATE BOARD OF EDUCATION, et al.,	*	
Defendants.	*	CASE NO.: 95258055 / CL20251

* * * * * * * * * * * * * *

MEMORANDUM OPINION

The Court would like to commend each of the parties for submitting superb proposed findings of fact and conclusions of law. Where appropriate, the Court has adopted and incorporated those proposed findings into its opinion.

I. BACKGROUND

On December 7, 1994, the Bradford plaintiffs filed suit against the Maryland State Board of Education, the Governor, the State Superintendent of Schools, and the State

Comptroller of the Treasury alleging that the State was failing to provide the students of the Baltimore City Public School System ("BCPSS") with the "thorough and efficient" education guaranteed by Article VIII of Maryland's Constitution. The Bradford plaintiffs are parents of children attending the BCPSS who are "at risk" of educational failure, meaning that they live in poverty or otherwise are subject to economic, social, or educational circumstances increasing the odds that they will not receive an adequate education.

On September 15, 1995, the Board of School Commissioners of Baltimore City and its President, the Mayor, and the City Council of Baltimore filed suit in this Court alleging the failure of the Maryland State Board of Education to provide an adequate education for City students.[1] The suits were consolidated for trial.

On October 18, 1996, this Court entered partial summary judgment for the School Commissioners and for the Bradford plaintiffs, holding that Article VIII, Section 1, of the Maryland Constitution requires that the General Assembly provide all students in Maryland's public schools with an education that is adequate when measured by contemporary educational standards and that the public school children in Baltimore City were receiving an inadequate education when measured by contemporary educational standards. (October 18, 1996 Order).

On November 26, 1996, the parties reached a settlement and signed a five-year Consent Decree, by which they undertook "to provide a meaningful and timely remedy . . . to meet the best interests of the schoolchildren of Baltimore City." The Decree imposed

---

[1] The Governor and the Comptroller of the Treasury who were original parties, were dismissed from both suits after the Court found that "relief can be granted without the Governor being a party to the litigation." (Transcript of Apr. 4, 1995, at 12).

two primary obligations on the parties. First, it addressed the State's concerns with management of the Baltimore City schools by establishing the "City-State Partnership," embodied in the New Board of School Commissioners jointly appointed by the Governor and the Mayor to manage the schools. Second, it provided additional funds for the schools: $30 million in Fiscal Year 1998 and $50 million in each of Fiscal Years 1999 through 2002 for operating funds, plus $10 million annually for capital improvements. (Consent Decree P 47-48).[2] Since 1996, this Court has supervised this gradual, phased-in remedy.

In June 2000, the Board and the Bradford plaintiffs sought additional funding under a provision in the Decree that permitted the Board to return to Court based on an expert "interim evaluation" of the schools' progress.[3] Based on the interim evaluation and other evidence submitted, this Court ruled that the constitutional violation it found in 1996 was continuing and that approximately $2,000 to $2,600 per pupil in additional annual operational funding was necessary to meet constitutional standards. (06/30/00 Memorandum Opinion and Order).

In response to the Court's 2000 ruling, the State enacted the Bridge to Excellence in Public Schools Act, or "Thornton" bill, in 2002, which dedicated an additional $258.6 million in funding (approximately $2,600 per pupil) to the Baltimore City Public School System by 2008. Funds provided under "Thornton" were not intended to offset the

---

[2] In April 1997, the General Assembly of Maryland codified the principal terms of the Decree at S.B. 795. See S.B. 795 Reg. Session (Md. 1997).

[3] "For Fiscal years 2001 and 2002 the Board may request funds in amount greater than those described in paragraph 47 from the State through the currently established State budget process, if the Board presents a detailed plan showing why such funds are needed and how they would be spent. The State will use best efforts to satisfy any such request, subject to the availability of funds." (Consent Decree P 52).

increased cost of education, but were additional funds to be dedicated to the expansion of educational programs and capacity.

On May 24, 2002, the School Commissioners and the Bradford plaintiffs' filed a Joint Motion for Extension of Judicial Supervision until such time as the constitutional adequacy of the education provided by the BCPSS has been remedied. After a hearing on the issue, this Court retained jurisdiction, pursuant to Paragraph 68 of the Consent Decree, and determined that continued judicial supervision of the matter was warranted until such time as the State has complied with the Court's June 2000 Order. The court noted at that time that Thornton funding, although scheduled to result in full compliance with the June 2000 order by 2008, was uncertain. (06/25/02 Memorandum Opinion and Order).

By the spring of 2004, it became apparent to the parties, and to the court through a series of status conferences, that what progress had been made toward constitutional adequacy had been placed in severe jeopardy by a serious short-term cash-flow crisis facing BCPSS and by the school system's accumulation of a $58 million structural deficit. On March 11, 2004, BCPSS' ongoing cash flow problem led this Court to issue an Order, which required the various governmental parties (i.e. Baltimore City, BCPSS and the State Defendants) to present their respective plans for the funding and fiscal management of BCPSS. In July 2004, the Bradford Plaintiffs filed a Motion for Declaration Ensuring Continued Progress Toward Compliance with Court Orders and Constitutional Requirements. Hearings were held over the course of four days on July 22, 23 and August 3, 4, 2004.

II. FINDINGS OF FACT

A. The Court Found In October 1996 That The Children Attending Baltimore City Public Schools Are Not Receiving A "Thorough & Efficient" Education

1. This litigation began in December 1994, when the *Bradford* plaintiffs sued the Maryland State Board of Education and the State Superintendent of Schools, alleging that the State was failing to provide the students of Baltimore City with the "thorough and efficient" education required by Article VIII of Maryland's Constitution.

2. The *Bradford* plaintiffs are parents of children attending Baltimore City public schools who are "at risk" of educational failure, meaning that they live in poverty or otherwise are subject to economic, social, or educational circumstances increasing the odds that they will not receive an adequate education.

3. The Mayor, the City Council of Baltimore, and the Board of School Commissioners of Baltimore City and its President sued the same State defendants alleging the same constitutional violation in 1995. The two suits were consolidated.

4. The *Bradford* plaintiffs moved to certify a class of plaintiffs, all present and future students in the Baltimore City public schools who are at risk of educational failure.

5. On December 14, 1995, this Court ordered that the named plaintiffs would be permitted to pursue their claims as representative plaintiffs on behalf of the class, although a class would not be formally certified. (Stipulation and Order of Dec. 14, 1995, ¶ 1.)

6. On October 18, 1996, this Court made its first determination of constitutional inadequacy in this case, when it entered partial summary judgment for the City and for the *Bradford* plaintiffs. The Court found that undisputed evidence – such as woefully low scores on the State's Maryland School Performance Program standards, Baltimore City's high drop-out rate, and other objective gauges of academic performance

– demonstrated that "public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards." (Order of Oct. 18, 1996 ¶ 2; *see also* Memorandum Opinion of June 30, 2000 at 2; Memorandum Opinion of June 25, 2002 at 2.)

B. The Consent Decree Provided For Management Changes, Limited Additional Funding, And A Provision For An Interim Court Determination Of Additional Funding Needs In 2000

7. Days before trial on the remaining issues of causation and the appropriate remedy for the constitutional violation was set to begin, the parties entered into the Consent Decree, by which they undertook "to provide a meaningful and timely remedy . . . to meet the best interests of the school children of Baltimore City." (Consent Decree at 3.)

8. The Decree addressed the State's concerns regarding management deficiencies in the BCPSS by reorganizing the Baltimore City school board, creating a "new Board" jointly appointed by the Governor and the Mayor from a panel proposed by the State Board of Education pursuant to specified guidelines designed to ensure that the Board had members with educational and operational expertise. (*Id.* ¶¶ 8-20; Memorandum Opinion of June 30, 2000 at 3.)

9. The Decree also required additional management changes, including the development of a "Master Plan" approved by the State, to improve management and education in the schools. (Consent Decree ¶¶ 21-23, 29-34.)

10. Finally, the Decree provided for modest annual increased operational funding, $30 million in FY 1998 and $50 million annually from FY 1999 through FY 2002 for operating funds. (Consent Decree ¶¶ 47-48.)

11. In April 1997, the General Assembly of Maryland codified the principal terms of the Decree in S.B. 795. (*See* S.B. 795, 1997 Reg. Sess.)

12. The Consent Decree largely followed the State's preferred remedy of management reform, with some limited additional funding.

13. It was plain in 1996 that an additional $230 million provided by the Consent Decree over five years was not enough to provide an adequate education to Baltimore City's population of disadvantaged children. (Memorandum Opinion of June 30, 2000 at 3.)

14. For that reason, the parties agreed to include provisions in the Decree authorizing the Board[1] to seek additional funds from the State during the term of the Decree, once the management changes and limited additional funds had begun to operate to improve the system. If the State did not cooperate to provide additional necessary funds to the BCPSS voluntarily, the Board was permitted to seek an order for such funding from the Court. (Memorandum Opinion of June 30, 2000 at 3-4; Consent Decree ¶¶ 52-53.)

C. The Court Declared in June 2000 That Substantial Additional Per-Pupil Funding Is Necessary For Constitutional Adequacy

15. In June 2000, the Board and the *Bradford* plaintiffs returned to Court, seeking additional funds as authorized by the Decree after the State failed to provide such funds voluntarily. (Memorandum Opinion of June 30, 2000 at 3-4.)

16. As required by the Consent Decree, an independent expert (Metis Associates) jointly selected by State and Board had assessed the BCPSS' performance. Metis issued a report entitled Interim Evaluation of the BCPSS: 1998-99 Master Plan Implementation and Related Issues, on February 1, 2000 ("Interim Evaluation"). (Memorandum Opinion of June 30, 2000 at 4.) The Interim Evaluation was submitted to the Court and was admitted into evidence in the June 2000 proceeding. (*Id.* at 5.)

---

[1] The term "Board" refers to the jointly-appointed Board of School Commissioners for Baltimore City created by the Consent Decree and S.B. 795. The term "State Board" refers to the State Board of Education.

17. The Interim Evaluation concluded that academic performance in the system was showing reasonable improvement, and that the Board had demonstrated "meaningful progress in implementing instructional initiatives at the elementary grade levels, recruitment and retention initiatives, and professional development initiatives." (Interim Evaluation, Executive Summary, at 3.) It also concluded that management in the system was demonstrating improvement. (*Id.*)

18. The Interim Evaluation concluded, however, that substantial additional funding, of approximately $2,700 per pupil, was necessary for the schools to achieve adequacy. (Interim Evaluation, Executive Summary, at 29-30.)

19. In its June 2000 order, the Court incorporated and relied on certain of the Interim Evaluation's findings, conclusions, and recommendations. (Memorandum Opinion of June 30, 2000 at 15-16.)

20. Specifically, the Court concluded, as had the Interim Evaluation, that substantial additional funds were necessary for adequacy. (*Id.* at 15.)

21. The Court also adopted the Interim Evaluation's recommendation that additional funds should be used for, among other things, "extended learning opportunities for all eligible students" (for example, summer school and extended-day programs); "middle and high school initiatives;" "strategies to improve the [BCPSS] competitive position for teacher recruitment and retention;" and additional opportunities "for teacher and principal mentoring, coaching, and on-going school-based professional development." (Memorandum Opinion of June 30, 2000 at 16.)

22. The Court adopted as well the Interim Evaluation's finding and recommendation that the BCPSS lacked sufficient funding for school facilities improvements. (*Id.*)

23. By June 2000, the Board also had independently developed a "Remedy Plan" entitled "Seeing Success: Baltimore City Public School System: Integrated Reform Plan" (Oct. 6, 1999) (the "2000 Remedy Plan"). (Memorandum Opinion of June 30,

2000 at 16-17.) The 2000 Remedy Plan was first sent to the State as part of the BCPSS' request for additional funding, and then submitted to the Court and admitted into evidence in the June 2000 proceeding. (*Id.* at 5.)

24. The 2000 Remedy Plan represented the judgment of the Board and the educators running the system about the kinds of programs and services necessary to educate BCPSS' at-risk student population. It estimated the additional cost of such programs at approximately $265 million, or approximately $2,650 per pupil at then-current enrollment levels. (Memorandum Opinion of June 30, 2000 at 16-17.)[2] It also sought an additional $133 million annually for capital improvements. (*Id.* at 17.)

25. Among the necessary programs and services that the Board identified in the Remedy Plan and for which it sought additional funding through the June 2000 proceeding were several of those now at issue, including (1) increasing instructional time by extending the school day, *providing for summer school programs*, and providing intensive individualized tutorials for all children performing below grade level; (2) expanding the instructional curriculum by implementing art, music and physical education in all elementary schools, enriching gifted and talented programs, and by offering foreign language classes in all schools; (3) hiring additional teachers to provide for *smaller class size at all levels*, system-wide pre-kindergarten, and full day kindergarten; (4) implementing a plan to increase instructional technology; (5) expanding alternative offerings for disruptive students and expanding dropout prevention programs; (6) expanding student support services by adding social workers, mental health

---

[2] At the State's request, the Board engaged in a "triage" process and also submitted a substantially narrowed plan asking for a $49.7 million "downpayment" on the programs and services for which the system had the most immediate and critical need. (Memorandum Opinion of June 30, 2000 at 17.) That narrowed "remedy plan," entitled "Building on Success: A Remedy Plan to Address Continuing Funding Needs of The Baltimore City Public School System" (Dec. 9, 1999), was also admitted into evidence in the June 2000 proceeding. The submission of the narrowed "remedy plan" has created some confusion as to which plan was the Board's real Remedy Plan. When these findings refer to the "2000 Remedy Plan" they mean the *full* plan estimating that some $265 million in additional funding was necessary for additional programs and services.

professional services and guidance counselors; and (7) extending the school year to allow for extended professional development and increased teacher compensation. (Bradford Exhibit 78, 2000 Remedy Plan at 1-11.)

26. Based on the Interim Evaluation, the Board's 2000 Remedy Plan, the declaration of educational expert Stephen M. Ross, Ph.D., and over 100 additional exhibits and affidavits, the Court in June 2000 reaffirmed its 1996 determination that schoolchildren in BCPSS have a constitutional right to an education that is adequate when measured by contemporary educational standards. (Memorandum Opinion of June 30, 2000, at 1, 25, 26.)

27. The Court declared that "the State of Maryland is still not providing the children of the Baltimore City Public Schools with a Constitutionally Adequate Education when measured by Contemporary Educational Standards," so the students "still are being denied their right to a 'thorough and efficient' education under Article VIII of the Maryland Constitution." (*Id.* at 25.)

28. The Court further declared that an additional $2,000 to $2,600 per pupil in State aid was needed to provide the children of the Baltimore City Public Schools with a constitutionally adequate education. (*Id.*)

29. In addition, the Court found the State had violated its contractual obligation to use "best efforts" to fund requests from the Board. (*Id.* at 23-24.)

30. Having declared a constitutional and contractual violation and estimated the amount of additional funding necessary for adequacy, the Court stated that it trusted that the executive and legislative branches would act to remedy the violation without the necessity for further action by plaintiffs. (*Id.* at 26.)

31. The State initially appealed the Court's June 2000 declaration, as contemplated and authorized by the Consent Decree. (Consent Decree ¶ 53.)

32. The State later withdrew its appeal. The June 2000 order is now final and binding on the State, therefore. (Tr. 1562:24-1563:7.)

33. In Response to the June 2000 Declaration, The State Provided For Substantial Increases In Additional Per-Pupil Funding For the BCPSS, To Be Fully Phased-In By FY 2008

1. The Thornton Commission Found That Funding Increases Even More Substantial Than The Court's Order Were Necessary

34. In response to the June 2000 declaration, the State enacted the Bridge to Excellence in Education Act, largely adopting the recommendations of the Commission on Education Finance, Equity, and Excellence, commonly known as the "Thornton Commission." (Tr. 1425:11-20, 1425:24-1426:8.)

35. The State directed the Thornton Commission to assess the amount of additional funding that all schools in Maryland, including the BCPSS, needed to meet state adequacy standards. (Bradford Exhibit 72, Commission on Education Finance, Equity, and Excellence, Final Report, Jan. 2002 ("Thornton Commission Report"), at ix, xiii; Tr. 1425:11-20, 1425:24-1426:8; State Exhibit 2, Rohrer Aff. ¶¶ 6, 11.)

36. The Commission issued its report in January 2002. The Commission found a substantial gap between the resources currently available to school systems in Maryland and the resources necessary for educational adequacy. (Bradford Exhibit 72, Thornton Commission Report, at x-xi.)

37. The Commission relied on expert studies, following accepted school finance adequacy assessment models, to determine how much additional funding was necessary to enable students to meet state standards. (Bradford Exhibit 72, Thornton Commission Report, at x-xii; Tr. 1425:11-1426:8, 1575:15-1576:1; State Exhibit 2, Rohrer Aff. ¶¶ 7-10.)

38. The Commission found that substantial additional resources in addition to then- current funding were necessary to educate students who live in poverty, to enable those students to meet state standards and receive an adequate education. (Bradford

Exhibit 72, Thornton Commission Report, at xiii-xiv, 53-56; Tr. 1426:9-18, 1491:5-14, 1540:12-:18, 1575:18-22; State Exhibit 2, Rohrer Aff. ¶¶ 10, 12.)

39. The Commission also found that substantial additional resources over current funding are necessary to educate students who have special educational needs, to enable those students to meet state standards and receive an adequate education. (Bradford Exhibit 72, Thornton Commission Report, at xiii-xiv, 53-56; Tr. 1426:9-18, 1491:5-14, 1540:12-18, 1575:18-22; State Exhibit 2, Rohrer Aff. ¶¶ 10, 12.)

40. Consistent with the Court's June 2000 ruling and its own determination that students who live in poverty or face similar disadvantages cost more to educate, the Commission found that Baltimore City's "adequacy gap" – the difference between current funding and the funds necessary to provide an adequate education – was the highest in the State.

41. The Commission cited evidence demonstrating that Baltimore City needed an additional $2,938 to $4,250 per pupil to achieve educational adequacy. (Bradford Exhibit 72, Thornton Commission Report, at 27, 28, 33; Bradford Exhibit 128, Woolums Dec. ¶ 17.)

2. The General Assembly Adopted The Thornton Commission's Findings In The Bridge to Excellence Act, S.B. 856

42. In May 2002, the State enacted a bill that substantially incorporated the Thornton Commission's recommendations, the "Bridge to Excellence in Public Schools Act," S.B. 856. (State Exhibit 2, Rohrer Aff. ¶ 4.) S.B. 856 phases in a new statewide funding system that will result in $1.3 billion in additional annual State funding for all counties over a six-year period from FY 2003 through FY 2008.

43. In enacting S.B. 856, the State also recognized a substantial "adequacy gap" for Baltimore City, of $3,380 per pupil. (Bradford Exhibit 64, Dept. of Legis. Services, S.B. 856 Fiscal Note, Revised May 10, 2002, at Ex. 1; State Exhibit 2, Rohrer

Aff. ¶ 11 (cited State-determined adequacy gap of $3,400-$3,500); Bradford Exhibit 128, Woolums Dec. ¶ 17.)

44. If all of the increases projected by S.B. 856 had been fully funded Baltimore City was predicted to receive increases in State aid (over previously anticipated APEX increases and other funding streams) of approximately $18.7 million in FY 2003, $28.1 in FY 2004, $68.9 million in FY 2005, $125.5 million in FY 2006, $187.6 million in FY 2007, and $258.6 million in FY 2008. (Bradford Exhibit 64, Dept. of Legis. Services, S.B. 856 Fiscal Note, Revised May 10, 2002, at Ex. 8.) As part of the phase-in of this new formula, S.B. 856 also phased out the funding provided by the Consent Decree and other funding for the Baltimore City-State partnership starting in FY 2004.

45. Local funding is also a substantial part of S.B. 856's formula for adequacy. The Act anticipated that local jurisdictions would contribute to the cost of adequacy. (Bradford Exhibit 64, Dept. of Legis. Services, S.B. 856 Fiscal Note, Revised May 10, 2002, at 17-18 and Exhibit 10.)

46. All Maryland's districts will eventually receive substantial increases under S.B. 856, even those that the Thornton Commission found already have the funds necessary for adequacy. For instance, the Thornton Commission and the State found that Montgomery County and Howard County had no "adequacy gaps" between current and needed funding – i.e., they had enough money to educate their students. (*Id.* at Ex. 1.) Montgomery County will eventually receive additional funding of approximately $274.2 million under S.B. 856, however, and Howard County will receive approximately $117 million. (*Id.* at Ex. 8.)

47. Districts with the greatest demonstrated need do not receive a faster phase-in of the increased funding provided under Thornton. To the contrary, portions of S.B. 856 were "front-loaded" so that richer districts with fewer needs received greater

increases in the earlier years. Baltimore City's first "big contribution" from Thornton, therefore, begins this year. (Tr. 1571:1-15; Bradford Exhibit 128, Woolums Dec. ¶ 13.)

48. S.B. 856 directed a further adequacy analysis to be done at the end of the funding phase in, by 2012. (Bradford Exhibit 72, Dept. of Legis. Servs., S.B. 856 Fiscal Note, at 8.)

D. State Resources Available To The BCPSS Continue To Be Far Too Low To Permit The BCPSS To Educate Its At-Risk Student Population Adequately

1. Full Thornton Funding (At Least) Is Necessary For Students To Meet State Standards and To Attain Constitutional Adequacy

49. The Thornton Commission, the State Superintendent of Schools, the Department of Legislative Services, and others repeatedly have confirmed that at least full funding under the S.B. 856 is necessary to enable students to meet state standards for adequacy. (Bradford Exhibit 64, Dept. of Legis. Servs., S.B. 856 Fiscal Note, Revised May 10, 2002, at 10; Bradford Exhibit 72, Thornton Commission report, at 5; Bradford Exhibit 70, Memorandum from Nancy Grasmick re Update on the Thornton Commission Recommendations; Tr. 1575:15-1576:1; Bradford Exhibit 55, MSDE Fact Sheet, at 1; Bradford Exhibit 56, Dept. of Legis. Servs., 90-Day Report, Apr. 11, 2003, at L-1; Bradford Exhibit 62, Dept. of Legis. Servs., Major Issues Renew, at 1-6; Bradford Exhibit 46, Dept. of Legis. Servs., The Commission on Education Finance, Equity, and Excellence and the Bridge to Excellence Act., Oct. 22, 2003, at 5-10.

50. As Department of Legislative Services director John Rohrer explained, "the [Thornton] Act bases State education funding on the concept of 'adequacy' – an empirical estimate of the amount of funding that schools and school systems require in order to obtain the resources they need to reasonably expect that students can meet the State's academic performance standards." (State Exhibit 2, Rohrer Aff. ¶ 6).

51. Indeed, the State Superintendent has confirmed that full funding under S.B. 856 is necessary to permit students to achieve the "thorough and efficient" education required under Article VIII of Maryland's Constitution. In a resolution she submitted to the State Board of Education to adopt (and that was adopted), the State Superintendent urged the State Board to push for full Thornton funding because such funding would enable Maryland to achieve a "thorough and efficient system of free public schools." (Bradford Exhibit 70, at Ex. IV.)

52. Moreover, there is evidence that 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. (Bradford Exhibit 128, Woolums Dec. ¶ 18.)

53. The Thornton Commission, for instance, assessed amounts necessary for high school students to pass the then-current "functional tests." (Tr. 1576:20-1577:4, 1578:5-8.) Now, the State requires high school students to pass "High School Assessment" tests for graduation. (Tr. 1576:20-1577:4; Bradford Exhibit 128, Woolums Dec. ¶ 18.) The HSA tests are required for graduation, and are substantially more difficult than the functional tests. (Tr. 1576:25-1577:12.)

54. Similarly, standards imposed by the federal No Child Left Behind act are now in place, requiring, among other things, *all* students to achieve satisfactory achievement on state tests. (Bradford Exhibit 128, Woolums Dec. ¶ 18.)

55. These increases in standards, not considered by the Thornton Commission, mean that it is likely that the Thornton Commission's estimates were too low. (Bradford Exhibit 47, Dept. of Legis. Servs., Office of Policy Analysis, Comparison of Bridge to Excellence and No Child Left Behind Legislation at 8, Bradford Exhibit 128,Woolums Dec. ¶ 18.)

56. The State Superintendent testified, moreover, that the needs of children in poverty have increased since the Thornton recommendations were issued. (Tr. 1540:24-1541:14.)

2. This Court Already Has Determined, Correctly, That Full Thornton Funding Will Not Occur, If At All, Until FY 2008

57. Since S.B. 856 was enacted, the BCPSS has received the following annual increases in Thornton funding: $18.5 million in FY 2003, $16.5 million in FY 2004, and $53.5 million in FY 2005. (Tr. 1572:2-4.; *see also* Bradford Exhibit 6, DLS Charts, at unnumbered page 18 (showing $48.7 million in increased Thornton finding in FY 2005; Bradford Exhibit 21, BCPSS Budget for FY 2005, at 31 (same).) These increases already are substantially less than the increases projected when Thornton was enacted. (*See supra* paragraph 43; Bradford Exhibit 64, Dep't of Legislative Servs., S.B. 856 Fiscal Note, Revised May 10, 2002, at Ex. 8.)

58. This year, the BCPSS received approximately $53.5 million in additional Thornton money. (Tr. 1571:22-23; Bradford Exhibit 6, DLS Charts, at unnumbered page 18 (showing $48.7 million in increased Thornton finding in FY 2005; Bradford Exhibit 21, BCPSS Budget for FY 2005, at 31 (same).) Because the funding stream was "front-loaded" to benefit richer counties, that amount represents BCPSS' first substantial Thornton contribution. (Tr. 1571:10-15.)

59. Accordingly, at least $225 million in additional funding to the BCPSS remains to be phased in under S.B. 856. (Tr. 1431:25-1432:2, 1576:13-19; State Exhibit 2.)

60. In June 2002, the Court entered an order extending the Consent Decree's initial five-year term and its own jurisdiction over the case. (Memorandum Opinion of June 25, 2002 at 5.) The Decree provided for such an extension for "good cause." (Consent Decree ¶ 68.)

61. In its June 2002 Order extending the Consent Decree and judicial supervision over the remedy phase of this matter, this Court determined that even "arguable" compliance with the June 2000 Order would not occur unless and until the Bridge to Excellence in Public Schools Act is fully funded, which is not scheduled to occur until FY 2008. (Memorandum Opinion of June 25, 2002 at 5.)

62. The Court also concluded that full funding of the Act was uncertain. (*Id.*)

63. By that order, the Court extended its jurisdiction to supervise the remedy "phase-in" provided by the Thornton bill, to ensure continued progress towards that remedy.

64. Testimony by State witnesses confirms that both of the Court's determinations in 2002 – that full compliance will not occur until, at the earliest, FY 2008, and that full funding is uncertain – remain valid today. In his affidavit, John Rohrer, the Coordinator of Fiscal and Policy Analysis for the State Department of Legislative Services, estimates that state education aid to BCPSS, including the increases mandated by the Bridge to Excellence in Public Schools Act, "will essentially eliminate the adequacy gap," but states that that elimination will not occur until FY 2008. (State Exhibit 2, Rohrer Aff. ¶ 11.)

65. State Superintendent Grasmick also acknowledged in her testimony that full Thornton funding will not occur until FY 2008, and further acknowledged that the General Assembly may, in its discretion, delay or reduce the planned funding increases to BCPSS under the act. (Tr. 1576:1-4; 1587:4-6; *see also* Bradford Exhibit 128, Woolums Dec. ¶¶ 19-23; Bradford Exhibit 1, July

14, 2004 Memorandum of Bill Ratchford, former director of the State Department of Fiscal Services ("Ratchford Mem.") at 1.)[3]

3. State and BCPSS Witnesses Repeatedly Confirmed That The BCPSS Continues To Need Substantial Additional Resources

66. Witnesses from the State and BPCSS uniformly recognized that, as of August 2004, the BCPSS continues to need substantial additional resources to educate its at-risk student population. (Tr. 647:21-648:2; Tr. 648:12-14; Tr. 711:15-20.)

67. State Superintendent Nancy Grasmick testified that BCPSS needs additional resources to meet state standards. (Tr. 1576:13-19). Indeed, Dr. Grasmick testified that adequate funding was an essential part of any remedy for the BCPSS. (Tr. 1574:21-15786:4.) In fact, Superintendent Grasmick admitted that Baltimore City needs $225 million for adequacy as defined by the Thornton Commission. (Tr. :1576:13-19.)

68. BCPSS Chief Executive Officer Bonnie Copeland testified that the BCPSS needs substantial additional resources to provide an adequate education. (Tr. 1283:10-1285:7).

69. Dr. Copeland noted, for instance, that the BCPSS does not have enough resources to focus on three areas that are critical to ensuring an adequate education: providing the best and most talented teachers in the classroom; providing the best and most talented leaders at the principal and administrative level; providing the support services necessary to allow at-risk students to learn. (Tr. 1283:1-1285:7).

70. Chief Academic Officer Linda Chinnea testified that BCPSS needs more money to provide a constitutionally adequate education to its students. (Tr. 711:15-20; Tr. 734:16-23.) As Ms. Chinnea explained, "[i]f I had the money, it would be my, my hope that the system would have a full program of interventions, where summer school

---

[3] The Governor, however, has *no* discretion to reduce Thornton funding. He must include full Thornton funding in the budget submitted to the General Assembly. (Tr. 1427:13-18; Bradford Exhibit 128, Woolums Dec. ¶ 20.)

would be included, along with during the year interventions. (Tr. 647:21-648:2; Tr. 648:12-14 (if had money, would reduce class sizes).)

71. Officer for Student Support Services Gayle Amos testified that BCPSS needs more money to provide students with the services necessary for adequacy. Ms. Amos stated: "[i]f I had more money, the first thing I would do would be to give it to capital improvement and improve the schools. The second thing would be to make sure we did have qualified teachers and qualified leaders in the schools by having programs dedicated to that." (Tr. 934:18-935:2.)

72. Declarations and petitions submitted by hundreds of parents, students, teachers, and principals demonstrate that the BCPSS needs more money to provide students with services necessary for adequacy. (Tr. 504-511; Bradford Exhibit 113; Bradford Exhibit 126.)

4. The Final Evaluation And BCPSS' Most Recent Remedy Plan Confirms That The BCPSS Needs Substantial Additional Resources

73. In addition to the Interim Evaluation submitted into evidence in the June 2000 proceeding, the Consent Decree also called for a Final Evaluation by an independent expert to be appointed jointly by the State and BCPSS. (Consent Decree ¶ 40.)

74. That expert, Westat, submitted its Report on the Final Evaluation of the City-State Partnership on December 3, 2001 ("Final Evaluation"). The Westat Report was submitted to the Court and admitted into evidence in the June 2002 proceedings in which the Court considered whether to extend the Consent Decree as Bradford Exhibit 76.

75. Based on its extensive inspection and evaluation of the schools, the Final Evaluation concluded generally that the system is "tremendously improved" under the Consent Decree. (Final Evaluation at vi). It noted, however, that the "task of

reengineering the school system and establishing it as a system that effectively serves the children of Baltimore is far from complete." (*Id.* at xxiii).

76. In the area of instructional reforms, the Final Evaluation concluded that BCPSS has "accelerated its rate of progress at the elementary grades where the vast majority of resources have been targeted," and in many areas the rate of progress in Baltimore's schools has exceeded the progress of the State overall. (*Id.* at vi, 345). The Final Evaluation attributed the improvement in student achievement in considerable degree to the Board's targeted and effective application of the additional funds provided under the Consent Decree. "[W]here the monies have been spent," the Final Evaluation concluded, progress has been made, but that "where monies have been more scarce, such as at the high school level, less progress is seen." (*Id.* at 320).

77. The Final Evaluation also found that substantial additional funding is necessary for the BCPSS. (*Id.* at xiii, 338, 347).

78. In the same time period, the BCPSS completed an updated Remedy Plan. (Bradford Exhibit 78, The Baltimore City Remedy Plan for FY 2003, Aug. 31, 2001 (the "2001 Remedy Plan".) The 2001 Remedy Plan, like the earlier 2000 Remedy Plan on which the Court in part based its June 2000 declaration, reflected the BCPSS' assessment of the additional programs and services necessary to provide an adequate education, and also reflected estimates of the costs of such programs and services.

79. The updated 2001 Remedy Plan called for approximately $435 million in additional operational funding. (*Id.*, cover letter.) The Plan requested additional funding for a number of initiatives, many of which are among the programs and services recently reduced to deal with the budget crisis. The initiative included additional efforts to recruit and retain quality teachers; the implementation of whole-school reform models, like Achievement First, in elementary schools; *expansion of class size reductions to grades beyond 1-3 in elementary schools*; provision of a variety of academic interventions to improve achievement, such as *expanded summer school* and extended day programs and

increased interventions during the school year; adding "reading coaches" and extensive, focused interventions for students performing below grade level; providing mathematics intervention programs; expanding the gifted and talented program; expanding fine arts, music, foreign language, and physical education programs; *reducing class size in middle schools*; providing additional focus on middle schools; creating smaller "academy" schools in middle and high schools; expanding access to *summer school* for middle school students; and expanding professional development for teachers, along with a number of other initiatives. (*Id.*, *passim.*)

5. The State Has Not Yet Complied With The June 2000 Declaration

80. As of FY 2005, the State has not yet come close to complying with the Court's June 2000 direction that an additional $2,000 to $2,600 per pupil be provided to the BCPSS.

81. In June 2000, this Court ruled that substantial additional state funds were necessary *on top of funding already in the budget for FY 2001 and FY 2002.* The Court stated: "[A]dditional funds provided for the Baltimore City public schools in the State budget *for Fiscal Year 2001* fall far short of [constitutional] levels and will not enable the New Baltimore City Board of School Commissioners to provide the City's schoolchildren with a Constitutionally Adequate Education when measured by Contemporary Educational Standards *during Fiscal Years 2001 and 2002*. . . . the Baltimore City public schools need additional funding of approximately $2,000 to $2,600 per pupil for educational operating expenses *for Fiscal Years 2001 and 2002*." (Memorandum Opinion of June 30, 2000 at 25-26 (emphasis added).)

82. State education aid to the Baltimore City Public Schools has *not* been increased by $2,000 to $2,600 per pupil since FY 2001 and 2002. Accepting the figures provided by the State in the Attachments to the Declaration of Stephen

A. Brooks, in FY 2005 such funding will have increased by only $1,650 per pupil over FY 2001 and by only $1,353 since FY 2002. (State Exhibit 1, Declaration of Stephen A. Brooks, Attachment A; Bradford Exhibit 128, Woolums Dec. ¶ 8.)

83. Moreover, the foregoing figures significantly overstate the real increase in state support for education in Baltimore City since this Court's June 2000 declaration, because they include mandated increases in pre-existing state aid formulas and other funding streams that BCPSS would have received even if the Bridge to Excellence in Public Schools Act had never been enacted. (Bradford Exhibit 1, Ratchford Mem.; Bradford Exhibit 128, Woolums Dec. ¶ 12.)

84. Even using the FY 2000 for measuring increases, the State still did not comply with its constitutional obligations and substantially underfunded the BCPSS for a number of years after this Court's declaration. (Tr. 1534:5-1537:2, 1563:8-16.)

85. The State, through the sworn testimony of Dr. Nancy Grasmick, State Superintendent of Education, admits that it has not complied with the June 30 Order. (Tr. 1433:10-1434:3).

86. At an absolute minimum (assuming the low-end increase of $2,000 per pupil per year) and using FY 2000 as the base year, the State underfunded BCPSS in the amount of $439.35 million for fiscal years 2001, 2002, 2003 and 2004.

87. At a potential maximum (assuming the high-end increase of $2,600 per pupil per year) and using FY 2001 as the base year, the State underfunded BCPSS in the amount of $834.68 million for fiscal years 2001, 2002, 2003 and 2004.

88. The proper measure of increased funding is the amount of increase per pupil over pre-existing funding streams, which is the way that the State

Department of Legislative Services described and estimated the fiscal impact of the Bridge to Excellence in Public Schools legislation. (Bradford Exhibit 64, Dep't of Legislative Services, S.B. 856, Fiscal Note (Revised); Bradford Exhibit 128, Woolums Dec. ¶ 12.)

89. This Court also intended the increased funding required under its June 2000 declaration to be provided on top of pre-existing mandated increases, as demonstrated by the fact that the Court declared that BCPSS needed an additional $2,000 to $2,600 per pupil in both FY 2001 and FY 2002, even though state aid to BCPSS was scheduled to increase by nearly $400 per pupil between those two years. (Memorandum Opinion of June 30, 2000 at 25-26; Bradford Exhibit 1, Ratchford Mem. at 3 (total state aid of $5,807 in FY 2001, $6,197 in FY 2002).)

90. When pre-existing planned increases in state education aid are factored out, the increase in state education aid to BCPSS in FY 2005 as a result of the Bridge to Excellence in Public Schools Act amounts to just over $500 per pupil. (Bradford Exhibit 1, Ratchford Mem.; Bradford Exhibit 128, Woolums Dec. ¶ 14.)

91. According to an analysis prepared by Bill Ratchford, the former director of the State's Department of Fiscal Services, from data prepared by the State Department of Legislative Services in July 2004, the increase in total state education funding per pupil to BCPSS over the amount anticipated under prior law will not exceed $2,000 per pupil until FY 2008, and then only if the Bridge to Excellence in Public Schools Act is fully funded. (Bradford Exhibit 1, Ratchford Mem. at 3.)

92. The cost of education has increased substantially in the four years since this Court issued its June 2000 declaration and, at a minimum, the funding increases called for in that declaration should be adjusted to reflect that increased

cost. One reasonable measure of this cost increase is the rise in teachers' salaries, because professional salaries account for more than three quarters of the total cost of education in BCPSS and most other school districts. (Tr. 51:16-52:2; Bradford Exhibit 128, Woolums Dec. ¶ 15.)

93. Average teacher salaries in both BCPSS and across the state of Maryland have increased by more than fifteen percent over the past four years. (Bradford Exhibits 119, MSDE, Analysis of Professional Salaries, 1999-2000 and 2003-2004.

94. The higher "contemporary education standards" that have been adopted since 2000, discussed *supra* in paragraphs 51 through 54, against which educational adequacy in the BCPSS must be measured, also increased the cost of an adequate education. (Bradford Exhibit 47, Dept of Legislative Services, Office of Policy Analysis, Comparison of Bridge to Excellence and No Child Left Behind Legislation at 8, Bradford Exhibit 128;Woolums Dec. ¶ 18.)

E. Student Scores And Other Objective Indicators From The BCPSS Remain Far Below State Standards And Far Below State Averages

95. Almost eight years have passed since the Court first found a constitutional violation in September 1996, and four years have passed since the June 2000 declaration.

96. There are students now about to enter high school who were first graders in 1996, and who thus have at least spent eight years in an unconstitutional and inadequate system.

97. Named plaintiff Keith Bradford, for instance, brought this suit when his son Brandon was in third grade and his sons Kendall and Adrian were in pre-school. Brandon graduated from high school this year, never having attended a constitutionally adequate system. Kendall is starting high school, and Adrian is starting middle school. (Tr. 1249:12-23.)

98. Student scores and other objective evidence continue to demonstrate, as they did in 1996 and 2000, that the BCPSS students are performing at levels far below state standards, and far below state averages, although there have been some improvements in recent years.

1. Maryland School Assessment Scores Are Far Below Standards and State Averages

99. In 2003, Maryland replaced the Maryland School Performance Assessment Program ("MSPAP") tests with the Maryland School Assessment ("MSA") tests, pursuant to the federal No Child Left Behind law. That law requires each state to require schools to make "Adequate Yearly Progress" towards a specified level of performance on a statewide test.

100. In Maryland, all students must be "proficient" in the subject matters tested by the MSA by 2014. Students who show a "basic" performance for reading are "unable to adequately read or comprehend grade appropriate literature and informational passages." Those with "basic" performance in mathematics "demonstrate only partial mastery of the skills and concepts defined in the Maryland Mathematics Content Standards."

101. In Baltimore City, 2003 scores on the MSA showed that a majority of students (from 45% to 65%, depending on grade level) were functioning only at a "basic" – i.e., unsatisfactory – level in reading and from 58% to 89% (again, depending on grade level) of students were functioning only at a "basic" level in mathematics. (Bradford Exhibit 117; BCPSS Exhibit 37.)

102. In Baltimore City, therefore, nearly two-thirds of the City's tenth-grade students (65%) *do not "adequately read or comprehend" grade level reading material.*

103. There are similar gaps between the BCPSS performance and state requirements, and state averages, at every grade level and on every test. (Bradford Exhibit 117.)

104. The gap between the City and the State average increases as the children get older. (Bradford Exhibit 117.)

105. Baltimore City's 2004 achievement scores indicate that the majority of students are functioning at "basic" - that is, inadequate - levels in reading and mathematics. (Bradford Exhibit 5.) Approximately 50-65% of Baltimore City children scored at a basic level in reading and 60-80% scored at a basic level in math. (Tr. 451:18-452:19; Bradford Exhibit 117.)

106. The 2004 achievement scores reported on the Maryland State Department of Education website indicate a wide gap between Baltimore City special education students and their counterparts in Montgomery County. (BCPSS Exhibit 37, Data from 2004 Maryland Report Card-Achievement Gap on 2004 MSA Administraton.). Specifically, the scores shows 53.2% of special education students in Montgomery County at the proficient level compared to the only 28% of Baltimore City special education students who scored at the proficient level. (*Id.*)

107. These scores also show that special education students in Montgomery County reached close to the same level of proficiency as the *regular* education students in Baltimore City. (Tr. 813-818.)

2. The State Superintendent Has Placed The Entire System in Corrective Action Based On Those Scores

108. Based on the BCPSS' performance on the MSA tests last year, the State Board of Education placed the entire school system in "corrective action," pursuant to the requirements of the No Child Left Behind act, and directed it to perform a number of specified actions designed to enhance performance. (Bradford Exhibit 30, Letter from Nancy Grasmick to the Hon. Thomas V. Miller, *et al.*, March 31, 2004, at 9-10, Tr. 1462:21- 1463:5.) A system in "corrective action" is one which has demonstrated "consistent academic failure." (20 U.S.C. § 6316(b)(7).)

109. Even though MSA results demonstrated some encouraging improvement in 2004, approximately 96 of the approximately 180 schools in Baltimore City remain on various levels of the State's "watch list" for required improvement. (Tr. 1457:15–1458:6; Bradford Exh. 103.) Schools identified for improvement are those that have failed for two consecutive years to meet adequate yearly progress goals under the No Child Left Behind act. (20 U.S.C. § 6316(b)(1)(A).)

3. High School Assessment Scores Are Far Below Standards and State Averages

110. The BCPSS' performance on the High School Assessment tests also demonstrates a substantial failure to meet state standards. On these new "high-stakes" tests that will be required for high-school graduation, Baltimore City students performed well below the rest of the state in 2002 and 2003. (Bradford Exhibits 117, 30 and 57.)

111. For instance, only 20.7% of Baltimore City students passed the Algebra exam compared to the more than 50% who passed throughout the State. Likewise, in 2003, only 26% of Baltimore City students passed the Biology exam compared to the State passing average of over 54%. (Bradford Exhibit 117.)

112. Superintendent Grasmick expressed extreme concern over the low percentage of students in Baltimore City passing the high school assessment. At some schools, she noted, only .7 percent students taking the exams passed. (Tr. 1459:11-1460:16.) Of the 300 students at Douglass who took the Algebra I exam, only 2 passed, and of the 275 students that took English I, only 7 passed. (*Id.*).

4. Dropout Rates and Graduation Rates Continue To Be Unacceptable

113. Baltimore City's dropout rate still substantially exceeds the state satisfactory standard (3%), and still hovers close to 11% (down from almost 14% in 1997). (Bradford Exhibit 117.)

114. BCPSS representative Gayle Amos testified that BCPSS' dropout rate is not only the highest in the state, but is increasing (Tr. 989:6-12) and that the system needs substantial additional funds for dropout prevention programs. (Tr. 989:10-992:1.)

115. The BCPSS rate of graduation is only 54.18%, meaning that slightly more than half the students graduate. (Bradford Exhibit 117.) Statewide, the graduation rate is 85%. (*Id.*)

5. Attendance Rates Continue To Be Unacceptable

116. Attendance rates are also low and absenteeism is a large issue for BPCSS, another objective indicator of continuing inadequacy. (Tr. 914; 940; 943-45.) As Gayle Amos explained, under No Child Left Behind, the attendance rate in Maryland must be 96% to make AYP (adequate yearly progress.) In 2003, however, the high school attendance rate was 80% and in 2004 it was 88%. (Tr. 938:15-940:20.) On any given day in 2003, therefore, one out of five students was not in class.

6. Suspensions and Expulsions Are The Highest In The State

117. The BCPSS' suspension and expulsion rate is the highest in the State generally, and the highest even at the elementary school level. (Tr. 864:9-870:13; *see also* Tr. at 992:2-13 (BPCSS leads the state in long-term suspensions and expulsions).)

7. Expert Testimony Demonstrated, and The State And BCPSS Both Concede, That These Scores Indicate An Inadequate Level Of Educational Services

118. Educational expert Steven Ross concluded: "By any measure, a system demonstrating those outcomes has not achieved acceptable educational goals either locally or nationally." (Bradford Exhibit 5, Ross Dec. at 5.)

119. As Dr. Ross explained at the hearing, "Baltimore ranks last in Maryland" with approximately 50-65% of the children scoring at a basic level in reading and 60-

80% scoring at a basic level in math. (Tr. 451:18-452:19.) "Basic," as Dr. Ross explained, "means inadequate," and students performing at the "basic" level need extra help to succeed. (Tr. 452:4-8, 452:16-19.)

120. The State has repeatedly acknowledged the continuing gap between Baltimore City and the rest of the state on these objective indicators of educational quality. (*See, e.g.*, Bradford Exhibit 30, Letter from Nancy Grasmick to the Hon. Thomas V. Miller, *et al.*, March 31, 2004, at 9; Bradford Exhibit 57, Letter from Nancy S. Grasmick, *et al.* to Hon. Thomas V. Miller, Jr., *et al.*, March 2003, at 4.)

121. BCPSS representatives also concluded that BCPSS achievement levels are unacceptable. (Tr. 917:17-921:17; 956:15-958:1; 961:19-962:6; 1335:2-11.)

8. The BCPSS' Student Population Contains Substantial Numbers of Students Who Live In Poverty And Have Other Needs That Require Increased Educational Focus And Resources

122. The BCPSS student population has a high percentage of students eligible for free and reduced lunches, which is the common measure of at risk or disadvantaged students. In 2003, 83% of Baltimore City's elementary students lived in poverty by this measure. (Bradford Exhibit 5, Ross Dec. at 3; Tr. 451:10-17 ("free and reduced price lunch, meaning these are disadvantaged students that need financial help").) As Dr. Grasmick explained, Baltimore City has "the largest percentage" of economically disadvantaged students in the State. (Tr. 1386: 16-1387:3; 1491:17-24.)

123. As Dr. Ross opines, it is "harder to teach these [disadvantaged] kids." (Tr. 451:15-16.)

124. Dr. Copeland testified that Baltimore City has the highest poverty level in the state and the BCPSS has a significant number of children at risk of educational failure. (Tr. 1303: 3-8.)

125. Among Maryland's jurisdictions, Baltimore City ranks last in wealth per pupil. (State Exhibit 2, Rohrer Aff. ¶ 5.)

F. The Budget Deficit And The Measures Taken To Address It

1. The Deficit and the BCPSS' Corrective Measures

126. Starting in FY 2002, the BCPSS began to engage in deficit spending. By the end of FY 2002, the cumulative deficit reached $21 million. It grew to $52 million at the end of FY 2003, and reached $58 million by FY 2004. (Bradford Exhibit 24, Draft Financial Recovery Plan, May 30, 2004, at 9.)

127. In April 2004, the accumulated deficit led to a serious cash flow crisis, raising the possibility that the BCPSS would be unable to meet its short-term financial obligations. (Bradford Exhibit 15, Draft Financial Recovery Plan.)

128. Initially, the Governor proposed a plan, to be effectuated by act of the General Assembly, which would have advanced additional State monies to the BCPSS and, in return, established substantial additional State control over the system.

129. As an alternative to the State's plan, the City provided a short-term loan of $42 million from its rainy day fund. (Bradford Exhibit 15, Draft Financial Recovery Plan.)

130. As a condition of receiving this loan, under a Memorandum of Understanding signed by BCPSS and City, the BCPSS was required to repay $34 million in August 2004, and to repay the remaining $8 million, plus interest, in FY 2006. (BCPSS Exhibit 23, MOU ¶ 3; Bradford Exhibit 24, Draft Financial Recovery Plan at 14; Tr. 1314-15.)

131. On August 1, 2004, the BCPSS repaid $34 million of the loan from the City as promised. (Tr. 1114, 1314.)

132. As a further condition of receiving the short-term loan from the City, the BCPSS also agreed, in the MOU, to retire the accumulated $58 million deficit by June 30, 2006. (BCPSS Exhibit 23, MOU ¶ 3; Bradford Exhibit 24, Draft Financial Recovery Plan at 14 Tr. 1314-15.)

133. A state statute passed this legislative session, S.B. 894, also purports to require the BCPSS to retire its accumulated deficit within two years.

134. Consistent with these requirements, the BCPSS has determined to institute cost savings sufficient to retire 60% of the deficit ($35 million) in FY 2005 and 40% ($23 million) in FY 2006. (Tr. 1314-15, 1204.)

135. The BCPSS has also determined to institute cost savings sufficient to create $10 million surplus in FY 2005 and a $10 million surplus in FY 2006 as a reserve against unanticipated expenses. (Bradford Exhibit 24 Draft Financial Recovery Plan at 14; Bradford Exhibit 21, BCPSS FY 2005 Budget.)

136. It appears that the BCPSS currently is operating within its means. (Bradford Exhibit 24, Draft Financial Recovery Plan at 11-12.) The BCPSS finished FY 2004 with a balanced budget for the first time in several years. (Tr. 1218.)

2. City and State Oversight Responsibility of the BCPSS Requires Them To Bear Some Responsibility For The Budget Issues

137. The City and State, as well as the BCPSS, bear some responsibility for the BCPSS management and the budget crisis facing the BCPSS.

138. Under S.B. 795 and the Consent Decree, the City Council reviews and approves the BCPSS' budget on an annual basis and could and should have been aware of the mounting deficit and the system's fiscal woes. Indeed, audits and assessments of the budget issues were performed in 2003.

139. The State similarly has substantial oversight responsibility under the City-State Partnership, the Consent Decree, and S.B. 795.

140. For instance, the Board is jointly appointed by Governor and Mayor, from a slate of candidates recommended by the State Board. (Tr. 1532.)

141. The State has other involvements with the system as well, including technical assistance, review and approval of the Master Plan, the ability with withhold money, oversight liason counsel, and actia; numerous site visits to schools. (Tr. 1439-1442, 1479.)

142. Moreover, the State Superintendent is required by the Decree and S.B. 795 to submit an annual report to the legislature each year on the progress of the BCPSS. (Tr. 1441.) The Superintendent's 2003 report specifically informed the General Assembly of the deficit problem as it then existed, describing a lack of fiscal controls and a FY 2002 deficit, and projecting an additional $31.2 million deficit in FY 2003. (Bradford Exhibit 57, Letter from Nancy Grasmick to the Hon. Thomas V. Miller, *et al.*, at 10, Tr. 1501-02.)

143. The three-person audit panel found that "City and State officials should have known" about challenges faced on the budget as early as 2000, and "failed to intervene and aggressively work to assist BCPSS with the deficit identified at that time." (State Exhibit 11, at 8.)

G. The Measures Taken To Address The Budget Deficit Have Reduced Educational Opportunity in the BCPSS And Slowed Progress Toward Constitutional Adequacy

144. In order to address the fiscal issues, repay the City, retire the accumulated deficit and accumulate a substantial rainy-day fund over two years, the BCPSS has instituted a number of cost savings measures that will reduce educational opportunities offered to Baltimore City's students and slow progress towards constitutional adequacy.

145. The BCPSS' total budget next year is approximately $963 million. (Tr. 73:24-74:1.) That represents an increase of approximately $63 million from last year's budget of approximately $900 million. (Tr. 74:4-11.)

146. To address the deficit, BCPSS has instituted some $45 million in reductions. The determination to retire 60% of the $58 million deficit in FY 2005 requires the system to institute $35 million in reductions to outlays for education in FY 2005. (Tr. 1244:4-7.) The determination to institute a $10 million "rainy day fund" in FY 2005 requires the system to institute an additional $10 million in reductions to outlays for education in FY 2005. (Tr. 1204:3-1205:2.)

147. In order to accomplish this approximately $45 million in reductions to outlays for FY 2005 the BCPSS instituted a number of cuts to educational programs and services, all of which are described more specifically below.

148. As Dr. Copeland conceded, the BCPSS made choices to cut educational services in order to quickly reduce the deficit and build up a reserve fund. (Tr. 1244:16-1446:3.)

149. For example, it achieved approximately $10 million in savings by eliminating systemic summer school for children in grades K-8 and by requiring high school students to pay $150 a course for summer school offerings; it achieved approximately $12.5 million in savings by eliminating some 250 teaching positions and increasing class sizes by 2 students; and it achieved approximately $ 24 in savings by reducing administrative and part time staff by some 1,000 employees, including among many others guidance counselors in elementary schools, attendance officers, and academic coaches and teacher mentors. (Tr. 255: 9-18; 1298:4-15, 1303:9-1304:7.)

150. The reductions in educational outlays, including decisions to eliminate systemic summer school for at-risk children in elementary and middle school, to increase class sizes, to eliminate guidance counselors and other specialists, to reduce the availability of mentor teachers and academic coaches, to encourage the retirement/attrition of experienced teachers and principals, and others – all without any adequate assurance that funds or focus shifted to other programs will compensate for such reductions in services to children – will immediately and adversely affect the quality

of education being provided to children in Baltimore City, as more specifically described below. (Ross, Tr. 450:6-451:9; 457:14-25; 468:4-7; McLaughlin, Tr. 612:3-20; 617:8-20; 622:8-623:20, Chinnea, Tr. 647-48; 713-15; Amos, Tr. 942:24-943:9; 993:11-994:10.)

151. The programmatic and staffing cuts initiated by the BCPSS negatively impact the educational opportunities for all students enrolled in the BCPSS, many of whom are economically and socially disadvantaged and thus "at risk." For at risk students who receive special education services the negative impact of the programmatic and staffing cuts is magnified by the presence of a disability that interferes with the student's ability to achieve. (Tr. 498.)

152. The reductions in educational outlays also created significant morale issues both within the system and among the parents and students it served. (Tr. 494-97; Tr. 504-511; Bradford Exh. 113, Buettner Dec. at 3, Eller Dec. ¶¶ 7, 9, Harrison Dec. ¶ 9.)

153. Notwithstanding a budget increase of approximately $63 million, including approximately $50 million in increased Thornton funding from the State, spending on academic programs is at best flat this fiscal year. (Tr. 121:19–123:1.)

154. Instead of being used to provide increased educational opportunities to Baltimore's student population, much of the new Thornton money provided to the BCPSS this year is being used simply to ameliorate the effect of the proposed budget cuts. (Tr. 1215:22-1217:1.)

155. There are also a number of initiatives required by the State as a part of the system's status in "corrective action" and as requirements to improve the master plan, including middle and high school reform, etc. (Tr. 1458:12-1459:7; Bradford Exhibit 12.) Although all of these initiatives require expenditures, no additional money has been provided. As a consequence, the system must institute these required actions within the

confines of its current budget and the reductions to that budget necessitated by the determination to eliminate the deficit over two years and build up a reserve fund.

156. BCPSS witnesses all recognized that the reduction in educational opportunities is a necessary result of the choices made this year to reduce the deficit, uniformly indicating that the choices made to eliminate programs and increase class sizes were "difficult" ones and testifying that if the funds were available their preferences as educators would be to continue the programs and reduce class sizes. (Tr. 647-48; Tr. 1282:2- 1285:7.)

157. The City's sole witness, similarly, conceded that the Financial Recovery Plan as suggested by the City and the Fiscal Operating Committee did not take into account classroom impacts, and agreed that a plan that does not take into account educational needs is "misguided." (Tr. 1173-74; Bradford Exhibit 24, Draft Financial Recovery Plan at 9.)

158. The State has said that to assume no educational impact from the cuts would be "naïve." (Bradford Exhibit 30, Letter from Nancy Grasmick to the Hon. Thomas V. Miller, *et al.*, March 31, 2004, at 9.)

159. General and special education are intricately linked. Students with disabilities cannot be successful without a successful general education system. (Grasmick, Tr. 1450-1451, 1466, 1477, 1517-1518; McLaughlin, Tr. 641-642.)

1. The Increase In Class Sizes Has Reduced Educational Opportunity

160. The BCPSS has achieved a savings of approximately $12.5 million by reducing teaching staff by approximately 250 and, as a result, increasing class sizes by 2.

161. The system is raising class size by two students for the 2004-2005 school year. (Tr. 106:2-4; 563:9-13; 1204:20-21.)

162. The increase in class size for 2004-05 builds on earlier increases to class size that were implemented in the 2003-04 school year. (Tr.1245: 25-1246:4; Bradford

Exhibit 63, June 13, 2002 Memorandum to School Principals re: Allocations for School-Year 2002-2003; Bradford Exhibit 65, April 17, 2002 Memorandum to Area I Principals re: Projections/Budget FY 2003.)

163. This additional increase will mean that class sizes have now been increased by up to four since the 2002-03 school year. (Tr. 1296:2-5; Tr. 563:14-24; Tr. 565:7-10; Tr. 648:8-11.)

164. The following table illustrates the changes in class size from FY 2003 to FY 2005:

	FY 2003	FY 2004	FY 2005
Pre-K	1:20 w/asst.	No change	No change
K	1:25 w/asst.	No change	No change
Gr 1-3	1:18	1:20	1:22
Gr. 4-5	1:27	1:27	1:29
Gr. 6-8	1:27	1:28	1:30
Gr 9-12	1:28	1:30	1:32

(Bradford Exhibit 21, BCPSS FY 2005 Budget; Bradford Exhibits 63, 65.)

165. These planned class size increases mean that Baltimore City, despite having the highest percentage of at-risk students who could benefit from small classes, will once again have the largest average class size of comparable Maryland districts. (Tr. 1311:19-24; Bradford Exhibits 96-101.)

166. In contrast, Montgomery County has instituted a program focusing resources on high-need, low performing schools that, among other things, has sharply reduced class size in kindergarten to 15 and in grades 1-3 to 17. There has been an

encouraging increase in test scores as a result of these reductions in class size. (Bradford Exhibit 5, Ross Dec. at 13; Bradford Exhibits 17, 19, 97.)

167. BCPSS previously has indicated that the increased class sizes are averages, not caps – meaning that classes may have *more* students than the anticipated limits. (Bradford Exhibit 13; (Letter from Sally A. Robinson to Judges Garbis and Kaplan, June 1, 2004, ("Robinson Letter").) BCPSS representatives testified, however, that the class sizes are caps, meaning that except in rare and exceptional circumstances no class will exceed the anticipated size. (Tr. 567-72; 1246:18-1247:3.)

168. The system is using its Thornton funds in part to reduce the effect of an otherwise planned class size increase, meaning that the system had planned to increase class sizes by three and it used Thornton funds to increase class sizes only by two this year. (Tr: 108:1-9.)

169. This increase in class size is particularly worrisome because one of Board's key initiatives to improve and ultimately attain adequacy – one of the centerpieces of the Remedy Plans submitted to this Court in 2000 and 2002, for instance – was smaller class size. (Tr. 1195:7-17; Bradford Exhibit 78.)

170. Students, parents, and teachers all testified that the increases in class size will adversely affect educational opportunity. As named plaintiff Keith Bradford explained, "[d]ue to budget cuts . . . [o]vernight, [his son] Andrew's two classes increased in size from approximately 21 students to a class size of approximately 27 students in one class and 33 students in the other." (Bradford Exhibit 113, Bradford Dec. ¶ 5.) This class size increase led to a sharp decrease in Andrew's grades, made it more difficult for the teachers to control the students, and caused Andrew to lose "his enthusiasm and his interest in education." (*Id.* ¶ 6.)

171. Mr. Bradford also testified that his son Kendall experienced losses in educational opportunities due to increased class sizes. For example, Kendall failed science because his class was "too large" (over 32 students) making it a difficult

environment in which to learn. (Tr. 1264:12-1267:17). Dunbar only provided one twilight science class for the hundred plus students that failed science that semester. (*Id.*). Only after significant pressure from the parents did the administration at Dunbar add one more twilight science class (leaving 90 plus students still without recourse), explaining that there was no "money in the budget to pay a teacher." (*Id.*).

172. Expert testimony demonstrates that the increase in class sizes will adversely affect educational opportunity for all BCPSS' students. Educational expert Steven Ross concluded that that larger class sizes "can only work in the direction of increasing teaching demands and reducing the potential to raise student achievement," and he notes that research demonstrates that smaller class sizes are particularly important in high-need districts like Baltimore City. (Bradford Exhibit 5, Ross Dec. at 16.) Increases in class size, according to Dr. Ross, "creates a less attractive situation for a teacher to stay in Baltimore" and "creates additional demands." (Tr. 451:2-4.) Dr. Ross points to the research demonstrating that larger class sizes disproportionately affect disadvantaged children. (Tr. 453:2-5, 15-18.)

173. Dr. Ross also raises serious question about the validity of the argument raised by the BCPSS in some court submissions that modest class size increases will not cause "significant liabilities." He concludes, to the contrary, that "there are logical and scientific reasons to believe that 'liabilities' occur with *any* increase in enrollment." (Bradford Exhibit 5, Ross Dec. at 12.) As Dr. Ross explains, "[a]ny increase in class size will be harmful, particularly in a district that serves many at risk students." (Tr. 450:7-13.) In Dr. Ross' opinion, "[e]very kid you add in a disadvantaged urban setting is increasing the demand on that teacher, decreasing the attractiveness of teaching in that district, [and] making it harder to be successful." (Tr. 455:8-13.) Ultimately, in Dr. Ross' opinion, given BCPSS' low 2004 scores, particularly the high percentage of students performing only at the "basic" level, there is an increased likelihood that larger classes will include more than a handful of students who need special attention to move

beyond the basic level. (Tr. 450-460; *see also id.* at 612:15-23; 613:25-614:24 (Dr. McLaughlin recognizing the burden on regular education teachers if there are not enough assistants trained in special education in large classrooms with students that have IEPs).)

174. The staffing cuts and increased class size also will diminish achievement outcomes for students receiving special education services. (Tr. 498-500; Tr. 603-607, 610-614, 622-623; Tr. 1466.)

175. Witnesses from the BCPSS conceded that, as educators, if the funds were available, their preference would be to reduce, rather than increase, class sizes. (Tr. 648:12-14.)

2. Teacher Reduction and Attrition and Reduction in Teacher-Mentor Program Have Reduced Educational Opportunity

176. The proposed reduction in the actual number and quality of teachers through layoffs and attrition, as well as the elimination or reduction of academic coaches and mentors that help less experienced teachers learn to teach, likely will, as Dr. Ross opines, also have an adverse impact on educational quality. (Tr. 469:17-471:12; Bradford Exhibit 5, Ross Dec. at 15-16.)

177. In order to increase class sizes for school year 2004-05, the system has reduced its teaching force by 250 teachers. (Tr. 1305:12-16).

178. A number of part-time teacher mentors, retired teachers whose function was to mentor and help train new teachers, were also laid off. (Tr. 1303:25-1304:2.) About 100 academic coaches, who also helped train teachers and provided professional development opportunities, were laid off at the beginning of the 2003-04 school year. (Tr. 1298:4-18.)

179. As educational expert Dr. Ross notes, "teacher effectiveness is by far the most important extrinsic determinant of student success" (Bradford Exhibit 5, Ross Dec.

at 15), and a policy that leads to experienced teachers leaving and provides fewer resources to assist new teachers is unwise.

180. BCPSS representative Bill Boden testified that the attrition and retirements are more likely to apply to experienced teachers than brand-new teachers. (Tr. 364-65.)

181. Dr. Ross testified that there is "very clear evidence" showing "that veteran teachers have significantly higher effectiveness scores" and that "[e]ffectiveness scores mean how much you bring your class of students up on the standardized tests than beginning teachers." (Tr. 470:6-14.)

182. It is unclear from the evidence whether the BCPSS will have sufficient teachers focusing in certain hard-to-hire specialties after the reduction/attrition to fully staff classes in those subject matter areas. (Bradford Exhibit 11, Letter from Valerie V. Cloutier to Hon. Joseph H.H. Kaplan, *et al.*, June 14, 2004, at 2; Tr. 1306.)

183. The State has repeatedly pointed out the importance of continuing to attract and retain qualified teachers and providing sound mentoring programs for them to continued progress for the BCPSS. (Bradford Exhibit 57, Letter from Nancy S. Grasmick, *et al.*, to Hon. Thomas V. Miller, Jr. *et al.*, March 2003, at 6; Bradford Exhibit 30, Letter from Nancy Grasmick to the Hon. Thomas V. Miller, et al., March 31, 2004, at 9; *id.* at 10; *id.* at 11; *id.* at 13.)

184. The loss of experienced teachers and the loss of mentoring resources already has, and will continue to, contribute to the substantial decline in morale throughout the system. As Dr. Ross explained, teacher disenfranchisement or lack of morale is one of the top two factors "in impeding reform" because "[i]t is the teachers who are the ones in the classroom interacting with the kids. If the teachers don't want to do the reform, don't embrace it, feel disenfranchise[d], it is not going to happen." (Tr. 494:7-21.)

185. Steve Buettner, a former principal who decided to take a job in Baltimore County, submitted a declaration, in which he describes the impact of the budget cuts on morale: "the budget cuts are bad enough, but the level of morale was absolutely morose. School staff cannot take these constant budget issues. It is one thing to lose a guidance counselor, secretary, and custodian, but it truly another blow to the children of this City to make their teachers feel they can lose their jobs at any time." (Bradford Exhibit 113, Buettner Dec. at 3.)

186. As described by Justine Jenkins in one of the student petitions submitted to the Court by the Algebra Project, "we lost some of the best teachers because of the crisis." (Bradford Exhibit 126; Tr. 509:11-18.) Chelsea Carson likewise described the lack of "qualified teachers" in the petition she submitted. (*Id.*; Tr. 510:1-5.)

187. A declaration submitted by Kathy Bacon, a teacher at Pimlico Middle School, emphasizes the important role that mentors play to young teachers. (Bradford Exhibit 113.) As Ms. Bacon explains, "when [my mentor] was laid off I was at a loss" and without mentors "I suspect that new teachers will be left to their own devices, causing them to make a large number of avoidable mistakes." (*Id.* at 3-4.)

188. Sheila Eller, a retired speech pathologist who served as a teacher-mentor, also submitted a declaration, in which she describes the impact of the elimination of mentors: "The budget cuts and subsequent dismissal of part-time mentors had a tremendous impact on Pimlico. For instance, teacher-administration communication suffered, after school workshops were no longer available and general teaching instruction was no longer available for novice teachers. Without teacher mentors . . . new teachers were without basic school supplies as many mentors supplied, out of their own pocket, money, chalk, pencils and paper for students." (Bradford Exhibit 113, Eller Dec. ¶ 6).

189. Niki Moghbeli, a former BCPSS teacher, likewise submitted a declaration highlighting the valuable role of mentors, particularly for new teachers. As a "brand new

teacher, the guidance I received from [my mentor] became an invaluable resource that improved my teaching skills and helped me provide quality lessons to my students." (Bradford Exhibit 113, Moghbeli Dec. ¶ 5; *see also id.* ¶ 10 ("[t]he mentor system was my most valuable tool".) After her mentor was laid off, Niki explains that, "both my teaching ability and my students' educational experience suffered. I lacked guidance in providing properly prepared materials and lessons for my students. Additionally, I could no longer provide my students with adequate school supplies – I could not even supply every student with a pencil based on the amount of supplies the school afforded me. [My mentor], however, had many outside contacts, such as her church, that donated paper, pencils and crayons to my students." (*Id.* ¶ 9.)

190. Sarah Reckhow, another new BCPSS teacher, also found her mentor to be a very valuable resource, but like others, had to survive without a mentor during the 2003-2004 school year. (Bradford Exhibit 113, Reckhow Dec. ¶ 2 (noting that "[t]he first year of teaching is incredibly challenging" and that she has "no doubt that the presence of mentors for first year teachers is an important way to improve the level of instruction for students in Baltimore City.").)

191. The impact of the high level of vacancies for special education teachers (115 vacancies) and the lack of certified special educators is exacerbated by BCPSS' cust in support staff and professional development opportunities. (Ross, Tr. 494-499; McLaughlin, Tr. 615-617; Grasmick, Tr. 1460-1462; Amos Tr. 780-786, 883-890, 908-913.)

3. Elimination of Systemic Summer School for Struggling Elementary and Middle School Students Has Reduced Educational Opportunity

192. The BCPSS purports to save approximately $10 million for FY 2005 by eliminating systemic summer school offerings for elementary and middle school students who are struggling academically and who have been retained in a grade. (Tr. 105:13 –

106:1: 1204:22-25; Tr. 521:13-17 (Chinnea – budget allocation for summer school in 2003 was between $11 and $14 million); Tr. 523:10-13 (2003 summer program was a systemic program).)

193. That represents an additional reduction from summer school offerings from 2002-03. For the 2002-03 school year, the system had budgeted $17 million to summer school. (Bradford Exhibit 45, BCPSS, An Evaluation of Summer School 2003: Phase I, Nov. 21, 2003, at 17.)

194. Previously, the system offered systemic summer school to all elementary school children who performed poorly on the Comprehensive Test of Basic Skills and who were at risk of being retained a grade. In 2002, 43,257 students were eligible for this summer school program, and approximately 30,600 attended. In 2003, similarly, 39,541 students were eligible, and 18,965 attended. (Bradford Exhibit 45, BCPSS, An Evaluation of Summer School 2003: Phase I, Nov. 21, 2003, Executive Summary; Bradford Exhibit 67, BCPSS, An Evaluation of Summer School 2002: Phase I, August 2002 at 22.)

195. Retained students from grades K-8 in need of summer school programs are no longer given the opportunity to make up that grade over the summer. (Tr.1300:24-1301:3; Tr. 529:17-25.) As student Malika Howell said, "[m]y little sister can't go to summer school and she is going to have to repeat the first grade." (Bradford Exhibit 126; Tr. 509:1-10.)

196. There is no plan in place for a systemic summer school program for 2005 either. (Tr. 655:24-656:8.)

197. Systemic summer school provided a substantial benefit to students who attended. Testimony and evidence from the BCPSS and the State, as well as educational experts, uniformly so indicates.

198. As the BCPSS noted in its June 1 submission to the Court and in the draft "intervention plan" submitted as an exhibit, students "lose approximately 2.6 months" of

grade level equivalency over the summer, and "[s]ummer learning loss contributes to the achievement gap in reading performance between lower income and higher income children and youth." (Bradford Exhibit 13, Robinson Letter, Attachment 1, Slide 1, quoting the Johns Hopkins University's Center for Summer Learning; Tr. 645:14-646:1; Tr. 714:12-19; BCPSS Exhibit 11.)

199. The system's own evaluations describe the benefits to students attending systemic summer school. as detailed in the BCPSS Remedy Plan for FY 2003 "BCPSS decided on summer school as one intervention, based on positive results from its own pilot research conducted in 1999 and the success of The Summer 2000 program." (Bradford Exhibit 78, The Remedy Plan.) (Bradford Exhibits 45, 67.)

200. Increased summer school offerings over the past few years have been credited with helping city schools improve their performance by the independent evaluators required by the Consent Decree and S.B. 795. (*See, e.g.*, Interim Evaluation, Executive Summary, at 3, 29-30 (noting that summer school "helped to increase achievement for a majority of students who participated").) as detailed in the BCPSS Remedy Plan for FY 2003 "BCPSS decided on summer school as one intervention, based on positive results from its own pilot research conducted in 1999 and the success of The Summer 2000 program." (Bradford Exhibit 78, The Remedy Plan.)

201. Representatives of the BCPSS testified that systemic summer school benefited students and was a "successful" program, and that elimination of summer school diminished opportunities for students. (Tr. 545:13-546:4; Tr. 645:21-646:1; Tr. 713:9-16; Tr. 1245: 16-21.)

202. System officials also testified that if the money was available, their preference would be a continuation of a systemic summer program, along with a full program of intervention during the school year. (Tr. 647:21-648:2; Tr. 1288: 4-9.)

203. The State, similarly, has conceded that systemic summer school provided a substantial benefit to students who attended. In her 2003 report to the General

Assembly, similarly, the State Superintendent noted that summer school was "critical to BCPSS students." (Bradford Exhibit 57, Letter from Nancy S. Grasmick, *et al.* to Hon. Thomas V. Miller, Jr., *et al.*, at 10). Superintendent Grasmick testified that the ideal program would combine interventions during the school year with a systemic summer school system. (Tr. 1544:17-1545:25.)

204. Expert testimony demonstrates that the elimination of systemic summer school reduces educational opportunities for students. Educational expert Steven Ross confirms that elimination of a systemic summer school program for struggling elementary and middle school programs will adversely affect educational opportunities. (Bradford Exhibit 5, Ross Dec. at 3-10.) As Dr. Ross testified, "[e]limination of a systemic summer school program is moving in the wrong direction. It is detrimental to the children of Baltimore. It would be detrimental to the children at risk in any environment." (Tr. 457:21-25.)

205. Dr. Ross bases this conclusion on research that shows that "[s]ummer school is one area that has a positive effect on disadvantaged students." (Tr. 458:1-7.) Dr. Ross also points to research showing that "during the summer, at risk kids lose about three months relative to where they were before [the] recess started" compared to "[m]iddle class kids or less disadvantaged kids only lose one month." (Tr. 458:18-22.)

206. In place of this systemic summer program, this summer BCPSS is offering (1) a patchwork of community-based programs to significantly fewer students, approximately 7,000; (2) a "summer learning challenge" developed by the mayor, in which students are expected to solve a daily math problem and read 30 minutes a day; and (3) a draft plan for targeted student interventions to take place in 2005. (Bradford Exhibit 13, Robinson Letter at 3-4; BCPSS Exhibit 11; Tr. 528-40.)

207. These programs do not provide an acceptable substitute for a systemic summer school program designed to provide academic help to struggling students and to prevent the inevitable summer learning loss that occurs when students are not in school.

208. The community-based summer programs serve substantially fewer students than the systemic summer school program – approximately 7,000, as compared to 18, 965 last year and 30,600 the year before. (Tr. 1300:20-23; BCPSS Exhibit 7, BCPSS Exhs. 25, 34.)

209. The community-based programs, moreover, are largely continuations of supplemental programs also offered last year. (Tr. 650:1-7; Bradford 124, 125.)

210. They do not offer students the opportunity to avoid repeating a grade. (Tr. 529.)

211. The community-based programs are ad hoc, developed by individual community groups and schools, without either the systemic, unified curriculum or the formal evaluative component that both Dr. Ross and the BCPSS recognized are important. (Tr. 457-67; Bradford Exh. 5) As Chief Academic Officer Linda Chinnea testified, there is no "formal evaluation" planned for the 2004 summer school program like the "evaluation of the [2003] systemic summer school program." (Tr. 540:3-17; *compare* Tr. 646:15-647:11 (noting importance of evaluative and systemic components for effective programs).)

212. Educational expert Stephen Ross opined that this patchwork of community-based programs, although they appear well-intentioned and may be individually valuable to a limited population of students, are not a sufficient substitute for a systemic program designed to stem the inevitable summer learning loss. (Bradford Exhibit 5, Ross Dec. at 6; Tr. 457-67.)

213. Similarly, Dr. Ross observed that programs like the Mayor's Summer Learning Challenge, although well intentioned, are not a "substitute for a research-based, well-designed, well-implemented program that gets kids learning during the summer." (Tr. 463:19-22.)

214. Finally, the system's draft "intervention plan," although it contains some promising indications of additional systemic focus on children who need help in reading

and math, does not substitute for a systemic summer school program. As Dr. Ross noted, the system's draft plan is "pretty thin;" appears to be just "a list of objectives" and lacks a "rigorous evaluation component." (Tr. 466:12-467:12.)

4. Adding A Fee To Summer School for High School Students Has Reduced Educational Opportunity

215. The 2004 summer program for high school children who need credits to graduate also has been scaled back significantly as a result of the budget cuts.

216. The high-school summer program is a credit replacement program. It permits high school students who have failed classes for which they need credits to graduate to earn those credits during the summer. Students may take two classes during the summer program. (Tr. 531, 668; Bradford Exhibits 45, 67, 102.)

217. In the summer of 2002, the summer school program for high school students was free. In 2003, students were charged $75 total to attend. In 2004, high school students were charged $150 per course or, if a student takes the maximum two courses, $300. (Tr. 522; Tr. 531:14-21; 673:22-674:25; 669:22-670:4.)

218. The system does provide a "waiver" program. There is evidence that students did not learn of the waiver (or, indeed, of their eligibility for summer school) until very shortly before summer school was to start, and there is also evidence that the administration of the waiver program was confused and did not provide students with appropriate opportunities to obtain waivers. (*See* Bradford Exh. 113, Foy Dec. at 2-3.)

219. Of the 2,646 students enrolled in the high school summer courses this summer, only 1,000 waiver applications were submitted. 800 waivers – representing about a third of the students attending – were granted. (Tr. 537:4-11; Tr. 670:25-671:4.) Most of the waivers granted were partial, not full, waivers. (Tr. 126:22-127:7.)

220. There was a substantial drop in the number of high school students that attended the 2004 summer program compared to both the 2002 program, which was free, and the 2003 program, in which students were charged only $75. (Tr. 673:22-674:25.)

221. The BCPSS' summer school reports reflect that in 2002, 6,489 attended at the high school level and that in 2003, 4,086 high school students attended summer school. (Bradford Exhibit 67, BCPSS, An Evaluation of Summer School 2002; Phase I at 28, table 11; Bradford Exhibit 45, BCPSS, An Evaluation of Summer School 2003: Phase I at 42, table 12.) In 2004, only 2,646 attended. (Tr. 673:22-674:25.)

222. Educational expert Dr. Steven Ross testified, "[t]he high school students having the strongest need for summer school experiences are also those least likely to have financial resources" so the fee "will serve as a barrier or deterrent for many students in need." (Bradford Exhibit 5, Ross Dec. at 8; Tr. 464: 15-19 ("the students most likely to need the summer school program are the least likely to have $150").)

5. Elimination of Elementary-School Guidance Counselors, Attendance Monitors, and Other Support Personnel Has Reduced Educational Opportunity

223. The BCPSS also decreased costs by eliminating guidance counselors and other essential staff, including employees charged with monitoring attendance and addressing student attendance problems. (Bradford Exhibit 21, BCPSS Fiscal Year 2005 Proposed Operating Budget at 77, 83; Tr: 109:9-17; Tr. 520:6-9; Tr. 940; Tr. 1091:12-1096:1)

224. Ms. Amos testified that 24 guidance counselors for elementary schools were eliminated leaving no guidance counselors to serve elementary age students, and that the guidance counselor to student ratio for middle and high school is 1:100. (Tr. 774-76; 945-46.)

225. At-risk students, in both elementary and high school, benefit from guidance counselors. (Tr. 914; 940; 943-45.) This is because BCPSS, in Ms. Amos' opinion, has to consider more than the academic side of the equation for at risk kids, "[y]ou have to consider the whole child, and support programs should be an integral part of a child's instruction, instructional program." (Tr. 943.) Irma Johnson submitted a declaration in which she describes the vital role that guidance counselors play in a system with high at-risk population. Bradford Exhibit 113, Johnson Dec. at 2 ("I was perplexed when it was announced that all elementary school counselors in BCPSS were going to be removed as of January 2, 2004. This service is vital to student living in low social economic areas!!")

226. Ms. Amos testified that the best model in her opinion would be to have guidance counselors and outside mental health services in place for the kids because "a lot of the guidance counselors don't do wraparound services, and our students come to school with family issues and issues that don't just end at 3 o'clock or 2:35, that they do need support in the community. A lot of them come from drug-infested areas. We have a lot of grandparents raising students. A lot of our attendance problems are due to, when we investigate, parents or grandparents not being able to get the kids to attend school, and for truancy, Juvenile Services doesn't really -- they are overwhelmed, so they don't really handle it very well. So a lot of mental health providers follow through outside of school. They visit the home. They work with the family and they do other things besides the guidance program. (Tr. 943-946.)

227. Dr. Ross has opined that such cuts will have an adverse educational impact. (Bradford Exhibit 5, Ross Dec. at 14-15.) As Dr. Ross notes, "[a]t risk kids, disadvantaged kids and schools need guidance counselors . . . in a very serious way in terms of helping" because "[t]here are more behavior problems, more suspensions, more referrals." (Tr. 468:4-7.) Thus, in Dr. Ross' opinion, "it is negative to eliminate some of the guidance counselor positions." (Tr. 468:18-19.) Special Education expert Dr.

McLaughlin also explained that the lack of guidance counselors and mentors affects teacher attrition. (Tr. 616.)

228. Students also testified to adverse effects from the loss of guidance counselors. Chantel Morant, a student representing an advocacy and tutoring group, the Algebra Project, explained that the loss of a guidance counselor at a crucial time in a student's academic career, for example, in the 11th grade when SAT exams and college recommendations need to be completed, can have a devastating impact. (Tr. 507:14-508:4.) Likewise, in one of the petitions submitted to the Court by the Algebra Project, Jaree Colbert explained that, "I lost my guidance counselor, leaving me to talk to a stranger about my personal life." (Bradford Exhibit 126; Tr. 509:19-25.)

229. The system also has eliminated most of the central office staff that address and track attendance issues, adding those duties to the workloads of employees in the area offices. Moreover, many of the attendance clerks in the area offices (who make phone calls to parents about truancy) were part-time staff and also were let go. The system also has eliminated "truancy courts" from a number of schools. (Tr. 1091:12-1096:1.)

230. Similarly, the loss of employees charged with monitoring attendance will have an adverse educational impact, particularly given the system's substantial problems with attendance and truancy described above.

6. Failure to Expand Existing Programs Will Reduce Educational Opportunity

231. In addition to these cuts and others, there are a number of areas in which the BCPSS has decided not to implement planned expansions in services designed to help educate at-risk students.

232. The February 2004 revised Master Plan currently on file indicates that the BCPSS intends not to implement previously planned expansions in music and arts and physical education programs, in gifted and talented programs, in pre-Kindergarten

programs, in technology models to early learning environments, in providing bilingual translators for parents with difficulty speaking English, and the like. (Bradford Exhibit 38, Revised Master Plan, at 173, 175, 187, 203, 236, 238.)

H. There Are A Number Of Ways To Infuse Extra Cash For Education Into The BCPSS For This Academic Year

233. The evidence demonstrated that there are a number of ways that the BCPSS could ensure that at least an additional $30 to $35 million is spent on improving educational opportunity for children this year.

234. The BCPSS and the State Superintendent could request a deficiency appropriation from the General Assembly.

235. Indeed, the most recent revision to the Financial Recovery Plan, submitted by Chief Executive Officer to the Board based on a report from the Financial Operating Committee, dated July 20, 2004, recites that the BCPSS intends to seek a deficiency appropriation for at least the approximately $10 million that a geographic cost of education index would have yielded to Baltimore City if that adjustment had been included in the state budget for FY 2005.[4]

236. The City could arrange a bond issue to accelerate the approximately $31.5 million in accrued but unpaid leave time that the City is currently paying the BCPSS over time.

237. After school system employees were transferred from the city payroll to the school system payroll as part of the creation of an independent Board under the Consent Decree and S.B. 795, the City agreed to pay the Board an amount to cover the cost of accrued unpaid leave for those employees, over a number of years. The current

---

[4] The Board has recently provided the Court with copies of the new Plan, which apparently was approved by the Board during a meeting on August 10.

balance owed comes to $31.6 million, to be paid in 11 payments, the first ten in the amount of $2.8 million each and the balance in a final payment. (Tr. 1147-49.)

238. City Finance Director Peggy Watson testified that the City is prepared to arrange a bond issue that would yield the present value of those payments to the BCPSS. (Tr. 1149-50.) Ms. Watson and a number of documents confirm that the BCPSS could then use the amount yielded by that issue to provide educational benefits to children. (Tr. 1150; Bradford Exhibits 34, 37, 94.)

239. The BCPSS has indicated a willingness to engage in such a transaction. The most recent Financial Recovery Plan drafted by the CEO, and recently submitted (after the hearing) to the Court, provides that the "City of Baltimore will accelerate its payments to BCPSS for unpaid leave."

240. The City could increase its local share of school funding. The Court notes that the City's local share of school funding has remained flat since the Court issued its June 2000 declaration finding that substantial additional funds were necessary, while the State's share of school funding has increased, albeit not enough for compliance with the June 2000 declaration. (Tr. 1168-70; State Exhibit 1, Brooks Dec. Attachment A, at 4.)

241. The City could arrange a further long-term loan to its partner, the BCPSS, and could arrange for repayment on more generous terms than the almost immediate repayment of the bulk of the $42 million loan it already has offered. City Finance Director Peggy Watson and City documents confirm that at least one major bond rating agency, Standard & Poor, has determined that the City's level of reserves was "satisfactory" even after the $42 million initial loan was made. (Tr. 1132-1136; City Exhibit 4.)

242. The BCPSS also could cut its planned $10 million "rainy day" fund by a substantial amount, recognizing that if there ever were a "rainy day" for the students of Baltimore City, this is it.

I. Management Of The System, While Still Exhibiting Deficiencies, Seems To Be Improving Under The New CEO And Management Team

243. The BCPSS is currently operating under almost entirely new management, including a new CEO, a new CAO, a new CFO, a new Director of Human Resources, and several new Area Officers.

244. The BCPSS, under this new management team, appears to be moving to address a number of the issues that led to the accumulation of the deficit. It is instituting a new computerized tracking system that should permit it to accurately track vacancies and salaries, which has been an issue in the past, and it has imposed significant new budgeting and fiscal controls. It has a timeline to address and appears to a making progress toward, the issues raised by the Ernst & Young and Greater Baltimore Committee audits.

245. Most of the evidence of mismanagement presented at the hearing appeared to relate to issues that are not current, and that were not attributable to current to management.

246. The Court believes at this time that the current new management should be permitted to continue its work.

247. The Court has continuing concerns, however, about the management of the system. In particular, there was troubling evidence at the hearing about the reporting and tracking of student credits, graduation requirements, and other information. There was also troubling evidence about continuing issues with correctly determining the number of students in the free and reduced price lunch program, continuing issues tracking Medicaid payments, and the like, all of which could have financial consequences for the system and harmful effects in the students. (Tr. 1450:24-1451:9.)

III. APPLICABLE LAW

A. *The Maryland State Constitutional Requirement of Educational Adequacy*

As this Court first recognized in 1996 during proceedings on Plaintiffs' motion for partial summary judgment, an education is not only of paramount importance to children and society, it is also a constitutional right of every Maryland schoolchild. This conclusion is mandated by the Maryland Court of Appeals' direction in *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 638-39 (1983). In *Hornbeck* the Court of Appeals held that the right to an adequate education is guaranteed by Article VIII of the Maryland Constitution. Article VIII of the Maryland Constitution provides:

> "The General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation or otherwise, for their maintenance."

Md. Const. Art. VIII § 1. Consistent with *Hornbeck*, this Court previously held in this Court's Order of October 18, 1996, that "the thorough and efficient language of Article VIII requires that all students in Maryland's public schools be provided with an education that is adequate when measured by contemporary educational standards." In granting partial summary judgment to the Bradford plaintiffs and the City, this Court determined that the State's own educational standards, as well as other contemporary education standards, established that Baltimore City schoolchildren were not receiving a constitutionally adequate education.

This Court has continuing jurisdiction to remedy the constitutional violation it found in October 1996 and June 2000. *See Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968)("the court should retain jurisdiction until it is clear that state-imposed segregation

has been completely removed"); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 337 (Wyo. 1980)(directing the trial court to "retain jurisdiction until a constitutional body of [public school financing] legislation [was] enacted").

B. *The Court's Inherent Power and Jurisdiction to Enforce its Own Orders*

This court has the inherent power and jurisdiction to enforce its own orders. *See e.g., Reich v. Walker W. King Plumbing & Heating Contractor*, 98 F.3d 147, 154 (4th Cir. 1996); *Virginia Panel Corp. v. MAC Panel Co.*, 139 F. Supp. 2d 753, 756 (W.D. Va. 2001); *Link v. Link*, 35 Md. App. 684, 688, 371 A.2d 1146, 1149 (1977); Memorandum Opinion of June 25, 2002, at 4-5.

IV. CONCLUSIONS OF LAW

The focus of these proceedings was on the ability of the Baltimore City Public School System (BCPSS) to operate financially and programatically during the upcoming school year given the system's serious cash-flow crisis and accumulation of a $58 million structural deficit. The system is in its current precarious position due to the cumulative effect of substantial under-funding by the State, past mismanagement by the School Board and prior administrators and the City's hastily conceived bail-out, which has imposed an unreasonable and unnecessary timetable for financial recovery. Clearly, the economic downturn of the system was set in motion by the State's failure to provide the financial support the experts and this court found to be necessary in 2000. The City exacerbated the problem by taking over the system when it did not have the economic wherewithal to operate the system. It is evident, however, that money alone cannot solve

the system's problems. The school system has lacked leadership at all levels, lacked control of its finances, lacked accountability and was top-heavy with administrative positions.

The Court is gravely concerned that measures taken by the State, City and School Board to address the current fiscal crisis have compromised the quality of education being provided to Baltimore City's schoolchildren. It is clear from the sheer weight of the evidence adduced during the July and August hearings that the constitutional violation that this Court found in October 1996 and June 2000 is continuing. Given the existence of this persistent constitutional violation, the System must not significantly reduce educational opportunities available to children. The BCPSS, however, under the direction of the Fiscal Operating Committee, has diverted funds toward the rapid pay down of the deficit which would otherwise be used to pay for fundamental educational services and programs for Baltimore City schoolchildren. Compounding the problem, the State has been unwilling to provide immediate funding in accord with this Court's final 2000 order and will not arguably comply with that order until 2008 when full funding under the *Bridge to Excellence Act* is received.

In the mean time the children cannot be made to suffer for the mistakes of the adults. To that end, the court will declare that both the Memorandum of Understanding between BCPSS and Baltimore City and S.B. 894, which require the pay down of the $58 million deficit in two short years, null and void as applied to BCPSS. Additionally, the Court will declare that the State should make every effort before FY 2008 to provide the substantial additional funding which it has unlawfully failed to provide in contravention of this Court's final 2000 order. For this school year alone, the State and BCPSS should

make available $30-45 million in operational funding to be spent on programs and services that benefit at-risk children. The Court sees no reason at this time for a major restructuring of the BCPSS. The Court, however, is concerned with the City's role under the MOU, which gives the City increased authority over the BCPSS budget through the Fiscal Operating Committee. The City has impressive capacity to assist the BCPSS in book-keeping and accounting. It lacks the capacity, however, to link educational outcomes to mandated budget cuts. Therefore, the Court will further declare that the City shall continue to monitor BCPSS' accounting and finances through the Fiscal Operating Committee and the MOU, but decisions regarding program funding and the BCPSS operating budget must be made solely by the School Board under the direction and assistance of the Maryland State Board of Education.

A. The Constitutional Violation This Court Idenitified in October 1996 and June 2000 is Continuing

Article VIII of Maryland's Constitution provides that the "General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools, and shall provide by taxation or otherwise, for their maintenance." Md. Const. Art. VIII § 1. Under Article VIII, a "thorough and efficient" education, meaning an education that is adequate when measured by contemporary educational standards, is the constitutional right of every Maryland schoolchild. *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 639, 458 A.2d 758, 780 (1983); *Montgomery County v. Bradford*, 345 Md. 175, 181, 691 A.2d 1281, 1284 (1997); Order of October 16, 1996; Memorandum Opinion of June 30, 2000, at 24-25 (final, binding, and the law of this case because the State dismissed its appeal). Under these standards, the constitutional

violation that this Court found in October 1996 and 2000 is continuing. A number of objective indicators, including the student scores, dropout rates, and other indicators described in the Court's finding of facts above, demonstrate that the students in Baltimore City, as of August 2004, are still not receiving an education that is adequate when measured by contemporary educational standards. They are still being denied their right to a "thorough and efficient" education under Article VIII of the Maryland Constitution.

B. The Court is Supervising A Phased-In, Gradual Remedy For That Constitutional Violation, And Until That Remedy Is Achieved The System Must Not Reduce Educational Opportunities Available to Children

The State of Maryland enacted the historic *Bridge to Excellence Act* in 2002 in direct response to this Court's June 2000 order declaring that additional State funding of $2,000 to $2,600 per pupil was required for constitutional adequacy. The *Bridge to Excellence Act* was intended to eliminate the "adequacy gap" between pre-existing funding and the amounts necessary for school systems to comply with state educational standards. Under the *Bridge to Excellence Act*, Baltimore City is to receive increases in State funding over pre-existing funding of approximately $258 million, to be fully phased in by FY 2008. This money is meant to provide Baltimore City with sufficient State funding to achieve adequacy. Evidence at the hearing indicates that the system should receive at least another $225 million over current levels under Thornton by FY 2008. Full compliance with this Court's June 2000 declaration will not arguably occur until the BCPSS receives at least $225 million in additional State funding under the Thornton Act. Therefore the State and BCPSS are under a continuing obligation to remedy the inadequacy of the education provided to students in the BCPSS. Until that constitutional violation has been corrected, the system must continue to make progress toward

constitutional adequacy. To that end, the parties shall not substantially reduce the educational opportunities provided to Baltimore's school children.

C. Declaratory Relief Ensuring Continued Progress Towards That Gradual Remedy, And No Deprivation of Educational Opportunities As A Result of The Budget Crisis, Is Appropriate

This Court has the authority and jurisdiction to enforce its own orders and to remedy the constitutional violation it found in October 1996 and 2000. *See e.g., Reich*, 98 F.3d 147, 154 (4th Cir. 1996); *Virginia Panel Corp.*, 139 F. Supp. 2d 753, 756 (W.D. Va. 2001); *Link*, 35 Md. App. 684, 688 (1977); Memorandum Opinion of June 25, 2002, at 4-5; *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968)("the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed"); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 337 (Wyo. 1980)(directing the trial court to "retain jurisdiction until a constitutional body of [public school financing] legislation [was] enacted"). Accordingly, the Court rules that, as a matter of law, the steps taken to address the fiscal crisis facing the Baltimore City public schools must not stop the progress towards providing a constitutionally adequate education for Baltimore schoolchildren. The following steps taken to address the fiscal crisis did reduce educational opportunities and impermissibly interfered with progress towards providing a constitutionally adequate education for Baltimore schoolchildren: elimination of a systemic summer school program, increases in class size by up to four children, reduction of experienced teachers and elimination or reduction of mentors and academic coaches, elimination of guidance counselors in elementary school. Among other things, the steps taken above, while achieving cost savings, reduced educational

opportunities and impermissibly interfered with progress towards providing a constitutionally adequate education for Baltimore school children.

The court hereby finds that the financial savings associated with these steps exceeds $30 million. The Court finds that the current BCPSS budget reserves $45 million ($35 million for deficit reduction and $10 million in reserve fund) to address fiscal issues rather than devoting those funds to education programs. Therefore, a declaration is appropriate which directs the BCPSS and the State to make available an additional $30-45 million in operational funding this fiscal year to be spent on programs and services that benefit at-risk children. The Court further directs the parties to report to it in four weeks on the status of the additional funding and plans for its use.

D. The Schedule Established for the Elimination of the $58 Million Structural Deficit and The Creation of a $20 Million Cash Reserve Starves the School System of the Operational Funds Needed to Sustain The System's Progress Toward Academic Achievement and Constitutional Adequacy

Senate Bill 894 and the Memorandum of Understanding ("MOU") between the City of Baltimore and the Baltimore City Public School System ("BCPSS") both require the accumulated $58 million deficit to be eliminated by FY 2006. The Court has the power and authority to strike the statute, as applied to Baltimore City, to the extent that it violates the children's constitutional right to an adequate education by requiring funds to pay down the deficit at the expense of reduced educational opportunities. *See, e.g., Sugarloaf Citizens Ass'n, Inc. v. Gudis*, 319 Md. 558, 568, 573 A.2d 1325, 1331 (1990) (declaring section 19A-22(b) of Montgomery County Code unconstitutional and explaining that "[c]ourts can invalidate legislation on grounds of unconstitutionality."); *Bd. of Pub. Works v. Baltimore County*, 288 Md. 678, 421 A.2d 588 (1980) (invalidating provisions of Chapter 889 of the Acts of 1980 that authorized the expenditure of state

funds); *Beauchamp v. Somerset County Sanitary Comm'n*, 256 Md. 541, 261 A.2d 461 (1970) (affirming the unconstitutionality of Chapter 674 of the Laws of 1996 that provided a property exemption from the levy of taxes); *Brigham v. State*, 692 A.2d 384 (Vt. 1997) (system for funding public education held in violation of state constitution); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (statutory funding scheme found unconstitutional). Similarly, the Court may invalidate the MOU to the extent that it stands in direct conflict with the Board's constitutional duty and is contrary to public policy. *See* 15 Grace McLane Geisel, *Corbin on Contracts* § 79.1-.3 (revised ed. 2003)(courts have the right to refuse contract enforcement when necessary to protect a public interest)(constitutions are declarations of public policy); *Medex v. McCabe*, 372 Md. 28, 811 A.2d 297 (2002)(contracts conflicting with public policy are invalid); *Jennings v. Gov't Employees Ins. Co.*, 302 Md. 352, 488 A.2d 166 (1985)(holding insurance policy clause contrary to public policy invalid and unenforceable). For the reasons discussed below, the Court finds both S.B. 894 and the MOU void to the extent they require the deficit to be eliminated by the end of fiscal year 2006. Additionally, the Court finds that, absent additional funding from the State of Maryland, the deficit should be retired no sooner than fiscal year 2008 and that no more than $5 million per year should be dedicated to the creation of a $20 million cash reserve.

The City's effective take over of the BCPSS through the MOU accomplished one thing, it brought the budget into line, though it did so at the expense of the most important job of the school system, educating the children. The City had a myopic view of the system. Their focus was on rescuing a bankrupt system and returning it to solvency regardless of the impact on the system's capability to educate its students. The City's

effort has gone a long way in restoring financial stability to the school system. It's $42 million loan met the system's short-term cash-flow needs and allowed the system to close out FY 04 with a balanced budget. But the funds used to pay back $34 million of the city loan were drawn directly from the $90 million payment the School System received from the State on July 31, 2004. These funds were intended for classroom instruction and to expand educational programs and opportunities for the city's at-risk student population, not for debt service. Instead, these funds were siphoned away to repay the City. The City knew when it extended the loan that the School Board was scheduled to receive the $90 million payment from the State. In short, the City risked very little to effectively retake control of the school system pursuant to the MOU. The School Board, in crisis, had no choice but to sign on and sign on they did.

The MOU requires the immediate pay down of the $58 million accumulated deficit over two years. Sixty percent, $35 million, is to be paid down by the close of FY05 and the remaining forty percent, $23 million, is to be paid down by close of FY06. (BCPSS Ex. 11, draft Financial Recovery Plan at p. 14). Additionally, the MOU requires that $10 million be set aside in each of FY 05 and FY 06 as a reserve against unanticipated expenses. (*Id.*) This schedule for eliminating the deficit starves the school system of the operational funds needed to sustain the system's progress toward academic achievement and constitutional adequacy. The great weight of the evidence submitted over the course of the four day hearing in this case clearly establishes that the constitutional violation this court first found in 1996 is continuing. Resolving the present fiscal crisis while simultaneously ensuring that educational quality and opportunity are not further compromised requires a greatly more nuanced approach than the immediate

and abrupt pay down of the deficit. Article VIII's emphasis on educational adequacy demands nothing less. Simply put, the children of the Baltimore City Public School System continue to receive an inadequate education as measured by contemporary educational standards and, while that constitutional violation persists, the system must not reduce educational opportunities available to them.

Going forward, balanced budgets are undoubtedly the goal, and a necessary component of a "thorough and efficient" system of education. The court is keenly aware that one "cannot spend more than it earns." But neither can the State, School Board nor City, if allowed to exert continued control over BCPSS' budget, shirk their constitutional obligation by cutting fundamental educational programs to resolve the budget crisis in the most expedient manner available. The court sees no reason why the $58 million structural deficit needs to be eliminated in a manner that suffocates operational cash flow and that ultimately results in disproportionately high class sizes, drastic reductions in administrative capacity and the elimination of fundamental educational programs. The State (and Sen. Robert Neall, who then was consulting on the BCPSS' financial problems) all have previously represented to the Court that if BCPSS is running a currently balanced budget (which it is) there is no fiscal reason why it should not take a longer period of time to retire the deficit, so that more money would be available for educational purposes. (Tr. 1584-85.) Indeed, Senator Neall suggested a 10-year period. (*Id.*)

Abbreviated time-lines and expedited repayment schedules are inappropriate here, in the context of public education, where the state and school system, in the face of a persistent constitutional violation, must continue to strive toward the goal of a thorough

and efficient education for the children of Baltimore City. To do otherwise would jeopardize, if not destroy, the gains made under the City-State partnership since 1996. For the above reasons, both S.B. 894 and the MOU between the City and BCPSS should be declared null and void to the extent that they require retirement of the $58 million deficit in two years. Additionally, the Court finds that, absent additional funding from the State of Maryland, the deficit should be retired no sooner than fiscal year 2008 and that no more than $5 million per year should be dedicated to the creation of a $20 million cash reserve.

E. The State Has Not Complied With Its Constitutional Obligations Or its Obligations Under the June 2000 Declaration

The State of Maryland has not complied with its constitutional obligations to provide and fund a thorough and efficient education for the students in Baltimore City public schools, nor has it complied with this Court's June 2000 order, a final order of this court, which constitutes the law of this case. The State has failed to provide the additional $2,000 to $2,600 per pupil that was ordered by this Court in 2000. The State will not even arguably comply with that declaration until, at the earliest, the full amount of funding provided for in the *Bridge to Excellence Act* is received by BCPSS. Even then, the State will have substantially underfunded the amounts due under the 2000 declaration. For the fiscal years 2001, 2002, 2003 and 2004 alone, the State has unlawfully underfunded BCPSS by an amount ranging from $439.35 million to $834.68 million[4]. The State

[4] The City and BCPSS have set forth two different methods of calculating the amounts still owed by the State under this Court's 2000 order for its failure to adequately fund during FY 2001, 2002, 2003 and 2004. The City's method uses FY 2000 as the base year for calculating increases in State funding, while the BCPSS method uses FY 2001 as the base year. The Court will not rule at this time on which is the appropriate calculation, suffice to say, the State continues to owe BCPSS significant and meaningful sums under

cannot avoid its constitutional obligation to provide adequate funding to BCPSS by focusing on management deficiencies at BCPSS. While the Court recognizes that management problems would have persisted regardless of the State's increased funding, those problems are no defense to the State's on-going and continuous violation of its obligations under the Maryland constitution and a final order of this court. Had the State fully complied with this Court's June 2000 order to provide $2,000 to $2,600 per pupil, BCPSS would not have been faced by such a crippling fiscal crisis.

Based on the findings of fact set out above, the Court holds that the State has not complied with its constitutional obligation to the children of Baltimore City, and will not comply, until, at the earliest, the full amount of funding provided for in the *Bridge to Excellence Act* is received. Moreover, the State has unlawfully underfunded BCPSS by $439.35 million to $834.68 million in contravention of a final order of this court. The State should not only continue to move toward full funding of the *Bridge to Excellence Act*, but should endeavor to repay over the next several years the amounts it failed to fund pursuant to this Court's 2000 order.

F. At The Present Time , A Major Restructuring of BCPSS, As Suggested By the State, Is Not Necessary For the System to Function Efficiently and Effectively

The Court sees no reason at this time for a major restructuring of the BCPSS. The BCPSS is currently operating under almost entirely new management, including a new CEO, a new CAO, a new CFO, a new Director of Human Resources, and several new Area Officers. The BCPSS, under this new management team, appears to be moving to address a number of the issues that led to the accumulation of the deficit. It is instituting a

---

this Court's 2000 order. Were even a fraction of such money made available to BCPSS, the system could move toward financial recovery without reducing the basic educational programming offered to city students.

new computerized tracking system that should permit it to accurately track vacancies and salaries, which has been an issue in the past, and it has imposed significant new budgeting and fiscal controls. It has a timeline to address and appears to be making progress toward, the issues raised by the Ernst & Young and Greater Baltimore Committee audits. Indeed, most of the evidence of mismanagement presented at the hearing appeared to relate to issues that are not current, and that were not attributable to current management. The Court believes at this time that the current new management should be permitted to continue its work.

The Court, however, is concerned with the City's role under the MOU, which gives the City increased authority over the BCPSS budget through the Fiscal Operating Committee. The City has impressive capacity to assist the BCPSS in book-keeping and accounting. It lacks the capacity, however, to link educational outcomes to mandated budget cuts. The City has admitted that its Fiscal Operating Committee recommended cuts without regard to the impact on the classroom. (Tr. 1143, 1145). The result, for the moment, is a financially stable, yet educationally inadequate, "bare bones" system. Therefore, the Court will further declare that the City shall continue to monitor BCPSS' accounting and finances through the Fiscal Operating Committee under the MOU, but decisions regarding program funding and cuts to the operating budget must be made solely by Board of School Commissioners under the direction and assistance of the Maryland State Board of Education.

V. CONCLUSION

The foregoing findings and conclusions of law establish, beyond any question, that the Baltimore City public schools remain constitutionally inadequate, that they remain substantially under funded, and that the budgetary steps taken to address the recent fiscal crisis significantly impair the already inadequate educational opportunities available to Baltimore City's school children. For these reasons, the Court will render the following rulings and declarations:

1. The constitutional violation that this Court found in October 1996 and June 2000 is continuing. The students in Baltimore City, as of August 2004, still are not receiving an education that is adequate when measured by contemporary educational standards. They are still being denied their right to a "thorough and efficient" education under Article VIII of the Maryland Constitution.

2. Full compliance with the Court's June 2000 declaration will not occur until the BCPSS receives at least $225 million in additional State funding under the Thornton Act by, at the latest, FY 2008.

3. Funding sufficient for the BCPSS to achieve constitutional adequacy will not occur until the BCPSS receives at least $225 million in additional State funding by, at the latest, FY 2008.

4. The children of Baltimore City should not have to wait another three years for adequate funding, given the continued constitutional inadequacy they face. The State has unlawfully underfunded the Baltimore City school system by $439.35 million to $834.68 million representing amounts owed under this Court's final 2000 order for fiscal years 2001, 2002, 2003 and 2004. Given the substantial

underfunding of the BCPSS, the Court declares that it would be appropriate for the State to accelerate increases in full Thornton funding to the BCPSS. The Court will not, in any event, tolerate any delays in full Thornton funding for the BCPSS beyond FY 2008.

5. Had the State of Maryland honored its commitment under this Court's 2000 order by front-loading Thornton funding for the at-risk student population of the BCPSS, the Court would not have been compelled to extend the period for deficit reduction established by S.B. 894 and the Memorandum of Understanding.

6. The Court will continue to retain jurisdiction to ensure compliance with its orders and constitutional mandates, and to continue monitoring funding and management issues. When the full funding outlined herein is received, the Court will revisit the issue of its continuing jurisdiction, and determine whether the Consent Decree should then be additionally extended for good cause.

7. A number of the steps taken to address the fiscal crisis did reduce educational opportunities and impermissibly interfered with progress towards providing a constitutionally adequate education for Baltimore schoolchildren. Specifically, elimination of a systemic summer school program, increases in class size by up to four children, reduction of experienced teachers and elimination or reduction of mentors and academic coaches, elimination of guidance counselors in elementary school, among other things, reduced educational opportunities and impermissibly interfered with progress towards providing a constitutionally adequate education for Baltimore schoolchildren.

8. Accordingly, the Court declares that, in order to ensure continued progress towards constitutional adequacy, the parties should ensure that educational opportunities for the school children are not reduced, by making available to the children of Baltimore City at least the amount of funding representing the savings achieved from those reduced educational opportunities described above, to be spent solely on programs and services

that benefit at-risk children. The Court further declares that that amount constitutes at least an additional $30-45 million in operational funding this fiscal year.

9. The Court believes that the best way to accomplish this goal would be for the parties with revenue raising capacity (the State or City) to increase the funding available to the BCPSS for the upcoming year.

10. To ensure that the necessary operational funding is available for BCPSS to provide the basic educational programs that have been reduced, the Court declares that S.B. 894's provision that the BCPSS' deficit must be eliminated by the end of fiscal year 2006 is unconstitutional as applied to the BCPSS.

11. To ensure that the necessary operational funding is available for BCPSS to provide the basic educational programs that have been reduced, the Court declares that the MOU's provision that the BCPSS' deficit must be eliminated by the end of fiscal year 2006 is null and void as against public policy.

12. Notwithstanding this Court's abrogation of the MOU's provision that the BCPSS' deficit must be eliminated by the end of fiscal year 2006, the City shall be repaid the remaining $8 million of its $42 million loan as scheduled.

13. Absent additional funding from the State of Maryland, BCPSS shall not retire the deficit before fiscal year 2008 and BCPSS shall not dedicate more than $5 million per year toward the creation of a $20 million cash reserve.

14. The City of Baltimore shall continue to monitor BCPSS' finances and accounting through the mechanisms established under the MOU, shall ensure that expenditures do not exceed revenues and may make recommendations concerning BCPSS' continued solvency. They shall not, however, through the MOU, impose budget cuts or restrict program funding. Such decisions must be made independently by the Board of School Commissioners under the direction of the Maryland State Board of Education.

15. The parties shall report to the Court in four weeks on the status of the additional funding and plans for its use. The report shall specifically list educational initiatives to be provided with the additional funding and describe how those initiatives will ensure continued progress towards constitutional adequacy. The report shall also update the Court and parties about the BCPSS' budget and fiscal situation.

16. Having issued this declaration, the Court trusts that the parties shall act in good faith and with all deliberate speed to ensure compliance without the necessity of further action by plaintiffs.

Date: August 20, 2004

Judge Joseph H.H. Kaplan
Judge's signature appears on original.
Chief Judge
Circuit Court for Baltimore City

EXHIBIT J

Keith Bradford, *et al.*,	*	IN THE
	*	
Plaintiffs,	*	CIRCUIT COURT
	*	
v.	*	FOR
	*	
Maryland State Board of Education,	*	BALTIMORE CITY
	*	
Defendant.	*	Case No.: 24C94340058
	*	
	*	
	*	

* *

PLAINTIFFS' PETITION FOR FURTHER RELIEF

Plaintiffs Keith Bradford, *et al.*, along with additional class representatives Stefanie Croslin and Angela Gant,[1] by their undersigned attorneys, respectfully submit this Petition for Further Relief in this longstanding school-finance case seeking to enforce the Court's prior declarations of Plaintiffs' constitutional rights to a "thorough and efficient" education under Article VIII of the Maryland Constitution. Defendants, the state officials responsible for school finance in Maryland, have failed to provide sufficient funding to comply with the Maryland Constitution and this Court's repeated declarations in 1996, 2000, 2002, and 2004 regarding insufficient funding of Baltimore City public schools. This Petition for Further Relief seeks to compel Defendants to comply with their constitutional obligations to provide an adequate education to Baltimore City school children consistent with contemporary education standards. In support of this Petition for Further Relief, Plaintiffs set forth the following grounds and incorporate by reference the accompanying Memorandum in Support, which provides extensive points and authorities as to why further relief is necessary.

[1] Along with this motion, Plaintiffs have filed a notice of substitution, as permitted by this Court's order of December 11, 1995 (Dkt. 41), designating Stefanie Croslin and Angela Gant to replace some of the prior class representatives. Their particular circumstances are discussed in that notice.

1. Plaintiffs are the parents of Baltimore City children facing the risk of not receiving the education they need to succeed in life.

2. Under Article VIII of the Maryland Constitution, the State of Maryland must establish a "thorough and efficient" system of public education throughout the state, and must further provide sufficient funding to maintain that system. Article VIII guarantees that all students in Maryland's public schools be provided with an education that is "adequate when measured by contemporary educational standards." *Montgomery Cty. v. Bradford*, 345 Md. 175, 189 (1997).

3. Plaintiffs brought this suit in 1994 to compel the State to comply with its constitutional duty to provide an adequate education to Baltimore City school children, including adequate funding for the Baltimore City Public School System ("BCPSS"). Defendants include the State Superintendent and the State Board of Education, among others. The City of Baltimore filed its own education funding lawsuit nine months later. The two cases were consolidated. Due to subsequent legal changes in the local responsibility for Baltimore City public schools, BCPSS has also become a party to the case.

4. In 1996, this Court granted Plaintiffs partial summary judgment as whether the children were receiving a constitutionally sufficient education, specifically finding that "[t]here is no genuine material factual dispute in these cases . . . . that the public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards. Dkt. 1-66, Order at 2 (Oct. 18, 1996). Shortly before a trial on causation and remedy, the Court entered a Consent Decree that provided immediate, but small, funding increases for school operations and for certain improvements to the decrepit school facilities.

5. In 2000, this Court found that BCPSS students continued to be deprived of "an education that is adequate when measured by contemporary standards" and "still are being denied

their right to a 'thorough and efficient' education" as constitutionally required. Dkt. 10 at 25 (Jun. 30, 2000). It further declared that "additional funding is required to enable [BCPSS] to provide an adequate education measured by contemporary educational standards," that "the State is not fulfilling its obligations under Article VIII of the Maryland Constitution," and that "additional funding of approximately $2,000 to $2,600 per pupil" per year was needed for FY 2001 and 2002 educational and operational funding. *Id.* at 26.

6. In 2002, this Court extended the term of the Consent Decree until the State's constitutional violations were remedied and ruled that it would "retain jurisdiction and continue judicial supervision of this matter until such time as the State has complied with this Court's June 2000 Order." *See* Dkt. 25 at 3, 5 (June 25, 2002).

7. In 2004, this Court ruled that the State was continuing to violate Article VIII because it still had not provided the $2,000 to $2,600 per pupil it had found necessary in 2000. In the aggregate, this Court found, "the State ha[d] unlawfully underfunded [BCPSS] by an amount ranging from $439.35 million to $834.68 million" for FY 2001, 2002, 2003, and 2004. Dkt. 50 at 64-65 (Aug. 20, 2004). The Court found that compliance with its 2000 order would not occur until at the least full funding of a formula established by a state commission (the "Thornton Commission") and enacted by General Assembly in the Bridge to Excellence Act was achieved, and further, that, because the State "has unlawfully underfunded BCPSS," it "should endeavor to repay over the next several years the amounts it failed to fund pursuant to this Court's 2000 order." *Id.* at 65; *see also id.* at 67-68. This Court also ruled that changed circumstances since 2001 made it "likely" that the Thornton levels "were too low" even then to measure "the cost of an adequate education." *Id.* at 15 ¶¶ 52-55; 24 ¶ 94.

8. This Court further declared that, due to inadequate funding, academic achievement among City students remained grossly unsatisfactory. *Id.* at 24-30 ¶¶ 94-125. The Court ruled that the constitutional violation it had previously found in 1996 and again in 2000 "is continuing," that Baltimore City children "still are not receiving an education that is adequate when measured by contemporary educational standards," and that they therefore were "still being denied their right to a 'thorough and efficient' education under Article VIII of the Maryland Constitution." Dkt. 51, Order at 1-2 ¶ 1 (Aug. 20, 2004). And again, the Court declared that it would "continue to retain jurisdiction to ensure compliance with its orders and constitutional mandates, and to continue monitoring funding and management issues," and that it would revisit its continuing jurisdiction once full funding was achieved. *Id.* at 2 ¶ 6. This never happened.

9. Despite this Court's repeated declarations, the State has abdicated its responsibilities to provide adequate funding for instructional activities and to address the chronically abysmal physical condition of school facilities in Baltimore City. State funding for BCPSS has largely stayed flat since FY 2009.

10. Starting in FY 2009, the State has acted to halt full Thornton funding. These actions have caused a steadily increasing "adequacy gap" for BCPSS. By FY 2013, the Department of Legislative Services ("DLS") calculated an adequacy gap of $156 million, and for FY 2015, that gap had risen to $290 million. A state-required evaluation separately calculated a $358 million annual "adequacy gap" in FY 2015. This means that, despite enactment of legislation in 2000 to implement the Thornton funding levels, children in Baltimore City were no better off in 2015 than they were in 2000 when the Court first declared that the adequacy gap for BCPSS was unconstitutional. Indeed, even if the Thornton formula had been followed, as this Court recognized in 2004, it falls far short of the amount needed for constitutional adequacy today.

11. There have also been repeated delays in the work of the State "Commission on Innovation and Excellence in Education" (the "Kirwan Commission"), which was expected to address these funding issues with a final report by December 31, 2017, so that funding could be considered in the 2018 legislative session. That deadline has been postponed repeatedly, most recently from December 31, 2018 to December 31, 2019. A BCPSS plan submitted to the Kirwan Commission further shows the inadequacy of the educational funding currently being provided; when costs are assigned to the menu of services the plan found necessary for educating BCPSS students, the additional amounts needed will likely be substantially higher than the "adequacy gaps" found by DLS and the state-required evaluation.

12. Each time the State delays, Baltimore City children suffer the consequences. BCPSS has less staff and less experienced staff than any other school district in Maryland. It has the highest ratio of students to staff of any school district in the state. BCPSS students perform at levels well below contemporary standards on standardized tests at elementary, middle, and high school levels. Graduation rates are lower than in any other district, whereas dropout rates are higher and continue to increase. On the State's own "Star ratings," BCPSS has significantly lower ratings than any other district in the state, with almost 60 percent of its schools receiving low one- or two-star ratings and only three schools (of 159) receiving the highest five-star rating.

13. BCPSS serves a student population with unique needs, which requires additional supports. According to DLS, BCPSS has the highest "at risk student index" in the state—the percentage of students who receive free and reduced meals, have limited English proficiency, and have special education needs. Further, its students are racially isolated from surrounding school districts.

14. The State also has abdicated its duty under Article VIII to provide funding sufficient to ensure that students in the City attend school in buildings that are safe, functional, have reliable heat and air conditioning, and have sufficient facilities to support an adequate education program. In violation of the children's constitutional rights, the physical condition of most school facilities in Baltimore City is abysmal. Children attending BCPSS are expected to learn in physical facilities that oftentimes lack functional and reliable heat, lack air conditioning, lack drinkable water, lack security measures such as classroom doors that lock or appropriate coverage by security cameras, have dilapidated elevators that routinely break down because they are decades beyond the date when they should have been replaced, and often have roofs and structures that are leaking, crumbling, and well beyond their useful lives.

15. Six years ago, at least 85 percent of the school buildings were rated "very poor" or "poor" by the engineering firm, Jacobs, which relied on accepted industry standards to assess every school building in BCPSS. BCPSS and the State rely on this report to assess facilities deficiencies in BCPSS. Based on those figures, BCPSS estimates that it would cost $3 billion to bring BCPSS buildings up to a minimally acceptable standards through repairs and building replacements and $5 billion to complete a full portfolio replacement to meet modern educational standards.

16. The system has reached a breaking point, and the condition is getting steadily worse. Last winter, the system closed for a week because numerous ancient heating systems failed and classrooms were without heat; last summer, schools closed for lack of air conditioning; this winter, problems have recurred.

17. Article VIII clearly requires adequate facilities, both because an adequate education under contemporary standards should be understood to include the facilities where students learn, and because adequate facilities are necessary for adequate learning. Nonetheless, BCPSS has been

starved of the funds necessary just to maintain its facilities, let alone bring them to modern standards. It spends $23 million annually on maintenance, which is well below the amount required under industry standards. To meet industry standards for maintenance, the system would be forced to take scarce funds from a budget needed to provide for in-classroom learning.

18. The State's lack of funding for BCPSS violates Plaintiffs' constitutional rights as determined by this Court in 2000, 2002, and 2004. This Court expected Defendants to comply with its findings and to fund BCPSS at constitutionally required levels, but the State has ignored those rulings for more than a decade. As the State has made clear that it will not voluntarily adhere to the State Constitution, Plaintiffs return to this Court to seek further relief compelling Defendants to meet their constitutional obligations under Article VIII.

19. For these reasons, and those set forth in the Memorandum in Support, this Court should order Defendants to show cause why Plaintiffs are not entitled to the following relief.

20. First, this Court should find and declare that:

a. The State is violating Article VIII by failing to provide a "thorough and efficient" education, *i.e.*, an education that is "adequate when measured by contemporary educational standards," to students at risk of educational failure attending BCPSS;

b. The State has been in continuous violation of Article VIII since this litigation commenced and has never complied with the Court's prior declarations as to its constitutional obligations under Article VIII, including the Court's declaration that, at a minimum, "full Thornton funding" is constitutionally required;

c. The State's current funding level for educational services in BCPSS is below constitutionally required levels;

d. The State's continuing failure to provide funding to BCPSS at levels required by Article VIII has deprived BCPSS students of least $2 billion that this Court has ordered over the past decades;

e. These constitutional violations will persist until the State of Maryland, including its legislative and executive branches, acts to provide

constitutionally adequate funding for educational services in BCPSS and to remedy the effects of its prior constitutional violations;

f. The State also is violating Article VIII by failing to provide sufficient resources to ensure that BCPSS facilities are adequate for a "thorough and efficient" education, *i.e.*, one that is "adequate when measured by contemporary educational standards"; and

g. These constitutional violations will persist until the State of Maryland, including its legislative and executive branches, acts to remedy the physical condition of the facilities to make them "adequate when measured by contemporary educational standards."

21. Second, this Court should order Defendants to comply immediately with the Court's prior rulings that "full Thornton funding," at the very least, is constitutionally required, using, at a minimum, the $290 million shortfall in annual funding that DLS found was needed for "full Thornton funding" for FY 2015, as adjusted for subsequent inflation;

22. Third, this Court should order Defendants to develop and submit a comprehensive plan for full compliance with Article VIII and the Court's prior orders and declarations, subject to review and approval by the Court. This must include, but not be limited to, provisions:

a. Remedying the effect of the aggregate shortfall of past violations of Article VIII;

b. Directing sufficient State funding and oversight to ensure that all BCPSS schools are brought into compliance with educational adequacy standards, including but not limited to, funding necessary for the Baltimore City Public School System's 2019 "Investing in our Future: A World-Class Education System for Baltimore City Students";

c. Ensuring that the State provides sufficient funding such that all BCPSS schools will have, among other things, adequate and reliable HVAC systems; adequate and reliable plumbing and piping systems; drinkable water; clean, well-lighted, and well-maintained facilities; adequate roofing; adequate and functioning bathrooms; adequate fire safety provisions; adequate ventilation; sufficient specialized facilities for a modern constitutionally adequate education, including computer, science, art, and music;

d. Directing on-going capital and operational funding sufficient to maintain, update, and replace BCPSS buildings as necessary, including funding

necessary to bring all schools to the standards of the 21st Century Schools program;

e. Ensuring adequate resources for, and organizational structure supporting, ongoing maintenance of facilities, including but not limited to sufficient staff for maintenance, consistent with industry standards and consistent with the current aged condition of BCPSS facilities and consistent with the staffing levels of other systems in Maryland; and

f. Removing unnecessary procedural barriers to accomplishing the above as quickly as reasonably possible, including bidding and contracting requirements;

23. Fourth, this Court should order the final approved plan to be entered as an enforceable judicial decree of the Court along with any additional relief that the Court finds necessary and appropriate; and

24. Finally, this Court should order that, should Defendants not comply with these orders and decrees, Defendants may be required to pay compensatory damages, including attorney's fees incurred in enforcing the Court's orders and decrees, as well as penalties to compel compliance.

Dated: March 7, 2019

Respectfully submitted,

BAKER & HOSTETLER LLP

By: Beth McCallum /gg

Elizabeth B. McCallum (*admitted pro hac vice*)
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
emcallum@bakerlaw.com
Phone: (202) 861-1500
Fax: (202) 861-1783

Deborah A. Jeon
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MARYLAND
3600 Clipper Mill Road
Suite 350
Baltimore, Md 21211
jeon@aclu-md.org
Phone: (410) 889-8550, ext. 120

Ajmel Quereshi
Cara McClellan
Sherrilyn Ifill
NAACP LEGAL DEFENSE FUND
700 14th Street, NW, 6th Floor
Washington, DC 20005
aquereshi@naacpldf.org
cmcclellan@naacpldf.org
sifill@naacpldf.org
Phone: (202) 216-5574

Attorneys for Keith Bradford, et al.

Keith Bradford, et al.,	*	IN THE
	*	
Plaintiffs,	*	CIRCUIT COURT
	*	
v.	*	FOR
	*	
Maryland State Board of Education,	*	BALTIMORE CITY
	*	
Defendant.	*	Case No.: 24C94340058
	*	
	*	
	*	

* *

MEMORANDUM OF GROUNDS, POINTS, AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' PETITION FOR FURTHER RELIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Acts

Other Authorities

Plaintiffs Keith Bradford, *et al.*, along with additional class representatives Stefanie Croslin and Angela Gant,[1] by their undersigned attorneys, submit this Memorandum of grounds, points, and authorities in support of their Petition for Further Relief.

PREFATORY STATEMENT

This Petition for Further Relief seeks to redress the unconstitutionally inadequate, underfunded, and decrepit, public schools attended by tens of thousands of Baltimore City school children. Through this Petition, Plaintiffs, who are the parents of Baltimore City children at risk of not receiving the education they need to succeed in life, seek to enforce prior rulings by this Court establishing their right to a constitutionally adequate education by contemporary standards. This case is a longstanding action that was brought by Plaintiffs in 1994 to require the State to comply with its constitutional duty to provide an adequate education to Baltimore City school children, including adequate funding for Baltimore City public schools.

Under Article VIII of the Maryland Constitution, the State of Maryland must establish a "thorough and efficient" system of public education throughout the State, and must further provide sufficient funding to maintain that system.[2] Despite this constitutional duty, and notwithstanding prior rulings by this Court in this case that the State was not meeting its obligations under Article VIII, for decades the State has abdicated its responsibilities to provide adequate funding for instructional activities and to address the chronically abysmal physical condition of school

[1] Along with this motion, Plaintiffs have filed a notice of substitution, as permitted by this Court's order of December 11, 1995 (Dkt. 41), designating Ms. Croslin and Ms. Gant to replace the prior class representatives. Their particular circumstances are discussed *infra* and in that notice.

[2] Article VIII is implemented by Article III, Section 52, which requires that the State budget include an estimate of appropriations for establishing and maintaining a thorough and efficient system of public schools throughout the State. Thus, both the executive and legislative branches are constitutionally obligated to determine the funding level needed to comply with Article VIII and then budget for that amount. As discussed below, Article III § 52's constitutionally mandated budget process has broken down and effectively been abandoned for the last decade.

facilities in Baltimore City. According to the Maryland Department of Legislative Services ("DLS"), the level of state underfunding of Baltimore City schools, *i.e.*, the gap between what was constitutionally required and what was actually funded, or the "adequacy gap," was $290 million in FY 2015. According to an independent analysis mandated by the General Assembly, the State underfunded Baltimore City public schools by $358 million that year. Over the decades of underfunding, the generations of children attending the Baltimore City schools have been deprived of over $2 billion in educational funding to which they were constitutionally entitled. In 2000, this Court adopted the findings of a court-ordered independent study determining that many Baltimore City public school buildings were in poor condition and getting worse, and estimating that it would cost $600 million to fix. The State ignored those and subsequent findings of decrepit school conditions, which now require $3 billion to fix and $5 billion to replace.

These numbers affect tens of thousands of Baltimore City school children, most of whom live in poverty and are children of color, who are denied the adequate education mandated by Article VIII. Among them are Stefanie Croslin's two sons, ages 11 and 13, who are Baltimore City Public School Systems ("BCPSS") students. The older of the two, Cohen, loves science, but his school does not have Bunsen burners or an eye wash station, much less the advanced computer technology available for students in comparable grades in neighboring Baltimore County. Teachers collect materials donated by parents to design experiments. Ms. Croslin's younger son, Cyrus, was devastated when his school had to cancel music class, permanently, due to a lack of funding. It was his favorite subject. Most parents in BCPSS have stories like these. Dashawna Bryant has sickle cell anemia and had to spend a week in the hospital last winter after a day in an unheated classroom. Angela Gant's daughter Naya, who used to excel in math, recently has begun

to struggle, but her school no longer offers tutoring services that were available when Ms. Gant's older daughter attended Baltimore schools.

On the whole, BCPSS has the lowest teacher to student, teacher and therapist to student, and non-instructional staff to student ratios in the State. The teachers that are employed often have less education and less experience than similarly-sized districts statewide. According to the State's own report card, BCPSS had the lowest number of five-star schools (the highest rating) and the highest number of one-star schools (the lowest rating) in the State. BCPSS students score lower than their counterparts nationally and across the State on almost every assessment and college entrance test. BCPSS's graduation rate is 17 points lower than the state average, and its dropout rate is nearly double the state average. In 2004, this Court pointed to similarly dismal statistics in concluding that the State's underfunding of BCPSS violated the State Constitution.

This Court has entered multiple orders declaring Plaintiffs' constitutional right to sufficient State funding for "adequate" public schools and specifying the then-minimum amounts of funding required, the last of which was entered in 2004. After a decade of working through the General Assembly and otherwise to attempt to convince Defendants (the State officials and agencies responsible for school funding) to honor their continuing promises to provide sufficient education funding, Plaintiffs now return to this Court to compel compliance with the mandate of Article VIII.

Article VIII guarantees:

> The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools, and shall provide by taxation, or otherwise, for their maintenance.

Md. Const., Art. VIII, § 1. This Article requires that all students in Maryland's public schools be provided with an education that is "adequate when measured by contemporary educational standards." *Montgomery Cty. v. Bradford*, 345 Md. 175, 189 (1997) ("*Bradford I*"); *Hornbeck v.*

Somerset Cty. Bd. of Educ., 295 Md. 597, 615 (1983); Dkt. 1-66 Order (Oct. 18, 1996);[3] Dkt. 10, Mem. Op. 24 (dated June 30, 2000, entered July 6, 2000). Article VIII is implicated when the State "'fails to make provision for an adequate education,' or the State's school financing system '[does] not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Article VIII, when measured by contemporary educational standards.'" *Bradford*, 345 Md. at 181 (quoting *Hornbeck*, 295 Md. at 639). Article VIII also requires the State make efforts to address student populations that require additional or different resources or programming, such as high concentrations of students who live in poverty. *See Hornbeck*, 295 Md. at 639 (affirming that Article VIII requires that "efforts are made . . . to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child").

This Petition presents two closely related sets of violations. *First*, Defendants have failed to provide sufficient funding for constitutionally adequate school operations and instructional functions despite the Court's numerous prior orders specifying the funding formulas that they must follow to reach minimal compliance. *Second*, Defendants have failed to fix the crumbling school facilities in Baltimore City that leave children cold from broken heat systems in the winter, overheated from schools lacking air conditioning in the summer, and wet from pipe leaks throughout the year. These failures directly limit the ability of students to learn.

To comply with Article VIII, Defendants must address both issues. Two full generations (12 grades per generation) have entered and graduated from Baltimore City Public Schools since this litigation was brought in 1994. Through the events of last winter and summer, the State's constitutional violations have reached the point of national notoriety. Only action by this Court

[3] The docket entries in this case are divided due to the conversion to an electronic docket in 2000, after which the numbering returned to start at number 1. For convenience, entries before the conversion are prefaced with "1-".

will halt the violations from continuing so that the current generation of school children receives the adequate education guaranteed by the Maryland Constitution. Because Defendants have made clear that they will not do so voluntarily,[4] Plaintiffs ask this Court to compel them to comply with the State Constitution.

LEGAL AND FACTUAL HISTORY

I. Defendants Have Not Complied with this Court's Declarations to Provide Full Funding to BCPSS, Thereby Preventing BCPSS from Providing an Education That is Adequate by Contemporary Standards.

A. Overview.

In a series of declaratory rulings in this case commencing in 1996, this Court (the Hon. Joseph H. H. Kaplan, Jr.) repeatedly ruled that the State of Maryland was in continuing violation of its constitutional obligation to provide children attending Baltimore City public schools with a "thorough and efficient" education, which this Court defined as an "an education that is adequate when measured by contemporary educational standards" mandated by Article VIII of the Maryland Constitution. Dkt. 1-66 Order (Oct. 18, 1996); Dkt. 10, Mem. Op. 24 (June 30, 2000) (relying on the Court of Appeal's decision in *Hornbeck*). Those rulings apply even more vigorously today, as the State's support for public schools in Baltimore City continues to fall far below minimum constitutional requirements. Each year, the gap has broadened between what the Maryland Constitution requires for on-going school operations and what the State of Maryland actually funds, depriving the students who have attended the BCPSS over the last decade of an accumulated $2 billion to which they were entitled for instruction alone. Rapidly decaying school buildings dramatically amplify the gap, adding another $3 billion to fix schools or $5 billion to replace them

[4] For instance, there has been no response to a Jan. 22, 2019 letter by Plaintiffs asking for action on the issues that was sent to the Governor and copied to legislative leaders. *Available at* https://www.aclu-md.org/sites/default/files/bradford_letter_1.22.2019_final.pdf.

to the amount needed to provide a constitutionally sufficient education. Together, these profound deficits mean that Baltimore City's children—many of whom live in extreme poverty and face daunting environmental and societal challenges—are extraordinarily short-changed in their educational opportunities.

This Petition for Further Relief is compelled by the State of Maryland's failure to meet this Court's expectations that the State would accept its constitutional obligations as established by the Court. This Court expected that the State would reach constitutional compliance by 2008, or, at the very least, that it would reach the funding levels for Baltimore City recommended by the Commission on Education Finance, Equity, and Excellence (the "Thornton" Commission), a legislatively created state body tasked with recommending adjustments to the state funding formula, and enacted by the legislature in the Bridge to Excellence Act. But, over the past decade, the State abandoned its promises to the Court that it would abide by the Thornton formula and instead each year has funded far less than the amount required by this Court's rulings. Moreover, the State has ignored the Court's direction that it attempt to remedy prior accumulated gaps in funding that had been identified by the Court as critical to bringing the State into constitutional compliance. This failure to abide by the Court's instructions as to what was constitutionally required has created an ever-deepening financing deficit that now totals billions of dollars and results in a constitutionally inadequate education for tens of thousands of Baltimore City children each year. That yawning "adequacy gap" constitutes the difference between an education that is adequate by contemporary standards (now commonly referred to as an education that prepares students for the 21st century economy) and the current struggling system.

This Court's rulings were intended to prevent this tragic record of educational deprivation. As this Court stated, it fully anticipated that, once the State's constitutional obligations were

spelled out in clear terms, Defendants would comply and honor those obligations. However, after several years of funding increases to approach the Thornton formula levels, the State elected to ignore the Court's rulings and abandon its prior commitments to adhere, at a minimum, to Thornton. Plaintiffs, therefore, return to this Court for further relief, namely an order compelling Defendants to comply with the State Constitution.

The need could not be greater. Since this litigation was brought in 1994, two generations of children have entered and graduated from BCPSS schools without receiving the education guaranteed them by the State Constitution. This is a wholesale abdication of the State's duty to provide sufficient funding to educate children in Baltimore City. Absent judicial enforcement of the children's constitutional rights and this Court's own prior declarations and orders, compliance with the Constitution will never occur. The question raised by this Petition is whether the constitutional guarantee of Article VIII will prove illusory for yet another generation of Baltimore City school children.

B. This Court's Prior Declaratory Rulings Determined that the State's Funding Levels Violate Article VIII of the Maryland Constitution.

This Court first found the educational system for Baltimore City children to be unconstitutional in 1996. The case was brought as a class action by parents of Baltimore City public school children "at risk of educational failure" because they lived in poverty; attended schools where a large number of students lived in poverty; needed special educational services; spoke English as a second language; had parents who did not graduate high school or were unemployed; were homeless; lived under a threat of violence; had been retained in grade at least once or had scored below grade level on standardized tests; or had experienced economic, social,

or educational disadvantage that increased the likelihood of an inadequate education.[5] *See* Dkt. 1-4, Compl. at 3 ¶¶ 8-9. Plaintiffs claimed that the State failed to fund BCPSS at constitutionally required levels, even though enhanced funding was plainly necessary given that Baltimore City had the lowest test scores, the lowest graduation rates, and the highest number of students facing risk factors in the State. *Id.* at 12-24 ¶¶ 41-74. The Defendants included the State Superintendent and State Board of Education, among others. The City of Baltimore filed its own education funding suit nine months later, the two cases were consolidated, and the State counterclaimed against the City, alleging that deficiencies in education were the fault of BCPSS rather than any lack of funding or support from the State.

1. The Court First Ruled in 1996 that Baltimore City Children Were Being Denied a Constitutionally Sufficient Education.

On October 18, 1996, this Court granted partial summary judgment to Plaintiffs, ruling that the "thorough and efficient" clause of Article VIII of the Maryland Constitution "requires that all students in Maryland's public schools be provided with an education that is adequate when measured by contemporary educational standards" and that that requirement was judicially enforceable. The decision declared:

> There is no genuine material factual dispute in these cases as to whether the public school children in Baltimore City are being provided with an education that is adequate when measured by contemporary educational standards. Based on the evidence submitted by the parties on the partial summary judgment and summary judgment motions in these cases, . . . the public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards.

Dkt. 1-66, Order at 2 (Oct. 18, 1996).

On the eve of trial on issues of causation and remedy, the parties agreed to a Consent

[5] The Court never formally certified a class and instead accepted an agreement of the parties that the Plaintiffs would be treated as a class and that the individual plaintiffs would be deemed "representative plaintiffs." Dkt. 1-41, Order (Dec. 11, 1995).

Decree approved and entered by the Court which provided for a small but immediate influx of cash for operations and facilities over five years.[6] BCPSS and the State were to retain an independent consultant to prepare interim and final assessments of, *inter alia*, the sufficiency of the additional funding, the need for further funding to reach constitutional adequacy, and the progress made toward reaching that standard. Dkt. 1-77, Consent Decree ¶¶ 41-42 (Nov. 26, 1996). Based on the results of the interim independent assessment, the BCPSS Board could return to court "to seek relief . . . for funding amounts greater than those described in Paragraph 47" of the Consent Decree. *Id.* ¶ 53.[7] The final report was due by the end of 2001 and the decree was set to expire after five years, on June 30, 2002, unless expanded "upon a showing of good cause to extend the Decree." *Id.* ¶ 68.

2. The Court's June 2000 Order Found Continued Constitutional Violations.

The interim independent evaluation ordered by the Consent Decree (the "Metis Report") found that, although progress was being made, an additional $2,698 per child (for a total per pupil expenditure of $10,274), or $270 million a year, in operational/educational funding was then

---

[6] In January 1995, Montgomery County tried, unsuccessfully, to intervene in the case. It appealed this Court's denial of its motion to intervene, and the Court of Appeals affirmed the Court's ruling denying intervention. *See Bradford I*, 345 Md. at 177, 200. Notably, as discussed above, the decision by Chief Judge Murphy affirmed *Hornbeck*'s holdings that Article VIII "does require that the General Assembly establish a Statewide system to provide an adequate public school education to the children in every school district" and that, if the State's school financing system "did not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Article VIII, when measured by contemporary educational standards, a constitutional violation may be evident." *Id.* at 181 (discussing *Hornbeck*, 295 Md. at 639).

[7] As this Court subsequently explained, "the parties were aware [at the time] that $230 million over five years was not enough to provide an adequate education to Baltimore City's unique population of disadvantaged children" and, therefore, provided in the Consent Decree "a mechanism for the New [BCPSS] Board to request additional funds from the State throughout the term of the Decree" and that, if, after June 1, 2000, "the State fails to satisfy the New Board's request for additional funds, the New Board may go back to Court for a determination of whether additional funding is needed in order for the BCPSS to provide a Constitutionally Adequate Education." Dkt. 10, Mem. Op. 3 (June 30, 2000).

needed for adequacy. Dkt. 10, Mem. Op. 14, 15 (June 30, 2000). When a lengthy process of negotiation with the State failed to secure additional funding for a BCPSS remedy plan implementing the Metis Report recommendations, BCPSS returned to the Court in 2000 to compel the State to provide constitutionally required funding. *See, e.g., id.* at 4.

On June 30, 2000, after considering substantial evidence submitted by the parties, this Court found that the State was not making "best efforts" to provide available funding for the BCPSS remedy plan as required by the Consent Decree; it formally adopted the Metis Report as its findings of fact. *Id.* at 14, 23-25. The Court specifically found that, despite progress, Baltimore City children continued to be deprived of "an education that is adequate when measured by contemporary standards" and "still are being denied their right to a 'thorough and efficient' education" as constitutionally required. *Id.* at 25. It further found that, despite a "significant budget surplus and new sources of revenue available in [FY 2001]," the State had failed to make sufficient efforts "to make a reasonable down payment on the additional funding of approximately $2,000 to $2,600 per pupil that is need[ed] to receive Constitutionally Mandated Adequate Education when measured by Contemporary Educational Standards." *Id.* The Court therefore declared that "additional funding is required to enable [BCPSS] to provide an adequate education measured by contemporary educational standards," that "the State is not meeting its obligations under Article VIII of the Maryland Constitution," and that "additional funding of approximately $2,000 to $2,600 per pupil per year" was needed for FY 2001 and 2002 educational and operational funding (which translated to an annual shortfall of $200 to 260 million). *Id.* at 26. As discussed below, as determined by DLS, the shortfall caused by State's current funding for BCPSS now substantially exceeds this level.

For relief, the Court determined that this declaration of rights should suffice to spur the State to comply with the Constitution, making a direct order unnecessary. It explained:

> Having determined and declared that the State is not fulfilling its obligations under Article VIII of the Maryland Constitution, as well as under the Consent Decree, the Court trusts that the state will act to bring itself into compliance with its constitutional obligations under the Consent Decree for the Fiscal Years 2001 and 2002 without the need for Plaintiffs to take further action.

Id. Thus, the Court trusted that its declaration of the State's constitutional violation would suffice to induce future compliance with Article VIII.

Some minimal progress was made after the Court's June 2000 order. However, the final evaluation required by the Consent Decree (the "Westat Report") confirmed the need for substantial additional funds, as did the Thornton Commission, the state body tasked by the Maryland legislature to revise the state formula for funding education. In 2001, the Thornton Commission issued its final report, which concluded that the BCPSS "adequacy gap" for educational funding needs (not including facilities) was the highest in the State at $2,938-$4,250 per pupil. *See* Thornton Comm. Rep. at 27-28 (Jan. 2002), *available at* http://dlslibrary.state.md.us/publications/OPA/I/CEFEE_2002_fin.pdf. The Thornton Commission report also provided a formula that would allow for determination of future levels of constitutional adequacy. *Id.* at iii, xiii.

In response, in 2002 the State enacted SB 856 (2002), the "Bridge to Excellence in Public Schools Act," to implement the Thornton Commission recommendations. 2002 Laws of Md., ch. 288. It recognized a substantial "adequacy gap" of $3,383 per pupil for BCPSS and committed to provide BCPSS with an additional $258.6 million annually in educational/operational funding, to be phased in over six years, *i.e.*, by FY 2008. Ex. 1, DLS, S.B. 856 Fiscal Note, Revised, at Exs.

1, 8 (July 3, 2002).[8] That amount translated to approximately $2,600 per pupil—the same amount this Court called for in its 2000 decision. *See* Dkt. 50, Mem. Op. at 3 (Aug. 20, 2004). The General Assembly, recognizing that costs of education increase and standards change, also directed an independent assessment of the schools, including the adequacy of educational funding, ten years after its Bridge to Excellence in Public Schools legislation. 2002 Laws of Md., ch. 288.

3. The Court's June 2002 Order Found Continued Non-Compliance and Extended Jurisdiction Indefinitely until the State Complies with the June 2000 Order.

In May 2002, BCPSS and Plaintiffs jointly moved to extend the term of the Consent Decree and to continue the Court's jurisdiction until such time that the State's constitutional violations had been remedied. *See* Dkt. 25, Mem. Op. at 3 (June 25, 2002). After receiving substantial evidence from the parties, the Court issued a Memorandum Opinion on June 25, 2002 granting the motion over the State's opposition. Judge Kaplan specifically found that continued jurisdiction was necessary because the Thornton funding was uncertain, as the State had not identified a revenue stream. *Id.* at 3-4. Moreover, the Court declared, "two years have passed and the State has yet to comply with this Court's order[.]" It further found that, although recent legislation would "arguably result in substantial compliance with the June 2000 order by 2008, it is uncertain that all the recommended increases will be funded." Accordingly, given the uncertainty and "the lack of compliance to date with the June 2000 order," the Court ruled that it would "retain jurisdiction and continue jurisdiction until such time as the State has complied with this Court's June 2000 Order." *Id.* at 5.

[8] The Bridge to Excellence in Public Schools Act provided additional funding for all Maryland schools, even those without an "adequacy gap." The phase-in schedule treated all districts equally, without any recognition of the greater needs of Baltimore City and other districts with adequacy gaps.

4. The Court's August 2004 Opinion Found Ongoing Lack of Compliance, Accumulated Underfunding of $439 to $835 Million, and Substantial Educational Deficits for Baltimore City Children.

In 2004, well before full phase-in of the constitutionally-required Thornton funding, a $58 million BCPSS deficit emerged that forced increases in class sizes, the elimination of summer school, and a reduction in supportive services such as guidance counselors. Dkt. 50, Mem. Op. at 30-51 (Aug. 20, 2004). As a result, Plaintiffs moved for further declaratory relief. After a week-long evidentiary hearing, the Court ruled in August 2004 that the State *still* had not provided the $2,000 to $2,600 per pupil the Court had found necessary in 2000 and that the State had "unlawfully underfunded [BCPSS] by an amount ranging from $439.35 million to $834.68 million" in the aggregate for FY 2001, 2002, 2003, and 2004. *Id.* at 64-65. It held that BCPSS would not be sufficiently funded, unless the State provided BCPSS at least $225 million in additional annual funding by FY 2008, at the latest. Dkt. 51, Order at 2 ¶¶ 2-3 (Aug. 20, 2004).

Significantly, the Court further found that, due to increased costs, the funding increases previously determined to be necessary "should be adjusted to reflect that increased cost" of education. Dkt. 50, Mem. Op. at 24 ¶ 92 (Aug. 20, 2004). In other words, the Court found that by 2004 the constitutional floor already exceeded the Thornton Commission levels. *Id.* at 24 ¶ 94. Moreover, the Court found that compliance with its 2000 order would not occur until full funding of the Thornton Commission formula was achieved and further, that, because it "has unlawfully underfunded BCPSS . . . in contravention of a final order of this court," it "should endeavor to repay over the next several years the amounts it failed to fund pursuant to this Court's 2000 order." *Id.* at 65; *see also id.* at 67-68.

The Court also made extensive findings of fact regarding the effect of the State's continuing constitutional violation. Overall, the Court found that the "objective evidence continue[s] to demonstrate, as [it] did in 1996 and 2000, that the BCPSS students are performing

at levels far below state standards, and far below state averages, although there have been some improvements[.]" *Id.* at 25 ¶ 98. Among the deficits: school assessment scores were far below state standards and averages; a low percentage of Baltimore City children had passed the state high school assessment tests; BCPSS had high dropout and correspondingly low graduation rates; student attendance rates were "unacceptable"; and Baltimore City had the highest suspensions and expulsions in the State. *Id.* at 14-29 ¶¶ 95-121. All of these factors were attributable to an inadequate level of educational services. *Id.* These dismal outcomes were compounded by the profound poverty and other demographic and socioeconomic characteristics of BCPSS students that established a "significant number of children at risk of educational failure." *Id.* at 29 ¶ 124. The Court found that these disadvantaged students "require increased educational focus and resources." *Id.* at 29.

Overall, this Court concluded that, as a result of these funding deficiencies, "academic achievement among City students remained grossly unsatisfactory," as the Court of Appeals later summarized the data. *See Md. State Bd. of Educ. v. Bradford*, 387 Md. 353, 379 & n.8 (2005) ("*Bradford II*") (discussing 2004 Mem. & Op. 24-30 ¶¶ 94-125).[9] The Court ruled that the constitutional violation it had previously found in 1996 and again in 2000 "is continuing," that Baltimore City children "still are not receiving an education that is adequate when measured by contemporary educational standards," and that they therefore were "still being denied their right to a 'thorough and efficient' education under Article VIII of the Maryland Constitution." Dkt. 51, Order at 1-2 ¶ 1 (Aug. 20, 2004).

[9] The State appealed the Court's 2004 order and its many findings and declarations. The Court of Appeals declined to hear most of the State's appeal on the basis that the Circuit Court's order was not final. *See Bradford II*, 387 Md. at 385-86. The remainder of the appeal concerned the BCPSS budget deficit, and the Court of Appeals reversed a specific injunction regarding the budget deficit. *See id.* at 387-88. That limited ruling is not relevant here.

Moreover, the Court also ruled that changed circumstances since 2001 made it "likely" that the Thornton levels even then "were too low." Dkt. 50, Mem. & Op. at 15 ¶¶ 52-55 (Aug. 20, 2004). It cited new, higher state standards for high school graduation; federal requirements under the No Child Left Behind legislation requiring all students to achieve satisfactory scores on statewide tests; and the increased needs of children in poverty (as acknowledged by the State Superintendent of Education); and higher education costs. *Id.* at 15-16 ¶¶ 52-56, 23-24 ¶¶ 92-94. In other words, "the cost of an adequate education" could not be measured by the Thornton numbers alone. *Id.* at 24 ¶ 94.

The Court declared that it would continue to retain jurisdiction to ensure compliance with its orders and to monitor funding and management issues and that it would revisit its continuing jurisdiction once full funding was achieved. Dkt. 51, Order at 2 ¶ 6 (Aug. 20, 2004). And, once again, it declared that "the Court trusts that the parties shall act in good faith and with all deliberate speed to ensure compliance without the necessity of further action by plaintiffs." *Id.* at 4 ¶ 16.

The Court's 2004 ruling was clear that: (1) at a bare minimum, the State must provide "full Thornton funding" for BCPSS "beyond FY 2008" to support any possible argument that it had achieved constitutional adequacy; and (2) that the Court would not, "in any event, tolerate any delays" in that "full Thornton funding." *Id.* at 2 ¶ 4. Unfortunately, as shown below, the State has betrayed this Court's trust and confidence that the State would abide by its constitutional obligations to provide an "adequate" education to Baltimore City children. Funding has not kept pace as constitutionally required, with disastrous consequences for Baltimore City children.

C. The State's Current Funding of BCPSS Does Not Provide Sufficient Funding for a Constitutionally Adequate Education.

Notwithstanding this Court's unequivocal rulings, the State has continued to violate Article VIII by serially underfunding BCPSS schools and shortchanging a generation of Baltimore City

school children. As DLS has concluded, the shortfall that existed three years ago was greater than the shortfall that existed when this Court first declared an additional $2,000 to $2,600 per pupil was necessary in 2000. An independent study completed in 2016, which was mandated by the General Assembly as part of the Bridge to Excellence in Public Schools Act, also confirmed a massive annual adequacy gap in Baltimore City. Most troubling of all, the State has recently delayed finalizing and acting on the recommendations of its own Kirwan Commission (identified below), which it had established to overhaul the Thornton formula.

1. The State's Studies Have Demonstrated an Annual Adequacy Gap of $290 to $353 Million Annually for Baltimore Schools.

This Court held that constitutional adequacy would not even begin to be met until the Thornton funding formula, enacted to fulfill this Court's 2000 decision, was fully phased in. This Court also found that adjustments to the formula were constitutionally necessary to address the rising cost of education and more stringent educational standards. Accordingly, even in 2004, before Thornton was fully phased in, the amounts in the Thornton formula were "likely" insufficient. Dkt. 50, Mem. & Op. at 15 ¶¶ 52-55 (Aug. 20, 2004). But the State has not even met that minimal floor, failing to fully fund Baltimore schools under the Thornton formula and failing to adjust it over time to address greater costs and needs.

The Thornton formula has built-in mechanisms for annual adjustments based on changes in "enrollment, local wealth, and other factors, including inflation in some cases." *See* DLS, Education in Maryland, IX Legislative Handbook Series (2014) ("Handbook") at 63, 72, *available at* https://www.dllr.state.md.us/p20/p20legishandbook.pdf. Initially, the Thornton formula amounts were to be increased for inflation each year, using a measure called the implicit price deflator for State and local government expenditures. *Id.* at 72. Starting with the 2007 legislative summer session, however, in response to a deficit, the State chose not to fund the increases

mandated by the Thornton Commission formula, even for BCPSS, notwithstanding this Court's rulings. Rather, it first eliminated and then capped inflation increases to the Thornton funding, among other reductions to the formula, which have continued since in every year thereafter, starting with FY 2009. *Id.* at 76-77. *Accord* APA Consultants, Final Report of the Study of Adequacy of Educational Funding in Maryland (2016) ("APA Final Report"), at 3, *available at* http://marylandpublicschools.org/Pages/adequacystudy/index.aspx. These decisions resulted in a steadily increasing "adequacy gap" by the State's own chosen method of calculation.

As a result, BCPSS received only minimal increases in State funding, contrary to the original Thornton formula and contrary to this Court's directions. In FY 2009, funding increased by only $20 million and in FY 2010, BCPSS received only a $9 million increase. By FY 2013, DLS calculated that the State's funding level for that year resulted in a shortfall for BCPSS of $1,952 per pupil (one dollar less than the gap for Prince George's County, which had the largest gap). *Id.* at 64 (Ex. 3.4). [10] This translated to an FY 2013 adequacy gap of $156 million.

For the State's FY 2015 budget, DLS again looked at the State's school financing levels and determined that the adequacy gap for BCPSS had risen to $290 million, based on a per-pupil funding shortfall of $3,611. *See* DLS, Education in Maryland, Presentation to the Commission on Innovation and Excellence in Education (2016) at 7, *available at* http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2016-12-08_DLS_Adequacy_Presentation.pdf. Indeed, State funding for BCPSS has largely stayed flat since FY 2009. *See* Ex. 2, Funding Chart. This decade of flat funding has negated the Thornton

[10] It appears that DLS did not use the original Thornton formula to calculate the adequacy gap for FY 2013 and instead applied an inflation factor that had been added to the statute in 2007. *See id.* at n.1. Thus, the actual shortfall for that year probably is higher than what DLS reported. Moreover, FY 2015 was the last year for which DLS appears to have performed this analysis.

increases of the prior decade. Based on the original Thornton formula, the State funding falls well below constitutional requirements for adequacy as previously determined by the Court, and therefore the funding level necessarily violates Article VIII.

These shortfalls have had a cumulative effect as well. The near-decade long period of constitutional violation of Article VIII has created an even greater educational programming deficit in Baltimore City. The aggregate underfunding since FY 2008 now totals (at least) over $2 billion. This is in addition to the prior aggregate funding gap ranging from $439.35 million to $834.68 million that the Court identified in 2004 and directed the State to remediate. Contrary to the Court's finding and expectation that the State would redress this past deficit, the State never tried to ameliorate it. These accumulated annual deficits represent generations of BCPSS students deprived of their constitutional right to an adequate education.

Moreover, a subsequent State-mandated independent study confirmed DLS's findings of a massive annual shortfall that BCPSS requires to provide an adequate education. In 2002, the Bridge to Excellence in Public Schools Act implementing the Thornton Commission's recommendations had required a new independent analysis of schools and funding adequacy after ten years. See APA Final Report, *available at* http://marylandpublicschools.org/Pages/adequacystudy/index.aspx. The State Department of Education hired Augenblick, Palaich, and Associates Consulting ("APA") in 2014 to meet this requirement, and APA issued its final report in November 2016. That report concluded that a "significant increase" in funding was required for BCPSS, as well as a new formula for determining adequacy. *Id.* at 86-87.

In reviewing the FY 2015 data, APA determined that Baltimore City needed another $358 million annually, or a per pupil amount of $3,416. *Id.* at xxv-xxvi (Tables 9, 10), 111 (Tables

6.7b, 6.7c). To put this sum in perspective, the $358 million shortfall constituted one-third of the State's entire funding level of BCPSS for FY 2015. *See id.* But even though this study was required by State law, funded by and prepared for the State Department of Education, it too failed to spur the State to reach compliance or materially change its funding pattern.

2. The State's Decision to Delay the Kirwan Commission Report Compounds the State's Continuing Constitutional Violation.

Instead of developing legislation to bring the State back into compliance after its actions reducing required funding under the Thornton formula, the State enacted legislation in 2016 to establish the "Commission on Innovation and Excellence in Education" (the "Kirwan Commission"). The Kirwan Commission was tasked with creating a new set of standards and funding proposals to establish "world-class" schools throughout Maryland, ensuring a 21st-century education for all Maryland children attending public schools and preparing them to meet the challenges of participating in the global economy. The Kirwan Commission was supposed to complete its work with a final report by December 31, 2017. That deadline has been postponed repeatedly, most recently from December 31, 2018 to December 31, 2019. Kirwan Commission, Interim Rep. of the Commission, at iv, 7-8, 11, *available at* http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2019-Interim-Report-of-the-Commission.pdf ("Kirwan Comm'n"). In the interim, the General Assembly has not addressed its ongoing failure to fund even the Thornton-required levels.[11]

But the Kirwan Commission's work to date resoundingly confirms the desperate need—right now—for additional resources to achieve adequacy. It found that, on national and

[11] The legislation creating the Kirwan Commission (like the legislation that created the Thornton Commission) does not require the General Assembly to fund its recommendations. Thus, there is no guarantee that the Kirwan Commission's final recommendations, if and when they ever are issued, will result in constitutional compliance (just as the Thornton Commission recommendations have failed to achieve compliance).

international standards, "Maryland schools perform at a mediocre level in a country that performs at a mediocre level internationally." *Id.* at 2. It found "glaring gaps in student achievement based on income, race, and other student subgroups." *Id.* It found "big teacher shortages," and noted that the current system is "unfair to poor communities and the children who live in them." *Id.* at 3. Its preliminary recommendations are particularly clear about the ways in which the current educational system is failing students who live in poverty, especially those who attend schools with high concentrations of poverty, and students of color. *Id.* at 14-15. Based on these needs, the Commission reached the "inescapable conclusion" that "substantial and sustained improvement in Maryland's educational performance requires targeted attention to its lowest performing schools and an integrated set of reforms that will enable its most challenged students to achieve their full potential." *Id.* at 15. Such needs, moreover, include "critical social services, health care, nutritional, and other needs that students from more affluent families receive as a matter of course." *Id.* (noting as well that such students "often live in neighborhoods where they experience traumas that are going untreated"). These needs, the Commission concluded, must be given priority, as must actions to address persistent racial inequities and the explicit and implicit biases that contribute to such inequities. *Id.* at 16-17.

Thus, the Kirwan Commission's work to date confirms that the status quo is unacceptable and that what is "adequate when measured by contemporary educational standards," *id.* at 117, has evolved since 2000, raising the constitutional floor. It demonstrates that modern educational needs have increased substantially, much as this Court recognized in 2004, just four years after the Thornton levels were established. And the State's decision to delay the Kirwan work for at least another year, with no promise of adequate funding at the end, means that the children who need additional funding the most (per Kirwan's recommendations) will not receive it.

3. BCPSS Has Submitted a Plan to the Kirwan Commission Confirming the Constitutional Inadequacy of Current Funding to the District.

Building on the Kirwan Commission's initial recommendations and areas of focus, BCPSS submitted its own analysis of needs in Baltimore City schools to the Kirwan Commission in January 2019. To develop the plan, called Investing in our Future: A World-Class Education System for Baltimore City Students (Jan. 2019) ("BCPSS World-Class Plan"), *available at* https://www.baltimorecityschools.org/sites/default/files/2019-01/investinginourfuture.pdf, BCPSS met with teachers, administrators, other stakeholders, and experts, and reviewed research on student outcomes, to attempt to answer the question: "What could it look like for a child born in Baltimore in the *second* 18 years of the 21st century— if all schools in Maryland were funded equitably and at a level that truly supports the world-class education that our children deserve?" BCPSS World-Class Plan at 3. The answer is a variety of programs and services focusing on the same areas that the Kirwan Commission identified: (1) early learning focus, including proposals both for three and four-year old public preschool programs and free childcare in public high schools for students who also are parents; (2) high-quality instruction including extended and special education options for students in need and tutors, assistant principals, assistants, and other necessary staff, for arts and elective funding, and for funds spent on technology purchases and upgrades; (3) college and career readiness, including ensuring BCPSS high schools are staffed with college and career counselors, along with internship programs and career education; (4) student wholeness—also one of the Kirwan Commission's most important areas—including providing mental health services, such as counselors and social workers, to students; (5) talent recruitment, development, and retention, with a focus on hiring and training; and (6) systems, structures, and facilities, including student transportation, administrative staffing, technological

upgrades, renovating current buildings, providing for preventative maintenance, and ensuring custodial and grounds support.

The plan's rich menu of programs and services further demonstrates that the students in the BCPSS are not receiving a constitutionally-adequate education. The plan does not specifically cost out its proposals for an adequate education or measure the additional funding necessary for implementation, but it seems likely that such costs would be substantially in excess of current funding.

4. The State Compounded Its Continuing Constitutional Violation by Diverting Funds from the Education Trust Fund.

Finally, adding yet another insult to the sorry story of constitutional injury set out above, for years the State raided an "Education Trust Fund" established in 2008, to receive a portion of new casino license revenues. In 2012, Governor O'Malley boasted that a plan to expand casino gambling would mean "hundreds of millions of dollars for our schools." *See* John Wagner, *Maryland's casino-gambling ballot measure: The big questions about Question 7*, Wash. Post (Oct. 22, 2012), *available at* https://www.washingtonpost.com/local/md-politics/marylands-casino-gambling-ballot-measure-the-big-questions-about-question-7/2012/10/22/347d10bc-1c54-11e2-9cd5-b55c38388962_story.html?utm_term=.eeca13d3cb12. That never happened. The funds Maryland voters were told would *supplement* education funding instead were used to *supplant* existing funding, meaning that available funds for compliance were not utilized and other priorities were funded instead. *See* Ian Duncan, *Casino "lockbox" for Maryland school funding and Election Day voter registration win approval*, Baltimore Sun, Nov. 6, 2018, *available at* http://www.baltimoresun.com/news/maryland/politics/bs-md-state-ballot-20181102-story.html. Even though a constitutional amendment was adopted this past year to establish a "lockbox" to halt reassignment of current funding, the current Governor has proposed legislation that would

utilize this funding to pay for statewide school construction requests, instead of using it to remedy existing constitutional violations in BCPSS and the State's ongoing violations of the Court's findings and orders. *See* HB 153, available at http://mgaleg.maryland.gov/2019RS/bills/hb/hb0153f.pdf.

5. National Studies Confirm the Huge "Adequacy Gap," Including its Impact on African-American Students.

National studies further confirm that the State's failure to fund BPCSS at constitutional levels over time has contributed to a widening gap between the education to which Baltimore students are constitutionally entitled and the education they receive, particularly in light of their increased level of need. For example, in its 2018 National Report Card of state support of public schools, the Education Law Center concluded that Maryland's system is among the most regressive in the entire country, receiving a "D" for its insufficient recognition of poverty and ranking 11th from the bottom nationwide. Education Law Center, *Is School Funding Fair: A National Report Card* (7th Ed. 2018), at 11, *available at* http://www.edlawcenter.org/assets/files/pdfs/publications/Is_School_Funding_Fair_7th_Editi.pdf. *See also id.* at 14 (demonstrating that Maryland is regressive as compared to its geographic region). *Accord* Kirwan Comm'n, *supra*, at 18 (finding that Maryland's formula is regressive). Additionally, Maryland's formula disproportionately harms its African-American population. The Education Trust looked at the State's funding distribution for FY 2015 and concluded that the system is inequitable for children of color, as the three districts with the highest numbers of children of color (Baltimore City, Prince George's County, and Caroline County) also are the three most underfunded districts in the State. *See* Baltimore Community Foundation, The Education Trust Report: Innovation, Excellence and Funding for Maryland Public Schools, "Inequities in Access to Funding of Students of Color" (2018), *available at*

http://education.baltimorecommunityfoundation.org/2018/11/02/ed-trust-report/. *Accord* discussion *supra* at 19-20 (discussing Kirwan Commission's interim report recognizing the pressing needs of children of color and children who live in poverty).

* * *

Whatever the measure, the State's current funding levels for BCPSS do not come close to meeting the requirements of Article VIII. During the years in which the State has been ignoring this Court's declaration of rights of the Plaintiffs to adequate schools, two generations of children have entered and graduated BCPSS schools since this litigation began without receiving the education the State Constitution guarantees them. This Court needs to act now to halt the State's chronic abdication of its fundamental duty to provide sufficient funding to educate the at-risk children in Baltimore City.

D. The State's Failure to Fund BCPSS Sufficiently Continues to Result in the Denial of an Adequate Education in Violation of Article VIII.

What this Court first found in 1996 remains distressingly true today: "There is no genuine material factual dispute . . . as to whether the public school children in Baltimore City are being provided with an education that is adequate[.]" Dkt. 1-66, Order (Oct. 18, 1996). In 2004, the Court agreed with the Thornton Commission's finding that Baltimore City's "'adequacy gap' . . . was the highest in the State." Dkt. 50, Mem. Op. at 12 ¶ 40 (Aug. 20, 2004). The sad reality is that, no matter the measure used, current data demonstrate that children in BCPSS continue to receive an education that is constitutionally deficient. These disparities echo the same deficits that Judge Kaplan found in 2004, and, as was the case then, are the result of the State's failure to fund education in Baltimore sufficiently. These disparities are exacerbated by the lack of sufficient local revenue that Baltimore City, the poorest large jurisdiction in the State, can tap to fill the huge hole in State aid. They are particularly tragic given the needs of Baltimore City's student

population, which is comprised by mostly low-income students of color who already suffer the combined effects of the persisting legacy of structural racial discrimination in Baltimore and the City's current economic woes.

The continuing constitutional violation is demonstrated both by the school system's "inputs" (the educational services, programs, and facilities available to students attending BCPSS) and its "outputs" (student performance on standardized tests and other measures used to determine whether and how well they are learning and being prepared to be 21st century citizens).

1. Baltimore City Public Schools Have Less Staff and Less Experienced Staff Than Other Districts Statewide.

The lack of financial resources translates to a lack of educational services. These disparities are reflected in, among other things, the lack of adequate numbers of teachers and staff in Baltimore City schools. Baltimore City averages the highest ratios of students to staff of any school district in the state: 16.4 students per teacher; 14.7 students per teacher and therapist; and 29.5 students per non-instructional staff member. *See* Maryland Public Schools ("MPS"), Staff Employed at School and Central Office Levels, at 5 (Oct. 2017) ("Staff Levels"), *available at* http://marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Staff/2018_Staff_Emply.pdf.

The problem is exacerbated by the fact that BCPSS has had to reduce significantly the number of its teachers. Baltimore has nearly 500 fewer teachers than it had just three years ago. Ex. 3, BCPSS, Investing in Student Success at 9. Budget shortfalls have affected other staffing decisions as well. Recently, BCPSS had to slash spending on leadership and management. *Id.* at 8. Current spending levels on school leadership and management lag behind similar sized districts nationwide, including Boston, Cleveland, Oakland, and the District of Columbia. *Id.*

A disproportionate number of the BCPSS teachers lack sufficient formal training. Over 20 percent of BCPSS teachers lack standard professional certification, compared to 2.2 percent in Baltimore County Public Schools, 1.1 percent in Carroll County Public Schools, 1.2 percent in Harford County Public Schools, 1.2 percent in Howard County Public Schools, and none in Anne Arundel County Public Schools. *See* Cara McClellan, *OUR GIRLS, OUR FUTURE: Investing in Opportunity & Reducing Reliance on the Criminal Justice System in Baltimore*, at 11, *available at* https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf. BCPSS teachers are also less experienced and more likely to be absent from school: nearly 25 percent are in their first two years of teaching. *See* U.S. Dep't of Educ., Civil Rights Data Collection (2018), *available at* https://ocrdata.ed.gov/districtschoolsearch#schoolsearch ("Civil Rights Data Collection"). Over 69 percent of BCPSS teachers are absent more than ten days of the school year. *Id.*

BCPSS teachers also have fewer advanced degrees than their counterparts around the State. Over 73 percent of teachers in Baltimore County Public Schools have a Master's degree or higher. *See* MPS, Professional Staff by Type of Degree and Years of Experience, 2017, at 8, a*vailable at* http://marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Staff/2018_Prof_Staff_by_Degree.pdf. By comparison, only 50 percent of BCPSS teachers have a Master's degree or higher. *Id.* In Montgomery County Public Schools, 22 percent of teachers have only a Bachelor's degree or less. *Id.* By contrast, 41 percent of BCPSS teachers fall into this category. *Id.*

Although Baltimore City is the fourth largest district in the state, it has fewer support staff than similarly sized districts, such as Anne Arundel County. *See* MPS, Staff Levels, *supra*, at 1. Likewise, although Montgomery County Public Schools is less than twice the size of BCPSS, it has almost four times the number of support staff. *Id.* Similarly, although Baltimore County

Public Schools is approximately 1.3 times the size of BCPSS, it has more than double the number of support staff. *Id.* The disparities and shortages are not limited to support staff. Many schools lack their own school nurse and mental health professionals. *Id.* at 3. In 2017, BCPSS had no library aides. *Id.* Again, given the needs of the Baltimore City student population, these staffing shortages are especially harmful.

Likewise, BCPSS employed merely 81 school counselors. *Id.* at 2. By comparison, Anne Arundel County Schools, a system of similar size, employed 219. *Id.* In some areas, the disparities are starkest at the elementary school level. BCPSS employs merely ten guidance counselors in its 127 elementary schools. *Id.* at 7. Baltimore County Public Schools employs 125. *Id.* The disparities continue as children progress through school. BCPSS employs merely 62 librarians; Anne Arundel County Public Schools, by comparison, employs double that amount. *Id.* at 6.

BCPSS also is challenged to respond fully to the needs of students with disabilities. Although Baltimore City's student population is roughly equivalent in size to that of Anne Arundel County, BCPSS has only 75 percent of the special education therapists that Anne Arundel County Public Schools does. *Id.* at 11.

Currently only 55 percent of Baltimore City elementary school students have music courses and only 81 percent have visual art; very few have dance and theatre. *See* Arts Every Day, Baltimore Arts Education Initiative at 5, *available at* https://www.artseveryday.org/wp-content/uploads/2019/02/City-Council-Hearing-2.pdf. In neighboring Anne Arundel County, 100 percent of elementary students are enrolled in both music and visual arts classes each year. *Id.*

2. Students in Baltimore City Public Schools Are Not Proficient in Reading and Math.

The lack of sufficient staff, along with other similar funding related deficiencies, has a direct impact on student performance. Despite some improvements, BCPSS students continue to

perform at levels well below contemporary standards. By national standards, only 13 percent of BCPSS students in 4th and 8th grade are proficient readers. *See* National Assessment of Educational Progress ("NAEP"), National Assessment of Educational Progress Results: Presentation to the Baltimore City Board of School Commissioners (Apr. 2017) at 7, *available at* https://www.boarddocs.com/mabe/bcpss/Board.nsf/files/AXPN9H5EB399/$file/18.04%202017%20National%20Assessment%20of%20Educational%20Progress%20(NAEP)%20Results.pdf. The results are similarly alarming when students are tested as to proficiency in math. In 2017, only 14 percent of 4th graders and only 11 percent of 8th graders were proficient. *Id.* at 8.

The percentage of students who meet these basic proficiency standards is far lower than those of students in Maryland and across the country. The disparities exist at every level of the system, including among the City's youngest students. Fourth grade students in Baltimore City, when tested as to their reading abilities, score 16 points lower than students in other large cities, 24 points lower than students nationwide, and 28 points lower than students on average throughout Maryland. NAEP, *supra*, at 5. Eighth grade students in BCPSS score 15 points lower in reading than students do in other large cities nationwide, 22 points lower than students across the country, and 24 points lower than students across Maryland. *Id.* Likewise, fourth grade students in BCPSS, when tested on math, score 17 points lower than students in other large cities, 24 points lower than students nationwide, and 26 points lower than students on average throughout Maryland. *Id.* at 6. Similarly, eighth grade students in BCPSS score 19 points lower than students in other large cities nationwide, 27 points lower than students across the country, and 26 points lower than students across Maryland. *Id.*

Even when compared with 28 other large school districts nationwide, Baltimore City students scored lower than all but three districts in reading and math. *Id.* at 19. Among the districts

that scored higher than Baltimore City were Atlanta, Philadelphia, and the District of Columbia, each of which have socio-economic demographic makeups similar to Baltimore. *Id.* BCPSS students in eighth grade scored lower than all but two districts, including Atlanta, the District of Columbia, Philadelphia, and Milwaukee. *Id.* at 20.

3. Baltimore City Students Score Lower on Advanced Placement and College Entrance Exams.

State funding also directly affects the availability of advanced placement and college preparatory courses and student performance on them. Of the 39 high schools that were open in 2017, only 23 offered Advanced Placement ("AP") or an International Baccalaureate Diploma Program. Civil Rights Data Collection, *supra.*

The students who are fortunate enough to enroll in AP courses often score lower than other students statewide. Of the nearly 2,300 students who took Advanced Placement courses in 2017, only 31 percent passed. *See* BCPSS, College and Career Readiness Update: Presentation to the Baltimore City Board of School Commissioners, Teaching and Learning Committee (Nov. 5, 2018) at 46, *available at* https://www.boarddocs.com/mabe/bcpss/Board.nsf/files/B5ZLUD4D571C/$file/College%20and%20Career%20Readiness%20Update.pdf. The average Maryland pass rate, 63.1 percent, was more than double that in BCPSS. *Id.* at 47. Again, the percentage of African-American students passing lagged far behind that of other students, with only 12.8 percent passing their exams. *Id.* at 48. The results are particularly alarming given that students in Maryland, on the whole, score more than 7 points higher than the national average. *Id.* at 47.

The disparities are likewise reflected in the lower test scores of BCPSS students taking college entrance exams. In 2017, the average SAT score for BCPSS students was 884, more than 150 points lower than the state average. *Id.* at 11. Similarly, 11th grade BCPSS students taking

the PSAT scored more than 183 points lower and students taking the SAT scored 162 points lower. *Id.* at 36, 51.

4. Graduation Rates Are Lower and Dropout Rates Are Higher among BCPSS Students.

These lower performance rates are reflected in the relatively low number of students who make it to graduation. Graduation rates for BCPSS students continue to lag behind students in other districts across the state. "Four-year graduation rates have flattened, with the class of 2017 showing a four-year rate of 70.7 [percent]," significantly lower than the statewide average of 87.7 percent and the average graduation rates in Anne Arundel, Howard, Montgomery, Prince George's, and Baltimore County Public Schools. Ex. 4, BCPSS, Summary Report: 4 Year Graduation and Dropout Update Class of 2017, at 1.

"While graduation rates have flattened, four-year dropout rates in City Schools increased from the previous year. The four-year dropout rate for the Class of 2017 stood at 15.9 percent, up from 13.9 percent for the Class of 2016 . . . ." *Id.* at 2. By contrast, only 8.2 percent of students statewide dropped out. *Id.* at 4. Rates from other large counties, including Anne Arundel, Howard, and Montgomery County Public Schools, were even lower. *Id.* Dropout rates increased among most student groups, but were most pronounced among the Hispanic/Latino and English Learner populations, which also saw the largest increases in population. Both groups' dropout rates increased by more than 12 percentage points. *Id.* at 3.

The disparities are also reflected in where students find themselves once they graduate. The percentage of BCPSS students enrolled in a two or four-year college in their first fall after graduation has continued to fall, with only 41.7 percent of students enrolled, compared to 46 percent in 2012. *See* BCPSS, College and Career Readiness Update, *supra*, at 54. Two years after graduation, only 53 percent of former BCPSS students are enrolled in college, compared to 71.1

percent statewide. *Id.*; Md. State Dep't of Educ., Maryland Report Card: Demographics (2017), http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20162017Student/2017EnrollbyRace.pdf.

5. The Official State Report Card for Public Schools Confirms these Disparities.

The State's own official measure of school performance confirms that BCPSS schools fail to meet state standards in numerous categories. In 2017, the General Assembly passed legislation, the Protect our Schools Act of 2017 (HB 978) refining the factors and calculations the Maryland State Board of Education uses to assess schools statewide, assigning them star ratings—from 1 to 5 stars—and percentile rankings based on performance. *See* Md. Laws 2017, ch. 29; Danielle E. Gaines, *With New Report Card, State Schools Receive A Star Rating*, Maryland Matters (Dec. 5, 2018), *available at* https://www.marylandmatters.org/2018/12/05/with-new-report-card-every-state-school-receives-a-star-rating/.[12] All schools in the state were assigned a star rating based on the possible percentage of points achieved after an assessment of, among other things, standardized test scores, graduation rates, and the chronic absenteeism rate. *Id.* Five-star schools received at least 75 percent of the possible points; one-star schools received less than 30 percent of the possible points. *Id.* The report card improved on the previous system by, among other things, considering different factors for elementary, middle and high school students and improvement over time among elementary and middle school students. *Id.* The previous system was criticized for

[12] As explained by MSDE, the new Report Card assessment of schools constitutes the formal measurement tool for Maryland to comply with the federal Every Student Succeeds Act, which requires states to develop plans to improve schools through accountability and innovation. It was approved by the US Department of Education early in 2018. In addition to collecting information on how schools and districts fare on State assessments, it also measures "other factors such as growth in achievement, high school graduation, student access to a well-rounded curriculum, the progress of English language learners, and postsecondary readiness." MSDE, Maryland Report Card, Introduction. *available at* http://reportcard.msde.maryland.gov/.

"paint[ing] too simplistic a picture of the complicated factors that go into" assessing whether a school is providing students an adequate education. *Id.*

The new system of measurement, like its predecessor, reveals the gross disparities between BCPSS and its counterparts. Baltimore had 23 schools that received only one star, almost twice the number of one-star schools in every other Maryland school district combined. *Id.* Only 3 percent of schools statewide received the lowest rating, and 66 percent of these schools (23 of 35) were in BCPSS. *Id.* Although three and four-star ratings were by far the most common statewide, only 39 percent of BCPSS schools were so rated compared to 74 percent of schools in the rest of the state. *Id.* BCPSS was the only school district in which the largest number of schools received two stars. *Id.* Altogether, almost 60 percent of BCPSS schools received only one or two stars (99 of 166 schools)—not only the largest percentage in the State, but more than *eight times* the percentage for the rest of the State, where less than 7 percent of all schools received only one or two stars (80 out of 1150 total schools outside of Baltimore City). *Id.*

Conversely, only three BCPSS schools received five stars. *Id.* Baltimore County had 36 such schools; Howard County had 31 such schools; and, in Montgomery County, 50 schools were awarded five stars. *Id.* Only 13 percent of BCPSS schools were awarded four or five stars—the lowest percentage in the State, and almost half that of the school district with the next lowest percentage. *Id.* Combined, 219 schools statewide received five stars. BCPSS accounted for barely 1.5 percent of these schools. *Id.* On average, 17 percent of schools statewide received five stars; in Baltimore, only two percent of schools did. *Id.*

6. Baltimore City's Student Population Has Higher Needs Resulting from Higher Poverty Rates and Other "At-Risk" Factors.

Students who attend BCPSS face additional challenges that the State must account for. This Court previously found that the "students who live in poverty or face similar disadvantages

cost more to educate." Dkt. 50, Mem. Op. at 12 ¶ 40 (Aug. 20, 2004); *accord id.* at 29 § 8 (finding that the substantial number of students who live in poverty and have other needs "require increased educational focus and resources") (capitalization omitted). It accepted the Thornton Commission's finding that "substantial additional resources in addition to then-current funding were necessary to educate students who live in poverty[] to enable those students to meet state standards and receive an adequate education." *Id.* at 11 ¶ 38. Citing testimony by the State Superintendent, this Court also found that "the needs of children in poverty have increased since the Thornton recommendations were issued." *Id.* at 16 ¶ 56. All of these findings apply with equal force today, as the January 2019 interim report from the Kirwan Commission confirms. *See* Kirwan Comm'n, *supra*, at 4 (recommending "broad and sustained new support" for students who liv in poverty); *id.* at 106-07 (explaining that "extra resources and a determined, persistent, and comprehensive effort" are needed for schools with high concentrations of poverty).

As calculated by the State, BCPSS has the highest "at risk student index" in the State—the combined percentage of students that receive free and reduced meals, have limited English proficiency, and have special education needs. *See* DLS, Overview of State Aid to Local Governments, Fiscal 2020 Allowance, at 40-42, *available at* http://dls.maryland.gov/pubs/prod/InterGovMatters/SteAidLocGov/Overview-of-State-Aid-to-Local-Governments-Fiscal-2020-Allowance.pdf. Over 86 percent of students in BCPSS are eligible for free and reduced meals—the highest percentage in the state. *Id.* at 40. By comparison, on average, only 42 percent of students are eligible statewide. *Id.* Of these, 19.3 percent of BCPSS students suffer from extreme poverty, nearly three times the statewide average. Ex. 3, BCPSS, Investing in Student Success at 4. BCPSS identified 2,716 homeless youth who attended the

district's schools in the 2012-13 school year. *See* BCPSS, Homeless Services, *available at* http://www.baltimorecityschools.org/homeless.

These differences are not without consequence. Students who are economically disadvantaged score significantly lower than other students. The National Assessment of Educational Progress found that, in 2017, BCPSS students, tested separately in grades 4 and 8, who received SNAP (Food Stamp) or TANF (welfare) benefits, were homeless, or were in foster care, received lower scores in both math and reading. NAEP, *supra*, at 15-16.

Unfortunately, the barriers extend beyond wealth. More than 7 percent of Baltimore City students have limited English proficiency—the sixth highest percentage in the state. *See* DLS, Overview, *supra*, at 41. Seventeen percent of the City's student population has special education needs—the second highest percentage in the state and four points higher than the state average. *Id.* at 42.

Because of the social and economic challenges that Baltimore neighborhoods face, BCPSS schools have a high proportion of students who need social and emotional supports. Nearly 30 percent of children in Baltimore, compared to 19 percent statewide, have ACE ("Adverse Childhood Experiences") scores of two or more, meaning that they have experienced more than two incidences of traumatic events such as domestic violence, living with someone with an alcohol/drug problem, the death of a parent, or being a victim/witness of neighborhood violence. *See* Balt. City Health Dep't, Healthy Baltimore 2020: A Blueprint for Health (Mar. 2017) at 10, *available at* https://health.baltimorecity.gov/sites/default/files/HB2020%20-%20April%202017.pdf. As research has established, these barriers drastically affect a student's ability to learn because toxic stress affects a child's developing brain. *See* Centers for Disease Control and Prevention, *Violence Prevention: Adverse Childhood Experiences*, *available at*

https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Facestudy%2Findex.html.

Approximately 37 percent of BCPSS students are chronically absent due to these and other challenges. *See* Liz Bowie, *Does Maryland really have the highest rate of chronically absent students in the U.S.?*, Baltimore Sun (Sept. 17, 2018), *available at* https://www.baltimoresun.com/news/maryland/education/k-12/bs-md-report-school-absence-20180917-story.html. Students who attend high poverty schools are significantly more likely to experience conditions that make it difficult to attend school every day. *See* Hedy N. Chang & Mariajosé Romero, *Present, Engaged, and Accounted For: The Critical Importance of Addressing Chronic Absence in the Early Grades* (Sept. 2008), *available at* http://www.nccp.org/publications/pdf/text_837.pdf. These conditions include: physical and behavioral health conditions; substandard, unstable housing; dangerous routes to and from school; and unreliable public transportation. Many students have one or more health conditions that put them at risk for frequent absence from school, such as asthma, dental health, and vision impairments, among others. Chronic absence rates highlight educational inequity and lack of access to opportunities. *See* Krenitsky-Korn S., *High school students with asthma: attitudes about school health, absenteeism, and its impact on academic achievement*, 37 J. Ped. Nursing 61, 68 (2011); Julia Burdick Will, *et al.*, *Danger on the Way to School: Exposure to Violent Crime, Public Transportation, and Absenteeism*, 6 Sociological Sci. 118, 119-20 (2019); Stephanie L. Jackson, *et al.*, *Impact of Poor Oral Health on Children's School Attendance and Performance*, 101 Am. J. Pub. Health 1900, 1906 (2010).

These factors work together to decrease the quality of education and opportunities that students receive. Classes with significant student populations with high and diverse needs make

it more difficult for teachers to meet all students' needs. Ex. 3, BCPSS, Investing in Student Success at 21. As a result, schools must provide additional special education resources and other support services which otherwise would not be needed. *Id.* This leaves fewer resources for general education and the provision of a more rigorous curriculum for all students. *Id.* Examples of additional resources required might include, among other things, physical health supports, such as school nurses; mental and behavioral health supports, such as school psychologists; and academic support and tiered interventions, such as small group instruction and tutoring. *Id.*

BCPSS spends 24 percent of its total operating budget on services for students with disabilities, the highest among comparison districts in the State. *Id.* at 20. This is due, in part, to having to expend 41 percent more on physical health services and 60 percent more on social emotional services for students than other districts spend on average statewide. *Id.* City schools' transportation costs are also higher for students with disabilities. *Id.* According to BCPSS estimates, the district needs an additional $600 per elementary school student and $1,375 per middle and high school student to address *just the additional costs* that arise from having an overwhelmingly high need, student population. Ex. 5, Proposed Changes to the Fair Student Funding Model at 35 (Jan. 9, 2018).

Nonetheless, the State has ignored and continues to ignore Baltimore's student population. As of 2013, DLS determined that Baltimore City had the second largest funding gap per student in the state—the gap between current funding and funding determined by the State in 2002 to be necessary to provide students an adequate education—$1,952 per student. *See* Handbook, *supra*, at 64. Although, in a majority of states, students in the poorest school districts tend to receive more funding than rich districts, Maryland is one of six states where the wealthiest 25 percent of school districts receive more money than the poorest. *See* Jill Barshay, *In six states, the school*

districts with the neediest students get less money than the wealthiest, The Hechinger Report (July 9, 2018) (discussing 2014-15 data from, and recent report by, the National Center on Educational Statistics), *available at* https://hechingerreport.org/in-6-states-school-districts-with-the-neediest-students-get-less-money-than-the-wealthiest/. As discussed above, a study by the Education Law Center found that Maryland's funding system is among the most regressive nationwide for its failure to provide additional funding to school districts with high concentrations of low-income students. *See* Education Law Center, *Is School Funding Fair: A National Report Card*, *supra*, at 15 & n.15.

7. BCPSS Is Racially Isolated from Surrounding School Districts.

Compounding matters, the Baltimore region is highly segregated, which is reflected in the racial composition of BCPSS's student population. *See* Jennifer B. Ayscue, *et al.*, *Settle for Segregation or Strive for Diversity? A Defining Moment for Maryland's Public Schools*, at 6 (April 2013), *available at* https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/settle-for-segregation-or-strive-for-diversity-a-defining-moment-for-maryland2019s-public-schools; Gary Orfield, *et al.*, Brown at 62: *School Segregation by Race, Poverty and State*, at 4 (May 16, 2016), *available at* https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state. Accordingly, the State's failure to fund BCPSS adequately has caused the denial of an adequate education to a significant proportion of Maryland's African-American student population. Approximately 79 percent of BCPSS students are African-American—the highest percentage in the state. *See* MPS, Public School Enrollment by Race/Ethnicity and Gender and Number of Schools, at 1, *available at* http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Student/2018EnrollbyRace.pdf. As of 2015, 53 percent of African-American students in Maryland attended

chronically underfunded schools, compared to just 8 percent of white students across the state. *See* Letter from Sonja Brookins Santelises to Kirwan Comm'n (Jan. 16, 2019), *available at* http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2019_01_18_BaltCityPublicSchoolsLetter.pdf. Moreover, as the Kirwan Commission has found, Maryland has "glaring gaps in student achievement based on income, race, and other student subgroups." Kirwan Comm'n, *supra*, at 2; *id.* at 14 (citing data); *id.* at 16-17 (finding that "race and poverty are not interchangeable" and that students of color face unique barriers from racial inequities and explicit and implicit bias).

Additionally, racially isolated schools hamper the educational opportunities of all students by impeding the development of critical thinking skills, stifling educational and career goals, and failing to prepare students for careers in a diverse workforce. *See* U.S. Comm'n on Civil Rights, Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation at 5 (Jan. 2018), *available at* https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf). The impact of racial isolation on educational opportunity can be addressed only through state-wide policies and initiatives to foster diversity and address the segregation that exists between schools and school districts. Thus, in addition to increasing funding on other areas that are proven to increase educational outcomes for students through recruiting and supporting strong and experienced faculty, expanding social and health services in schools, and offering high quality early education, among other things, additional funding to support a constitutionally-adequate education is needed to remediate the effects of racial segregation and isolation. *See* Jennifer Ayscue, *et al.*, *The Complementary Benefits of Racial and Socioeconomic Diversity in Schools* (Mar. 2017), *available at* http://school-diversity.org/pdf/DiversityResearchBriefNo10.pdf.

8. Baltimore City Public Schools Require State Funding Because Baltimore City Lacks Sufficient Revenue Resources Available to Wealthier Counties.

State funding is particularly important to BCPSS because of the low level of local funding available for education in Baltimore City. Only 24 percent (approximately $278 million) of BCPSS funding comes from local sources, even though the City's property tax rate is the highest in the state. Ex. 6, Funding 101 Slides at 2. By comparison, Howard County receives over 70 percent (approximately $572 million) of its funding from local sources. *Id.* The disparity is not borne from disinterest or inadequate support by the City government. Rather, it reflects the economic reality of Baltimore City's population: Baltimore City residents are lower-income than residents in surrounding districts. *See* https://factfinder.census.gov. Indeed, Baltimore City residents are, on average, much poorer than the residents in any other large jurisdiction in the State. *Id.* As a result, the tax base is much lower, and the City cannot fill budget holes with its own revenues like other large jurisdictions are able to do. The Kirwan Commission has recognized this problem, noting that "several national studies show Maryland to be 'regressive' in its school funding, which means, in effect, that our school finance system is unfair to poor communities and the children who live in them." Kirwan Comm'n, *supra*, at 3.

To cite one glaring consequence of this stark inequity, BCPSS expends over $50 million annually from its general operating budget to pay its share of the cost of the bonds that are funding the new "21st Century School Plan"[13] buildings in Baltimore City. *See* BCPSS Operating Budget for 2018-19 at 23 (listing $53,496,255 for "debt service"), *available at* https://www.baltimorecityschools.org/sites/default/files/2019-01/Budget-FY19OperatingBudget-

[13] The Plan is a joint agreement between the City and the State to fund the construction of a limited number of new school buildings in Baltimore. *See* https://baltimore21stcenturyschools.org/about/history. However, as explained below, the Plan is insufficient to address the overwhelming facility needs of the system's buildings.

English.pdf. Other jurisdictions are able to pay their share of school construction costs out of separate capital budgets and thus do not have to raid academic operations in order to pay for new school construction.

This Court has already noted the significance of Baltimore City's comparative lack of resources. In 2004, Judge Kaplan made an express finding that Baltimore City ranked last among Maryland jurisdictions in wealth per pupil. Dkt. 50, Mem. Op. at 30 ¶ 125 (Aug. 20, 2004). Today, the situation is not much better.

Moreover, Baltimore City is already contributing more, proportionately, than many richer jurisdictions. APA's state-mandated study for the State Department of Education in 2016, for instance, concluded that not only should the State share of funding for Baltimore City be increased by $387 million (in FY 2015 numbers), or 45 percent, but the City's share should actually be *decreased* by $29 million, or 13 percent. *See* APA, *supra*, at 109 Table 6.7a, 6.7b (net annual "adequacy gap" of $358 million).

9. The Aggregate Evidence Demonstrates that Defendants' Violations of Article VIII Persist, Nearly 15 Years after this Court's 2004 Decision.

For all of these reasons, what the Court concluded in 2004 about the State's chronic underfunding of BCPSS remains true today: "Student scores and other objective evidence continue to demonstrate, as they did in 1996 and 2000, that the BCPS students are performing at levels far below state standards, and far below state averages[.]" Dkt. 50, Mem. & Op. at 25 ¶ 98 (Aug. 20, 2004). Among the pertinent evidence were disproportionately low scores on state achievement tests and high school assessment tests; unacceptable dropout, graduation, and attendance rates; and high concentration of poverty and other high-risk factors. *Id.* at 25-30 ¶¶ 99-125. These poor outcomes and high-risk factors "indicate an inadequate level of educational services." *Id.* at 28 § 7 (capitalization omitted). The objective evidence of poor outcomes has not changed materially

since 2004, and, accordingly, neither should the Court's conclusions. BCPSS schools receive insufficient funds to provide "an []adequate level of educational services." *Id.* (capitalization omitted).

II. The State Is Violating Its Constitutional Obligation to Provide Baltimore City Students with Adequate School Facilities.

In addition to depriving Baltimore City children of funds sufficient for adequate educational and instructional programs, the State also has abdicated its duty under Article VIII to provide funding sufficient to ensure that students in the City attend school in buildings that are safe, functional, have reliable heat and air conditioning, and have sufficient facilities to support an adequate education program. The physical condition of most school facilities in Baltimore City is abysmal. The system has reached a breaking point, and the condition is getting steadily worse. Accordingly, these problems continue to directly affect the ability of Baltimore City students to learn.

Article VIII clearly requires adequate facilities, both because an adequate education under contemporary standards should be understood to include the facilities where students learn, and because adequate facilities are necessary for adequate learning. Accordingly, this Court has already recognized that facilities are relevant to assessing whether a system of education meets contemporary standards, because it approved the Consent Decree which included funds for improving schools and because it adopted as its own the findings of the Metis Report, which focused extensively on the inadequacy of the BCPSS facilities. As discussed below, moreover, that recognition is consistent with several decisions from other courts across the country applying identical or similar constitutional provisions.

Nonetheless, BCPSS has been starved of the funds necessary even to maintain its facilities, let alone to bring them to modern standards. Children attending BCPSS are expected to learn in

physical facilities that oftentimes lack functional and reliable heat, lack air conditioning, lack drinkable water, lack security measures such as classroom doors that lock or appropriate coverage by security cameras, have dilapidated elevators that routinely break down because they are decades beyond the date when they should have been replaced, and often have roofs and structures that are leaking, crumbling, and well beyond their useful lives. *See, e.g.,* Talia Richman, *Leaky roofs, lead in the water, fire risk: Baltimore schools face nearly $3 billion maintenance backlog*, Baltimore Sun, *available at* http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-ci-facilties-costs-20180914-story.html; Ex. 7, Jacobs, State of School Facilities, Baltimore City Public Schools, June 2012, at 23 ("Jacobs Report" or "Jacobs Rep."); Ex. 8, BCPSS, Comprehensive Educational Facilities Master Plan (Oct. 12, 2018), at 620-26 (listing schools with a variety of problems, including structural issues, fire safety issues, and the need to replace HVAC systems, roofs, and electrical systems). Last winter, the system closed for a week because numerous ancient heating systems failed and classrooms were without heat; last summer, schools closed for lack of air conditioning; this winter, problems have recurred.

Six years ago, at least 85 percent of the school buildings were rated "very poor" or "poor" by the engineering firm, Jacobs, which relied on accepted industry standards to assess every facility in BCPSS. Ex. 7, Jacobs Rep., *supra*, at 26. The Jacobs report, the standard it used, and its findings have served as the accepted basis by BCPSS and the State to assess facilities deficiencies in BCPSS. *See* https://baltimore21stcenturyschools.org/about/history (noting the importance of the Jacobs report and its findings to the work of the 21st Century Schools fund, under which the State and BCPSS have partnered to renovate a small number of Baltimore schools). Using estimates projected by BCPSS from the 2012 Jacobs Report, it would cost $3 billion to bring BCPSS buildings up to a minimally acceptable standard through repairs and building replacements

and $5 billion to complete a full portfolio replacement to meet modern educational standards. Nor does the BCPSS have the funds to adequately maintain the schools, particularly in light of their already dilapidated condition—the $23 million annually it spends from its operating funds (taking funds from the classroom) is not even close to the $150 million that industry standards require for similar systems. Ex. 9, BCPSS SY 18-19 Comprehensive Maintenance Plan at 3.

Students feel the effects of this systemic constitutional violation at the individual school level. One compelling measure of how students experience day-to-day education in Baltimore City's aging facilities is the significant number of emergency/unscheduled work orders. Emergency work orders are "for immediate repair to equipment or the physical plant that is a threat to life and safety or the mitigation of the threat to life and safety." *Id.* at 46. In 2017 there were almost 42,000 such work orders for BCPSS's 159 school buildings, requiring 96,000 hours to address. There were 32,000 such work orders for 2018 requiring 53,000 hours. *Id.* at 46, 47. These emergency repairs "typically include full or temporary repairs to critical safety, mechanical, plumbing, electrical, and security systems" – and they can and do lead to school closures such as the events of last winter. *Id.* at 12.

A. BCPSS Facilities Are in Abysmal and Unconstitutional Condition.

1. Building Conditions Are So Poor that Emergency Issues, Including School Closures, Often Affect Students' Opportunities to Learn.

Last winter, students in 87 Baltimore City public schools—over half of all public schools in the City—attended class in rooms that were without heat or with limited heat because boilers and other major elements of the schools' aging heating systems failed. Ex. 10, BCPSS Mem. to Del. Maggie MacIntosh (Jan. 22, 2018) ("Mem. to Del. McIntosh"); *see also* Sarah Larimer, *Kids are freezing: Amid bitter cold, Baltimore schools, students struggle*, Wash. Post (Jan. 5, 2018), *available* at https://www.washingtonpost.com/local/education/kids-are-freezing-amid-bitter-cold-

baltimore-schools-students-struggle/2018/01/05/8c213eec-f183-11e7-b390-a36dc3fa2842_story.html?utm_term=.9a7b8903265f. As a result, over the course of a two-week period, over 60 schools were forced to close, with thousands of students forced to miss multiple days of instructional time. Teachers and families tried to raise funds to buy winter coats and space heaters for their shivering students, including through well-publicized GoFundMe campaigns. *See* Tim Tooten, *GoFundMe created in hopes of solving cold-school crisis in Baltimore City, available at* https://www.wbaltv.com/article/gofundme-created-in-hopes-of-solving-cold-school-crisis-in-baltimore-city/14751935. The problems with heat are chronic. Fifty-one of the 87 buildings that closed had *repeated* building-wide heating incidents during the 2017-18 school year. Ex. 11, 2018 Advisory Group Rep. 1. Fixing the problems is expensive: long-term capital needs related only to HVAC for these buildings were estimated at $154 million; overall long-term capital needs were estimated at $1 billion. Ex. 10, Mem. to Del. McIntosh, *supra*.[14]

This past summer, over 70 schools again were forced to close; this time, because classrooms had no air conditioning. *See* Abby Isaacs, *Lack of air conditioning closes 70+ Baltimore City schools early on first day*, WMAR Batltimore (Sept. 4, 2018), *available at* https://www.wmar2news.com/news/region/baltimore-city/lack-of-air-conditioning-closes-70_-baltimore-city-schools-early-on-first-day-of-school. Nearly 40 percent of all BCPSS schools lack air conditioning. *See* Richard Martin, *Baltimore Schools Without Air Conditioning Will Dismiss Early*, The Baltimore Sun (Sept. 6, 2018), *available at* https://www.baltimoresun.com/news/maryland/education/k-12/bs-md-ci-schools-dismiss-early-20180906-story.html; Ex. 11, 2018 Advisory Group Rep. 1.

[14] The State provided $12 million in short-term emergency funding at the peak of the crisis in late January 2018 but nothing for long-term capital needs. Only 21 of the 87 buildings are slated to be renovated, replaced, or surplused as part of the 21st Century Plan, discussed below. Ex. 10, Mem. to M. MacIntosh; Ex. 12, BCPSS Impact Mem.

This winter, issues with school closures because heat is lacking have continued. *See* Sara Meehan, *5 Baltimore schools closed because of water, heat problems Tuesday* (Jan. 22, 2019), *available at* http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-school-closures-20190122-story.html. Although the system reports working to improve monitoring and response times to avoid closures like last winter's, the capital needs that led to the problems remain. *See*, Talia Richman, *How are Baltimore Schools Preparing for Winter After Last Year's Heating Disaster* (Nov. 26, 2018), *available at* http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-ci-schools-winter-preparedness-20181119-story.html.

Heating and air conditioning are not the only urgent problems—aging plumbing and other structural systems cause disruptive situations as well. For instance, a teacher at one school recently tweeted a video of water coming from leaking pipes in the ceilings and reported that trash cans had been placed to catch it in the hallways. The system attributed the leak to "aging plumbing infrastructure." *See Video Shows Water Pipe Leaking at Baltimore School*, WBALTV, *available at* https://www.wbaltv.com/article/matthew-henson-elementary-leaking-water-pipes/26236298; Aaron Maybin, photos, *available at* https://www.dropbox.com/sh/q7twu6gfwsgwv6f/AADw3OwxLNTnnVcvaopnkqB0a?dl=0 (collection of pictures). Several schools have been closed for issues with their water systems. *See* Sarah Meehan, *5 Baltimore schools closed because of water, heat problems Tuesday*, (Jan. 22, 2019), *available at* http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-school-closures-20190122-story.html.

Student, parent, and teacher comments further illustrate the abysmal conditions in which Baltimore City children are expected to learn and the effect that these continuing emergency conditions have on learning and student achievement. Student Dashawna Bryant has sickle cell

anemia and spent a week in the hospital after a day in an unheated classroom last winter. She says:

> I would like our leaders to know that students in Baltimore also have a dream, and just because some of us aren't rich enough to have those dreams come true doesn't mean they should be taken away from us. I want to study to be a child psychologist when I go to college. I know some of my friends are trying to be doctors or lawyers or judges, but the fact that we go to a Baltimore City school, and the fact that we don't have heating or air conditioning or all this funding, takes away from those dreams. It makes it harder for people to want to go to college because they know how hard it is for them. I just want the elected leaders to know that just because we don't go to a private school, or just because we don't live out in the county, we do still have dreams that we want to accomplish.

Similarly, a teacher, former NFL football player Aaron Maybin, described school closings due to lack of heat as "mass institutional negligence," stating that it was "heartbreaking" to watch his students suffer:

> When I'm sitting there in a classroom with my students, who I know, who I love, who I understand, who I expect the most out of, who I definitely drive to be better — when I'm a room with them, and they can see their breath in the room, and some of them don't have winter coats, so they're shivering, their lips are chapped, they're ashy, you know what I mean? . . . It's infuriating. It makes you angry. It makes you sad. It makes you heartbroken. But more than anything, you want to do something.

Larimer, *supra*.

2. The Vast Majority of BCPSS Buildings Are in "Very Poor" Or "Poor" Condition Under Accepted Industry Standards.

These urgent issues are a symptom of a much larger problem—the pervasive age and deterioration of the buildings, the continued lack of capital outlay and sufficient maintenance, and insufficient funding for ongoing maintenance. Many BCPSS schools are the oldest in Maryland. Currently, the system operates 159 buildings, decreasing to 156 in the 2019-20 school year. Twenty-three percent of the buildings were built before 1946 and 74 percent were built between 1946 and 1985. Only three percent, not counting the new schools just opened under the 21st Century Program, have been built since 1985. Ex. 13, BCPSS, State of City Schools Buildings: Summary of the Preliminary Jacobs Report at 4 (June-July 2012).

The most recent comprehensive survey available, by the engineering firm Jacobs in 2012, demonstrates the decrepit and abysmal condition of Baltimore City school facilities. Jacobs assessed all 185 school buildings then operating and rated them on the established industry standard, the Facilities Condition Index ("FCI"), for physical conditions and educational adequacy, including security, technology, classroom size, special use areas like libraries, lighting, as well as specific equipment and space for programs like science, technology, and music/arts. Ex. 7, Jacobs Rep., *supra*, at 8-11. Its findings were damning. The overall FCI for BCPSS was 60 (on a 0-100 scale, with 100 the worst score), reflecting "facilities in very poor condition." *Id.* at 25. Sixty-nine percent of all school buildings were in "very poor" condition and an additional 16 percent were in "poor" condition. Of these, 50 buildings had such high FCIs that they "should be considered as candidates for replacement or [treated as] surplus." *Id.* at 33. BCPSS schools scored nearly as poorly for "educational adequacy," with an average score of 55, a "failing grade." *Id.* at 9.

Simply put, "City Schools buildings do not provide the physical structures, technology and instructional space to support 21st-century teaching and learning." Ex. 13, BCPSS, State of City Schools Buildings, *supra*, at 9. Jacobs estimated that it would cost $2.5 billion (about $3 billion today by BCPSS's estimate) to bring BCPSS buildings up to a minimally acceptable standard through repairs and building replacements and $4 billion ($5 billion today) to complete a full portfolio replacement to meet modern educational standards. *Id.* at 25. Notably, in a report to the General Assembly, the State's own Interagency Committee on School Funding (comprised principally of State cabinet officials, *i.e.*, the State Superintendent of Schools and the Secretaries for the Departments of General Services and of Planning), accepted the Jacobs Report's conclusions that "that City Schools facilities are severely deficient when measured by a number of

commonly accepted standards: age of facility, educational adequacy, facility condition index (FCI), and level of utilization." *See* Interagency Comm. on School Construction, Baltimore City: Public School Construction Program Block Grant Funding, at 4 (Jan. 8, 2013), *available at* http://www.pscp.state.md.us/reports/2012_p196_PSCP_Report%20on%20Baltimore%20City%20Block%20Grant.pdf.

The 2018 BCPSS Facilities Master Plan confirms that the problems identified in the Jacobs report persist in 2018 and continue to require substantial State funding to fix. Ex. 8, BCPSS, Comprehensive Educational Facilities Master Plan at 73 (Oct. 12, 2018). It further finds that "without considerable district-wide investment in capital improvement and facility sustainment, conditions will continue to deteriorate as older school buildings age and as deferred maintenance continues to degrade facility conditions." *Id.* And it confirms that BCPSS's facilities, the largest and oldest in the State, continue to need substantial emergency repairs to "critical building systems and equipment," including HVAC. *Id.*

3. The System Lacks Funds for Ongoing Maintenance (Including Dealing with Emergencies), Further Contributing to Deficiencies.

The deplorable, deteriorating condition of the schools is steadily worsening because BCPSS lacks sufficient funds for current preventive and corrective maintenance and operation of its schools (*e.g.*, pest control, snow removal, landscaping, trash removal, and utility charges). Each day that maintenance needs go unaddressed, the conditions worsen and the cost for repairs increases. The industry standard for public schools is that systems should budget three percent of the current replacement value of the buildings annually for ongoing building maintenance. Ex. 9, BCPSS SY 18-19 Comprehensive Maintenance Plan at 3. For BCPSS, the current replacement value is approximately $5 billion, and three percent of that is $150 million. *Id.* But BCPSS's annual

maintenance budget is only $23 million, *just 15 percent of the established industry standard. Id.* That does not address the significant deferred maintenance costs. Ex. 7, Jacobs Rep., *supra*, at 23.

B. For Years, the State Has Failed to Fund Facilities While Buildings Crumbled.

The State has ignored these problems for decades, despite clear notice that BCPSS facilities are rapidly deteriorating, thus allowing a $600 million problem to mushroom to a $5 billion one. The Jacobs Report was not the State's first warning. Over two decades ago, Plaintiffs first alleged that the BCPSS facilities were not constitutionally sufficient. *See* Dkt. 1-4, Compl. ¶ 105. They relied on a 1992 assessment demonstrating that over 20 percent of BCPSS schools were then in "poor" condition, "with seriously leaking roofs and other structural defects," and only 16 percent were in "good" condition. *Id.* (citing 1992 Facilities Master Plan, State Amended Admission 86).

By 1996, when this Court entered its summary judgment ruling determining that the education being provided to Baltimore students was constitutionally inadequate, the percentage of schools rated as poor had risen to 35 percent, with only 10 percent of the buildings rated in "good" condition. This Court relied on that evidence, among much else, in finding a constitutional violation and setting a trial on remedy. Dkt. 1-66, Order at 2, ¶ 2 (Oct. 18, 1996).

Likewise, the Consent Decree to which the parties agreed, and which the Court approved, included corrections to the facilities problems Plaintiffs identified. Specifically, the Decree provided additional funding for facilities conditions. Dkt. 1-77, Consent Decree at ¶ 48. It also required BCPSS to develop a "Master Plan," which had to address (among other things) "[t]he planning and provision of construction, repair, and maintenance services within BCPS." *Id.* at ¶ 33(C). Additionally, it required interim and final independent evaluations of the schools, including adequacy of funding, and permitted the BCPSS board to return to court to seek more funding based on the results of the interim evaluation. *Id.* at ¶¶ 40-42, 47, 53.

By 1999, the interim independent evaluation, the Metis Report, was complete, and it found

that the condition of the BCPSS facilities was getting worse. *See* Ex. 14, Interim Evaluation of the Baltimore City Public School System (Feb. 1, 2000) ("Metis Report"). The Report relied on a 1998 facilities survey that had "identified over $600 million in construction and improvement needs." *Id.* at 8-9. Based on that 1998 study and its own investigations, including teacher complaints about using their own funds to repair and maintain their classrooms, the Metis Report recommended substantial additional funding for facilities. *Id.* at II-31, 3. Funding to implement capital improvements, the Report found, was "essential" to educational strategies such as smaller class sizes, technology updates, and the like. *Id.* at 8.

The survey upon which Metis relied, performed by engineering firm 3D-I, had found that BCPSS physical facilities were rapidly deteriorating, with one-third of schools in "very poor [condition] and in need of immediate renovation." Major areas of concern included obsolete and deteriorating HVAC and electrical systems, worn roofs and windows, structural issues, battered doors and walls, deteriorated pavement and playgrounds, and leaks. *See* Baltimore City: Public School Construction Program Block Grant Funding, A Report to the Legislative Committees, at 15 (Jan. 8, 2013), available at http://www.pscp.state.md.us/reports/2012_p196_PSCP_Report%20on%20Baltimore%20City%20Block%20Grant.pdf.

In June 2000, this Court expressly adopted the Metis Report's "specific findings and recommendations", including the conclusions that BCPSS's physical facilities were in very poor shape and substantial additional funding should be requested and provided. Dkt. 10, Mem. Op. at 15 (June 30, 2000).

By the time the final independent evaluation under the Consent Decree was completed in 2001, conditions were even worse. That report found that BCPSS facility deficiency costs had

"grown to approximately $680 million" and that "[m]any school buildings have serious problems that interfere with the instructional mission."

By 2004, the amount necessary to fix BCPSS facilities had grown to $1 billion, an amount that the then-State Superintendent confirmed under oath to this Court. *See* May 2004 Hr'g Tr. at 1284:5-10, 1413:11-19, 1586:5-10. A state commission to study school facilities established by the General Assembly on the recommendation of the Thornton Commission, led by Treasurer Nancy Kopp and known as the "Kopp Commission," confirmed this. It examined the "minimal adequacy" of buildings and concluded that almost 70 percent of BCPSS facilities did not meet air quality standards; 95 percent did not have sufficient heating and cooling systems (compared to 16 percent of schools statewide); none had drinkable water; almost 60 percent did not meet standards for "human comfort"; 36 percent did not meet fire safety standards; almost 30 percent lacked adequate bathrooms; and many did not have sufficient space for library use, science labs, technology education, arts education, and health services. *See* Task Force to Study Public School Facilities Final Report, at 90, 125 (Feb. 2004) (the "Kopp Commission Report" or "Rep."), *available at* http://dlslibrary.state.md.us/publications/OPA/I/TFSPSF_2004.pdf.

The Court's 2004 Memorandum Opinion again recognized facility needs, noting that BCPS had "sought an additional $133 million annually for capital improvements," and that school officials' list of things for which they needed more money included immediate capital improvements. Dkt. 50, Mem. Op. at ¶¶ 24, 71 (Aug. 20, 2004). For the next two decades, the State ignored the Kopp Commission's recommendation that it update its facilities assessment every four years. *See* 21st Century Facilities Commission Final Report at 9 (Jan. 2018) (the "Knott Commission Report" or "Rep."), *available at* http://dls.maryland.gov/pubs/prod/NoPblTabMtg/SchFac21stCent/2017-Final-Report-Knott.pdf.

C. Substantial Additional State Funds Are Required to Ensure Adequate Facilities.

1. Capital Funding Has Been Insufficient to Meet Ever-Increasing Needs.

As discussed above, the most recent comprehensive assessment of the BCPSS buildings, the Jacobs report, found that $3.1 billion (in today's dollars) is needed for adequate repair and renovation of the existing buildings and $5 billion (again in today's dollars) is necessary for replacement. Over the years, State funding has been wholly insufficient to address these needs, with the result that the problem has grown from a $600 million problem in 2000 to a $5 billion problem today.

Baltimore City has the lowest per capita wealth and lowest tax base of any large district in the State and lacks the resources that other jurisdictions of comparable size use to support school construction. *See* DLS, Overview of State Aid to Local Governments, Fiscal 2019 Allowance, at 31, 49 (Jan. 2019), *available at* http://dls.maryland.gov/pubs/prod/InterGovMatters/SteAidLocGov/Overview-of-State-Aid-to-Local-Governments-Fiscal-2019-Allowance.pdf. The State has recognized its responsibility to address facilities issues in districts with outsized needs: the recent state report by the Knott Commission declares that "the State must focus its limited resources on critical areas of need, especially in low-wealth jurisdictions including those with a higher proportion of students living in poverty . . . ." *See* Knott Comm. Rep., *supra*, at 7.

The State's actual formula does not recognize this greater need. Rather, State support for capital spending on schools is based upon a formula that treats counties equivalently, without regard to county wealth, the age of schools, or other factors demonstrating acute need, based principally upon the size of the student population.

As a result, Baltimore City receives far less than required to replace or even repair its aging stock of schools. For instance, state funding for the larger county school systems shows roughly similar amounts given, but the much higher local amount contributed by, for example, Montgomery County ($215.5 mil.), Prince George's ($92.5 mil.), and Anne Arundel ($96.9 mil.) dwarfs the amount Baltimore City contributes ($16.9 mil.).[15] *See* School Construction Funding Trends in Maryland, Presentation to the 21st Century School Facilities Commission at 7, *available at* http://mgaleg.maryland.gov/Pubs/CommTFWorkgrp/2017-21st-Century-School-Facilities-Commission-Funding-Subcommittee-2017-9-27.pdf; Local School Construction Funding Presentation to the 21st Century School Facilities Commission at 3, *available at* http://mgaleg.maryland.gov/Pubs/CommTFWorkgrp/2017-21st-Century-School-Facilities-Commission-Funding-Subcommittee-2017-11-2.pdf. The combined state-local school construction funding available is widely disparate, even before taking into consideration the difference in school building conditions the funding must address.

Finally, emergency stopgap measures are insufficient. Short-term fixes on boiler and related HVAC system components are difficult in aged schools that have been in use long past their maximum expiration date and have suffered from years of deferred maintenance. For example, replacing a boiler—not an easy task in itself—may not be sufficient because the pipes leading to that boiler and the necessary electrical systems are outdated as well. Typically, it is easier and more cost-efficient to replace an antiquated building entirely rather than to patch it up.

2. The 21st Century Building Program Will Address Problems in Only 18 Percent of BCPSS Buildings.

The one bright spot occurred in 2013, when the General Assembly passed HB 860, the

[15] The Baltimore City share includes $20 million that Baltimore City is able to contribute annually to the 21st Century Schools Program.

Baltimore City Public Schools Construction and Revitalization Act of 2013, as a starting point to replace a small number of aging BCPSS schools with 21st century replacements, based on the Jacobs Report. This "21st Century Schools Program" has allowed the renovation or replacement of nine Baltimore City school buildings, with outstanding results, and will eventually lead to 23-28 new or fully renovated schools. *See* 21st Century Schools Baltimore, Current Status, *available at* https://baltimore21stcenturyschools.org/roadmap (listing school projects and status).

The 21st Century program is an important and good first step. It also confirms the obvious point that fixing facilities problems by replacing individual building components is not an efficient option. Rather, replacement of the school buildings with failing grades is the only cost-efficient long-term option. At present levels, the 21st Century program, however, does not come close to resolving the systemic problems. It will replace at most only about 18 percent of BCPSS buildings. *See id.* By contrast, the Jacobs Report found that at least 85 percent of those buildings are in very poor or poor condition. Ex. 7, Jacobs Rep., *supra*, at 26.

Moreover, the funding structure for the 21st Century buildings adversely affects BCPSS. The system was required to commit at least $20 million/year of its operating dollars for 30 years to leverage the bonds that finance the program, taking already limited dollars out of classrooms. *See* Financing the Plan, *available at* https://baltimore21stcenturyschools.org/about/financing-plan.

Although the Governor recently introduced legislation that would provide approximately $3.5 billion towards school facilities construction over the next ten years, it is unclear whether that funding will be allocated any differently than the current inequitable distribution and how much of that money will address the unconstitutional deficiencies in BCPSS buildings. *See* https://governor.maryland.gov/2018/12/11/governor-larry-hogan-announces-over-3-5-billion-building-opportunity-fund-school-construction-initiative.

3. State-Imposed Procedural Hurdles Hamper BCPSS's Ability to Use the Capital Funds It Has Received.

BCPSS has also reported significant issues (in addition to the financial deficits) with State-imposed procedural requirements that have impaired BCPSS efforts to address facilities issues. The State's Knott Commission has confirmed that the State's required review process imposes unnecessary complexity and cost and proposed numerous reforms, precluding greater local control. *See* Knott Comm. Rep., *supra*, at 12-15 (citing local jurisdiction testimony that "the State's current review process is overly bureaucratic and time consuming, which can delay projects and increase costs" and finding that many State requirements were outdated, "unnecessarily burdensome or obsolete"). For instance, BCPSS has indicated that stringent after-the-fact bidding and award requirements effectively preclude bulk purchases and single source procurement, which has significantly slowed the process underway to install portable HVAC units in classrooms. *See* Ex. 11, 2018 Advisory Group Rep. at 2. Similarly, BCPSS has reported that a long-term problem with multi-year capital funding only fixed legislatively last year required it to return approximately $66 million to the State, which then "recycled" those funds to support other projects rather than the ongoing multi-year project for which they were originally granted. *See* Ex. 15, BCPSS letter to Knott Commission (Oct. 17, 2017); HB 1783 (ch. 14, Laws of 2018).

D. Inadequate Facilities Harm Student Learning.

Just as insufficient operational/educational funding has a direct effect on the quality of education students receive, dilapidated school buildings also directly affect teaching and learning. Obviously, students whose schools are closed because they have no heat or air conditioning cannot learn. Even when schools are open, academic achievement suffers when students are forced to learn in poor conditions, without adequate light, ventilation, and essential facilities.

The Kopp Task Force, the State's prior task force on facilities, confirmed in 2004, adopting

a report by Plaintiffs' educational facilities expert Dr. Glen Earthman, that research "demonstrates a strong correlation between certain facility factors and student achievement." *See* Kopp Comm. Rep., *supra*, at 4. Dr. Earthman's report found that students in buildings rated "poor" (such as students in 85 percent of BCPSS schools) perform more poorly than students in functional school buildings, with scores five to 17 percent lower. *See* Ex. 16, Earthman Rep. at 8-9 (Jan. 5, 2004).[16] The research demonstrated that student achievement was affected by a variety of human-comfort factors: temperatures within the human comfort range regulated by appropriate HVAC systems; indoor air quality, including appropriate ventilation and filtering systems; lighting; acoustical control; laboratory and other specialized facilities; and student capacity. *Id.* at 10-11. Additional critical factors directly affecting student health include potable water, fire safety, adequate lavatories, security systems, and communications systems. *Id.* at 10.

More recent research amply confirms what the Kopp Commission found in 2004, with numerous studies showing "significant correlations between poor structural, conditional, and aesthetic attributes of school buildings and low student learning and achievement. These attributes include lighting, temperature and thermal comfort, acoustics, indoor air quality, and other environmental factors." *See* Build Us Schools, *Education Equity Requires Modern School Facilities* at 2 (Sept. 2018) (citing research), *available at* https://static1.squarespace.com/static/5a6ca11af9a61e2c7be7423e/t/5ba23b3688251b659c2f9eff/1537358671343/Education+Equity+Requires+Modern+School+Facilities.pdf.

For instance, a 2017 study found that moving students from aging and degraded buildings into new facilities increased test scores by ten percent of a standard deviation in math and five percent in English-language arts. *See* Julian Lafortune and David Schönholzer, *Does new School*

[16] "Poor" buildings are "those that lack appropriate HVAC systems, have poor lighting, are old, are noisy, lack functional furniture, or have some variation or combination of these qualities." *Id.* at 8.

Construction Impact Student Test Scores and Attendance?, Univ. of Calif. Policy Lab Policy Brief (Oct. 2017), *available at* https://www.capolicylab.org/wp-content/uploads/2017/10/Policy-Brief-Lafortune-Schoenholzer.pdf. Other studies show strong correlations between improved facilities and students' academic performance, standardized test scores, attendance, and overall school climate. *See, e.g.,* Jack Buckley, *et al.*, *Los Angeles Unified School District School Facilities and Academic Performance*, National Clearinghouse for Educational Facilities (2004), *available at* www.ncef.org/pubs/teacherretention.pdf (fixing a school facility so it went from "worst" to "best" on the overall environmental compliance rating correlated to a 36-point average increase in a school's Academic Performance Index); David Branham, *The Wise Man Builds His House Upon the Rock: The Effects of Inadequate School Building Infrastructure on Student Attendance*, 85 Soc. Sci. Q. 1112, 1113 (finding that poor facility quality significantly reduced daily attendance and increased drop-out rates); Christopher Neilson & Seth Zimmerman, *The effect of school construction on test scores, school enrollment, and home prices*, 120 J. Pub. Econ. *Journal of Public Economics* 1 (2014) (finding that moving students into a rebuilt or renovated school results in strong gains (0.15 standard deviations) in reading scores); Lorraine E. Maxwell, *School building condition, social climate, student attendance and academic achievement: A mediation model*, 46 J. Env. Psych. 206 (higher ratings of school social climate—which were correlated to better building conditions, as assessed by building professionals—predicted lower student absenteeism, which in turn predicted higher standardized test scores).

Peer-reviewed studies also show that the quality of physical school facilities affects not only students, but also teachers, with high quality buildings contributing to teacher retention and satisfaction. A 2002 survey found that when teachers consider their school to be in poor physical condition, they are far more likely to report that they plan to leave their school or to leave teaching

altogether, compared to teachers working in facilities that they consider to be in good or excellent condition. *See* Buckley, *supra.* A 2017 study found that improved ventilation and indoor air quality at schools improved teachers' self-reported job satisfaction. Stuart Batterman, *et al.*, Ventilation rates in recently constructed U.S. school classrooms, 27 Indoor Air 880, 880 (2017).

Additionally, as discussed above, there are disproportionate numbers of students who are poor and students of color attending Baltimore City schools. The poor condition of BCPSS schools exacerbates the effects of historic discrimination and other barriers to achievement, telling those children that they are less worthy than their peers. *Stout v. Jefferson Cty. Bd. of Educ.*, 250 F. Supp. 3d 1092, 1096 (S.D. Ala. 2017) ("when black public school students are treated as if they are inferior to white students, and that treatment is institutionalized by state or municipal action, the resulting stigma unconstitutionally assails the integrity of black students."). Social science research makes clear that "[w]hen schools offer fewer material resources . . . to low-income students and students of color than to their wealthier and white peers, schools send the message that those kids are less valuable." *See* U.S. Comm'n on Civil Rights, Public Education Funding Inequity in the Era of Increasing Concentration of Poverty and Resegregation at 110 (2018, *available at* https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf. Students who attend the decrepit, crumbling, weather-challenged schools in Baltimore City are taught the cruel lesson that they do not deserve the modern facilities that exist in neighboring jurisdictions that are wealthier and more diverse. *See, e.g.,* Michelle Fine, *The Psychological and Academic Effects on Children and Adolescents of Structural Facilities' Problems, Exposure to High Levels of Under-Credentialed Teachers, Substantial Teacher Turnover, and Inadequate Books and Materials, available at* http://decentschools.org/expert_reports/fine_report.pdf.

In sum, as the federal Department of Education has stated:

> Structurally sound and well-maintained schools can help students feel supported and valued. Students are generally better able to learn and remain engaged in instruction, and teachers are better able to do their jobs, in well-maintained classrooms that are well-lit, clean, spacious, and heated and air-conditioned as needed. In contrast, when classrooms are too hot, too cold, overcrowded, dust-filled, or poorly ventilated, students and teachers suffer.

U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Resource Comparability, at 17 (Oct. 1, 2014), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf.

ARGUMENT

I. This Court Should Enter an Order Compelling the State to Comply with its Constitutional Obligations Pursuant to the Prior Rulings by this Court and the Additional Evidence Presented.

A. The State is Liable for Its Failure to Provide BCPSS Students a Constitutionally Adequate Education.

The principal issue regarding the funding of BCPSS school operation and instruction costs is not the legal question of Defendants' liability. This Court has established that Defendants are liable under Article VIII for their failure to fund local school districts adequately. The Court of Appeals affirmed that right, first in *Hornbeck* and again in *Bradford I.*

Nor can there be a legitimate question as to whether, as a factual matter, Defendants are now violating Article VIII with respect to funding for educational operations. This Court has already determined in three separate orders that the State's funding of BCPSS below the Thornton formula violates constitutional norms. DLS, the agency responsible for budgetary analysis for the General Assembly, already has determined that State's funding falls far short of Thornton and has fallen short continuously since FY 2009. Indeed, the gap between what Thornton requires and what the State actually funds for BCPSS is greater now than it was when the Court previously found them to be unconstitutional.

There is little question that constitutional adequacy requires, at a minimum, compliance with Thornton—indeed it likely requires more. However, Defendants have not even come close to complying with that minimum standard. Whatever the constitutional requirement may be, the State's funding of BCPSS is at least $300 million below Thornton and therefore at least $300 million below even the minimum floor that existed 20 years ago.

B. The Court Has the Authority to Order the State to Correct Its Failure.

It is equally clear that this Court is not limited to declaring that the State has violated the Constitution, but has the power to compel the State to comply with Article VIII. As previously held by this Court, and as affirmed by the Court of Appeals in *Bradford I*, Article VIII establishes a specific right to an adequate education by contemporary educational standards for all Maryland children attending public schools, and it obligates the General Assembly to raise sufficient revenue through taxation or other means and to appropriate sufficient funds to ensure that all Maryland children receive a thorough and efficient education. Article III, Section 52 requires the State to budget for this amount. This right is judicially enforceable: Article VIII is not a meaningless, toothless provision that is valid on paper only. Constitutional rights that require State funding for compliance are fully enforceable by Maryland courts, and the courts have a *duty* to enforce those rights. The Court of Appeals has made that fundamental principle abundantly clear.

In *Ehrlich v. Perez*, 394 Md. 691 (2006), a group of Maryland residents who had immigrated to the United States after August 22, 1996, alleged that the State's failure to appropriate funds to pay for state funded medical benefits for, among others, children and pregnant women, while appropriating funds for similar individuals who immigrated prior to that date, violated Article 24 of the Declaration of Rights' guarantee of equal protection. The circuit court granted a preliminary injunction requiring payment of prospective and retrospective benefits, and the Court of Appeals affirmed in pertinent part, rejecting the defendants' argument that courts

lacked constitutional power to order the State to expend unappropriated funds. The Court of Appeals emphasized that because the circuit court was tasked with remedying a constitutional violation, it was acting within its authority even if it resulted in state expenditures. It explained that "the order prospectively reinstating medical benefits to the plaintiffs does not operate as an order directing the appropriation of specific funds" and instead "serves as a judicial determination that [defendants'] action warranted the issuance of a preliminary injunction because there is a likelihood that [their] action was unconstitutional." *Id.* at 735-36. Finally, the Court of Appeals confirmed that courts necessarily have power to issue an "order to remedy a constitutional violation." *Id.* at 737 (citing *Marbury v. Madison*, 5. U.S. 137, 177 (1803)).

The alternative is not tenable. As the Court of Appeals explained in *Ehrlich*, "to hold otherwise would create a 'legal' means for State government to employ invidious classifications that violate the equal protection guarantees of the Maryland Declaration of Rights (as well as other constitutional guarantees) by adopting budgets rather than by enacting laws, which we have long recognized is subject to constitutional constraints." *Id.* at 736; *see also id.* at 735 n.25 (quoting *Md. Action for Foster Children v. State*, 279 Md. 133, 139 (1977), in which the Court of Appeals similarly "concluded that a statute requiring equal funding levels to parents of foster children was not an appropriation because it did 'not purport to appropriate money out of the State Treasury or direct the Comptroller, Treasurer, or anyone else to make payments of money"). Thus, the Court has plenary authority to order the State to comply with Article VIII by providing sufficient support to meet the threshold for a constitutionally required education. An order compelling State officials to comply with the State Constitution by providing constitutionally required services or benefits does not offend the separation of powers.

Moreover, Article VIII expressly *requires* the State to raise sufficient revenue through taxation or other means to fund the constitutional right to a thorough and efficient education. Article III, Section 52 specifically *requires* that the State budget determine the amount of funding necessary to comply with Article VIII's mandate of sufficient funding to ensure educational adequacy for all Maryland children and to budget for that amount. Adequate funding is an intrinsic, non-severable aspect of the constitutional right to an adequate education. If the latter is enforceable, so is the former. Having expressly required the State to budget for and raise sufficient revenue to fund public schools sufficiently to comply with the Constitution, the framers of Article VIII hardly could have intended that this express clause would be toothless surplusage. *Cf. In re Adoption/Guardianship of Dustin R.*, 445 Md. 536, 578-80 (2017) (rejecting separation-of-powers challenge to order directing state agency to provide services pursuant to express statutes).

Courts in other jurisdictions have issued orders compelling compliance with similar constitutional provisions, especially when the state is provided ample opportunity to come into compliance, but fails to do so. *See, e.g., Gannon v. State*, 368 P.3d 1024, 1058 (Kan. 2016) (holding that "the judiciary clearly has the power to review a [school funding] law and potentially declare it unconstitutional. But this power is not limited solely to review. It also includes the inherent power to enforce our holdings [that a funding formula is unconstitutional.]"); *McCleary v. State*, 269 P.3d 227, 259 (Wash. 2012) ("What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education. Article IX, section 1 is a mandate, not to a single branch of government, but to the entire state. We will not abdicate our judicial role.") (internal citation omitted); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1264 (Wyo. 1995) ("When the legislature's transgression is a failure to act, our duty to protect individual rights includes compelling legislative action required

by the constitution."), *as clarified on denial of reh'g* (Dec. 6, 1995); *Robinson v. Cahill*, 351 A.2d 713, 720 (N.J. 1975) ("If . . . a thorough and efficient system of education is a fundamental right guaranteed by the Constitution . . . it follows that the court must afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper.") (citation omitted).

Thus, the Court has clear authority to order the State to comply with Article VIII and provide BCPSS with the constitutionally required funding. Under the circumstances of this case, where the State's failure to fund BCPSS pursuant to the Thornton formula is not reasonably debatable, and where overwhelming evidence demonstrates that the "adequacy gap" in fact has increased far beyond what had been necessary at the turn of the century, the need for judicial action is clear. Through a letter to the Governor, Plaintiffs have given Defendants notice of their continued constitutional violations, demanded prompt compliance, and warned of this action, all to no avail. *See* Letter from Bradford Plaintiffs (Jan. 22, 2019), *available* at https://www.aclu-md.org/sites/default/files/bradford_letter_1.22.2019_final.pdf. To date, Defendants have not responded. No plan currently exists for the State to come into compliance with Article VIII.

This Court trusted the State to honor its constitutional obligations to hundreds of thousands of Baltimore City children facing the risk of educational failure. The State has abjectly refused to honor that trust, causing lasting deprivations to at-risk children throughout Baltimore City. The State's most recent extension of the deadline for completion of the Kirwan Commission's work, making another year of constitutional deprivations inevitable, demonstrates the political resistance against Article VIII's mandate to fund decent schools for all children regardless of whether they live in the wealthiest or poorest of jurisdictions. Given rising political concerns about Kirwan's potential cost, there is no reason to believe that the latest deadline for a final report by December

31, 2019, will be enforced, or that the State will honor its findings. Without judicial action, the constitutional violations will continue, and another generation of children will go without the educational opportunities that Article VIII's framers required 151 years ago. Ten years of legislative inaction is enough time to establish a record that judicial authority is needed to compel the State to abide by its constitutional obligations.

The need for judicial intervention could not be graver. Lacking constitutionally adequate resources, BCPSS is unable to provide Plaintiffs with the educational programs and services required by the Maryland Constitution. Just a few of the statistics cited above reflect the urgency of the situation:

- **Lack of proficiency.** The lack of proficiency of BCPSS students in reading and math, with only 13 percent of 4th and 8th graders being proficient in reading per the national NAEP assessment, is a widely accepted evidence of substantial educational inadequacy. *See, e.g.*, *Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109, 129 (Del. Ch. 2018) (finding that low state assessment results "support a reasonable inference that Delaware is not providing a system of public schools that is fulfilling its educational purpose for low-income students"); *Gannon*, 390 P.3d at 500 ("We complete our outputs examination by concluding that, at a minimum, the results on various standardized tests reveal that an achievement gap, or proficiency gap, found by the [lower court] panel to exist between "all students" and certain subgroups persists as of school year 2015-2016. And the numbers of all students failing to reach proficiency in core subjects each year continue to be significant.").

- **Lack of staff.** BCPSS has the highest teacher-student ratios in the state, and the same is true for guidance counselors, therapists, maintenance staff, and others. These are crucial indicators of educational adequacy, or the lack thereof. *See Delawareans*, 199 A.3d at 116 ("Key

indicators of educational quality include levels of spending, teacher effectiveness, class size, and the availability of support services."); *McCleary*, 269 P.3d at 255 (holding that Washington State's school funding system was unconstitutional based on "compelling" evidence of severe shortfalls in "three major areas of underfunding: basic operational costs []; student to/from transportation; and staff salaries and benefits").

- **Lack of student success under state standards.** The new state Report Card makes it abundantly clear that BCPSS schools fall far short of the State's own standards for adequate schools. Where almost 60 percent of BCPSS schools received only one or two stars (99 of 166 schools), more than *eight times* the percentage for the rest of the State (7 percent), under an assessment formula mandated by state law (and approved by the federal government), Defendants should not be heard to contest the failure of BCPSS schools to meet constitutional standards. As the Court of Appeals, as well as numerous other jurisdictions have concluded, a state's failure to meet its own standards is evidence of its failure to provide its students a constitutionally adequate education. *See Hornbeck*, 295 Md. at 639 (noting that the plaintiffs did not allege or present any evidence that the State had failed to comply with the educational standards laid out in COMAR); *Delawareans*, 199 A.3d at 166 ("the proper course . . . [is] to look first to the standards that the General Assembly and the Delaware Department of Education have chosen"); *id.* at 165, n.313 (citing, *e.g.*, *McCleary* 269 P.3d at 246-47 (measuring adequacy by the state's own statutory and regulatory standards established in nine content areas)); *Idaho Schs. for Equal Educ. Opp. v. State*, 976 P.2d 913, 919 (Idaho 1998) (affirming that "'educational standards [promulgated] pursuant to the legislature's directive'" can establish test for determining compliance for constitution's requirement for thorough education) (alteration in original); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1186 (Kan. 1994) (using "the standards enunciated by the legislature and the state

department of education"); William F. Dietz, Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 Wash. U. L. Q. 1193, 1194 (1996) ("[T]he proper approach to a judicial definition of educational adequacy is to adopt as mandatory the standards that the legislature and the educational bureaucracy have adopted for themselves in the form of accreditation standards or statutory statements of educational goals.").

- **Resegregated, underfunded schools.** In sharp contrast with surrounding districts, BCPSS serves mostly students of color, almost 4/5 of whom are African-American. They also are predominantly from low income families, with 86 percent eligible for free and reduced lunch meals, the standard measure of poverty for students in public schools. Yet Maryland is one of six states where the wealthiest 25 percent of school districts receive more money than the poorest. As a court recently ruled on similar facts in Delaware:

> The complaint's allegations regarding how the State allocates financial and educational resources, coupled with its allegations regarding how Disadvantaged Students have become re-segregated by race and class, support an inference that the current system has deep structural flaws. These flaws are so profound as to support a claim that the State is failing to maintain "a general and efficient system of free public schools" that serves Disadvantaged Students.

Delawareans, 199 A.3d at 117. Ameliorating the effects of such disparities is a necessary and inherent element of Article VIII's mandate. *See Hornbeck*, 295 Md. at 780 (affirming that Article VIII requires that "efforts are made . . . to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child").

- **Lack of local resources.** As a relatively poor jurisdiction, Baltimore City's local financial contribution to its school system is much lower, proportionately, than any other large jurisdiction in Maryland. This exacerbates inadequate State funding, as amply demonstrated by the fact that BCPSS has to divert over $50 million annually of scarce operating funds to cover debt service costs for the 21st Century Schools new school construction program and other capital

bonds, compounding the inequitable funding levels that already exist. *See, e.g., Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 262 (N.D. 1994) ("The higher revenues in wealthy districts translate into more staff, better teacher-pupil ratios and programs, and adequate supplies . . . . The existing school finance system in North Dakota has systematically created and continues significantly unequal educational access and opportunities, stemming from lower per pupil expenditures due to property wealth variations. These serious educational disadvantages for some children are only explained by the lack of uniformity in resources."); *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 585 P.2d 71, 97-98 (Wash. 1978) (holding that school financing system was unconstitutional where complaining district was required to raise approximately one-third of its funding for maintenance and operations from a local levy).

This is an ongoing and escalating crisis. Every year, thousands of additional at-risk students have their constitutional rights violated. Every year, thousands graduate without receiving the education required by the Constitution. Every year, the State points to a future study or task force upon which no action should occur until the final findings are available for legislative contemplation, which then provides further excuse for the State to delay action, even though every year of additional delay means another year that children do not receive the education mandated by the State Constitution. It also means further inflation of the adequacy gap in Baltimore City, making subsequent compliance that much more difficult.

The Kirwan Commission is just the latest episode of this long saga. As the Kirwan Commission will not be proposing any solutions imminently, it is incumbent upon Defendants to comply with this Court's directions and meet its constitutional obligations to provide Baltimore City children with a thorough and efficient education. Only concerted and persistent action by this Court induced Defendants to move toward compliance with Article VIII at least six years after

completion of the Thornton Commission's work and enactment of the Bridge to Excellence in Public Schools Act. But the effect of the Court's prior rulings has worn off, and, for the past decade, the State has ignored them with seeming impunity.

C. This Petition Is the Appropriate Vehicle for Plaintiffs to Seek the Necessary Relief from this Court.

A petition for further relief pursuant to Maryland Courts and Judicial Procedure Code Section 3-412(a) is the appropriate vehicle for this Court to address the State's decade-long failure to comply with the Court's prior declaratory orders, as it expressly provides that "[f]urther relief based on a declaratory judgment or decree may be granted if necessary or proper." Thus, the Declaratory Judgments Act permits parties to return to court to seek enforcement of rights previously determined by declaratory judgment when those declared rights are violated. *See DeWolfe v. Richmond*, 434 Md. 403, 419-20 (2012) (applying statute and quoting position by State defendants that § 3-412(a) provides plaintiffs with "'the option to seek further relief, if necessary, under [C.J.] § 3-412 at a later time if Defendants were to fail to comply with the declarations'") (alteration in original), *on reconsideration*, 434 Md. 444, 472 (2013) (affirming parties' right to raise additional issues in a petition for further relief); *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 289 (Md. 2008) ("The statutory scheme expressly permits further relief based on a declaratory judgment if necessary or proper, either in a separate action or by application [to] a court who retains jurisdiction.").

The Declaratory Judgment Act's lone procedural requirement is that the applicant file a petition for further relief in a court with proper jurisdiction. Md. Code Ann. Cts. & Jud. Proc. § 3-412(b). If the petition is facially valid, the Court must order Defendants to show cause why the requested relief should not be granted. *See id* at § 3-412(c) ("If the application is sufficient, the court, on reasonable notice, shall require any adverse party whose rights have been adjudicated

by the declaratory judgment or decree, to show cause why further relief should not be granted."). As this Petition obviously states a facially colorable claim, the Court should order Defendants to show cause why the requested injunctive and additional declaratory relief should not be granted. A proposed order to show cause accompanies the Petition.

II. This Court Should Enter an Order Directing the State to Ensure that Baltimore City Students Learn in Constitutionally Adequate Buildings.

More than an entire generation of students has come and gone since this litigation was first brought, and the conditions in BCPSS schools have steadily deteriorated. The State Constitution *requires* that Plaintiffs' children attend schools that are not crumbling and are not at constant risk of closure due to seasonal weather patterns. Despite having had years to address the issue, the State instead has allowed a $600 million repair cost to balloon to $3 billion for repair and $5 billion for replacement. Ex. 9, BCPSS SY 18-19 Comprehensive Maintenance Plan at 3. The 21st Century Schools Project will replace only 18 percent of the systems' decrepit buildings, and operationally, BCPSS has funds for only a fraction of the ongoing current maintenance budget recommended for public school systems.

Baltimore City school children cannot wait any longer. When schools cannot stay open during cold winter weather and late-spring or late-summer heat waves; when teachers must raise funds to buy winter coats for their students; when a school system reaches a $1.2 billion backlog in deferred maintenance and has funding available to pay only a small fraction of what is required for basic ongoing maintenance, the State Constitution compels action. This Court should compel Defendants to remedy these deplorable conditions and require the State to fulfill its duty to ensure that the physical facilities of Baltimore City schools provide students the "thorough and efficient" education the State Constitution requires.

A. "Thorough and Efficient" Education Requires Adequate Physical Facilities.

The State's Article VIII obligation to "establish" and "provide for" for an adequate education, discussed in detail above, includes the duty to provide adequate physical facilities. Students cannot learn if they cannot attend school because there is no heat or air conditioning, or when they are unable to concentrate because of such conditions. Educational quality and teacher retention improves when school buildings are safe, inviting, functional, and adequately equipped.

Article VIII plainly applies to school environments for children's educational instruction just as much as it applies to the quality of that instruction. This Court has recognized and incorporated evidence regarding inadequate facilities into its findings of continuing constitutional violation, and the original Consent Decree in this case included additional funding for facilities improvement. *See* Dkt. 1-66, Order at 2, ¶ 2 (Oct. 18, 1996); Dkt. 1-77, Consent Decree at ¶¶ 43-54 (additional funding); *Id.* at ¶¶ 29-34 (Master Plan requirement); *id.* at 40-42 (further interim and final evaluations); Dkt. 10, Mem. Op. at 15 (June 30, 2000) (adopting Metis Report); Dkt. 50, Mem. Op. at ¶¶ 24, 71 (Aug. 20, 2004) (discussing evidence from hearing).

Moreover, courts in numerous states have held that the same or very similar language to Article VIII in their state constitutions requires safe facilities suitable to provide educational services and that such facilities are a critical part of a constitutionally adequate education. For example, the New Jersey Supreme Court has construed an identical "thorough and efficient" constitutional provision to find that "[d]eteriorating physical facilities relate to the State's educational obligation" and explained that it "continually ha[s] noted that adequate physical facilities are an essential component of that constitutional mandate." *Abbott by Abbott v. Burke,* 693 A.2d 417, 437 (N.J. 1997). The Supreme Court of Ohio has reached the same conclusion, namely that its constitutional provision requiring a "thorough and efficient" education requires adequate physical facilities and equipment:

> A thorough system means that each and every school district has enough funds to operate. ***An efficient system means one in which each and every school district in the state has an ample number of teachers, sound buildings that are in compliance with state building and fire codes, and equipment sufficient for all students to be afforded an educational opportunity***.

DeRolph v. State, 728 N.E.2d 993, 1001 (Ohio 2000) (emphasis added). To "pass constitutional muster," the Supreme Court of Ohio held, "the state must have in place legislation that will be likely to bring school facilities into compliance within a reasonable time." *DeRolph v. State*, 754 N.E.2d 1184, 1195 (Ohio 2002).

In Wyoming, the state Supreme Court held that this constitutional right (based upon very similar constitutional language) guaranteed students safe and efficient school facilities and that a public educational system that did not provide safe and adequate physical facilities was unconstitutional. "***Safe and efficient physical facilities,"*** the Court held, ***"are a necessary element of the total educational process. State funds must be readily available for those needs.***" *Campbell Cty. Sch. Dist.*, 907 P.2d at 1275 (emphasis added). Idaho has reached the same conclusion. *See Idaho Schs. for Equal Educ. Opp.*, 976 P.2d at 919-20 (citing Idaho regulations that "facilities are 'a critical factor in carrying out educational programs' and that '[t]he focus of concern in each school facility is the provision of a variety of instructional activities and programs, with the health and safety of all persons essential,'" but concluding, as a matter of constitutional law, that "a safe environment conducive to learning is inherently a part of a thorough system of public, free common schools that Article IX, § 1 of our state constitution requires the Legislature to establish and maintain.").

Moreover, a local jurisdiction cannot be saddled with a choice of diverting necessary funds for instructional operations toward maintenance to try to compensate for the lack of adequate capital spending by the State for adequate school facilities. This practice, all too true for Baltimore City, was rejected by Wyoming's Supreme Court:

> Without adequate funding for costly repairs, renovations, and building construction, school districts faced with non-routine major expenditure items must choose from the lesser of two evils: either ignoring the problem or, if that is no longer an option, diverting operational funding intended for teachers' and staff salaries and essential school programs. If the schools' operational funding budgets have no surplus money to divert, a deficiency results and educational staff and programs are eliminated to reduce expenditures. At the same time, it is rare that these extraordinary efforts are sufficient to properly maintain buildings.

State v. Campbell Cty. Sch. Dist., 32 P.3d 325, 327 (Wyo. 2001). A "fundamental precept," it concluded, was that "***the State is responsible for funding capital construction of facilities to the level deemed adequate by state standards***." *Id.* at 337 (emphasis added).

Courts in other jurisdictions have similarly required substantial increases in state funding to address deplorable facilities. Arizona's Supreme Court has held that its state constitutional obligation includes establishing standards for school facilities and providing funding sufficient to ensure that districts do not fall below the standards. *See Hull v. Albrecht*, 960 P.2d 634, 637 (Ariz. 1998). Likewise, consent decrees and injunctions compelling increases in state funding for school facilities have been entered or ordered in many jurisdictions, including New Mexico, Arizona, New Jersey, and Los Angeles. *See, e.g., Martinez v. New Mexico,* Case No. D-101-CV-2014-00793 (N.M. Dec. 20, 2018); *Hull v. Albrecht,* 950 P.2d 1141, 1146 (Ariz. 1997); *Abbott v. Burke,* 693 A.2d 417, 456-57 (N.J. 1997); *Rodriguez v. Los Angeles Unified Sch. Dist.*, No. C 6 11-3 5 8 (July 22, 1992).

In a series of admissions, moreover, state representatives have also repeatedly recognized that the State's constitutional obligation extends to adequate school buildings suitable for learning. When he announced additional funds for facilities, Governor Hogan said:

> I believe very strongly that every single child in Maryland deserves access to a world-class education regardless of what neighborhood they happen to grow up in, and an important part of that is making sure that all of our students are educated in facilities that are modern, safe, and efficient which provide them with an environment that encourages growth and learning.

Office of Governor Larry Hogan, *available at:* https://governor.maryland.gov/2018/12/11/governor-larry-hogan-announces-over-3-5-billion-building-opportunity-fund-school-construction-initiative/.

Similarly, Robert Gorrell, Executive Director of the Maryland Public School Construction Program, affirmed in 2017 that facilities were covered by "the mandate" of Article VIII and that a "thorough and efficient system" of public schools included both programs and facilities. Ex. 17, Gorrell Presentation to Knott Comm. at 2 (Sept. 27, 2017) ("'[The State] . . . shall by Law establish throughout the State a thorough and efficient ***System*** of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.' Education ***System*** = Programs + Facilities"). "Educationally adequate facilities," he explained, are those that "provide healthy and safe physical environments that support the effective delivery of education programs that meet Maryland's education standards." *Id.* at 7. Similarly, the Kopp Task Force in 2004 described its task as "to review, evaluate, and make findings and recommendations regarding whether public school facilities in Maryland are adequate to support educational programs funded through an adequate operating budget as proposed by the Thornton Commission." *See* Kopp Comm. Rep., *supra*, at Apx. 4 p. 149.

B. Court Intervention Is Required to Compel the State to Remedy Its Constitutional Violations and Ensure that BCPSS School Facilities Can Provide an Adequate Education by Contemporary Educational Standards.

The State has watched Baltimore City schools steadily deteriorate throughout the course of this litigation, a period now spanning 24 years, without taking necessary, comprehensive action to fix the problems. It has yet to change a school construction program that allocates state funds to Baltimore City schools on a par with state funds to Montgomery County schools, despite the huge difference in availability of local funds. When the State has taken steps, the measures have been relatively limited (*i.e.*, the 21st Century School Buildings Program, which will renovate/build 18

percent of the building stock and requires only a State outlay of $20 million/year), belated (the legislation last year to change the State's procurement cycle took years of advocacy before the General Assembly finally forced the State to change its policy), and insufficient (*e.g.*, the $12 million in emergency funding last winter). The State has never tackled the overall problem, and, as a result, tens of thousands of children attend constitutionally inadequate schools each day, every year. A class of students graduates each year never having had the experience of attending class in modern, safe, and healthy schools.

The State's decades of neglect speak volumes. Its own Kopp Task Force made the gravity of the constitutional violations perfectly clear some fourteen years ago. No action was taken, and the State's funding of school construction failed to prioritize the conditions in Baltimore City. This longstanding record of neglect and inaction begs the question: Will the State comply with the Maryland Constitution without action by this Court? The past 24 years teach the clear lesson that Court intervention is necessary.

This Court first declared that Baltimore City school children were receiving an unconstitutionally deficient education in 1996. It made the same or similar declarations in 2000, 2002, and again in 2004. Those declarations, and the relief entered by the Court, have failed to achieve compliance. Today, the physical facilities are in much worse condition than they were in 1996 or 2004. Plainly, the relief previously ordered has failed to secure compliance with the Constitution, and further relief from the Court is required.

III. The Court Should Make the Following Declarations and Provide the Following Further Relief.

For these reasons, this Court should order Defendants to show cause why Plaintiffs are not entitled to the following relief.

First, this Court should find and declare that:

a. The State is violating Article VIII by failing to provide a "thorough and efficient" education, *i.e.*, an education that is "adequate when measured by contemporary educational standards," to students at risk of educational failure attending BCPSS;

b. The State has been in continuous violation of Article VIII since this litigation commenced and has never complied with the Court's prior declarations as to its constitutional obligations under Article VIII, including the Court's declaration that, at a minimum, "full Thornton funding" is constitutionally required;

c. The State's current funding level for educational services in BCPSS is below constitutionally required levels;

d. The State's continuing failure to provide funding to BCPSS at levels required by Article VIII has deprived BCPSS students of least $2 billion that this Court has ordered over the past decades;

e. These constitutional violations will persist until the State of Maryland, including its legislative and executive branches, acts to provide constitutionally adequate funding for educational services in BCPSS and to remedy the effects of its prior constitutional violations;

f. The State also is violating Article VIII by failing to provide sufficient resources to ensure that BCPSS facilities are adequate for a "thorough and efficient" education, *i.e.*, one that is "adequate when measured by contemporary educational standards"; and

g. These constitutional violations will persist until the State of Maryland, including its legislative and executive branches, acts to remedy the physical condition of the facilities to make them "adequate when measured by contemporary educational standards."

Second, this Court should order Defendants to comply immediately with the Court's prior rulings that "full Thornton funding," at the very least, is constitutionally required, using, at a minimum, the $290 million shortfall in annual funding that DLS found was needed for "full Thornton funding" for FY 2015, as adjusted for subsequent inflation;

Third, this Court should order Defendants to develop and submit a comprehensive plan for full compliance with Article VIII and the Court's prior orders and declarations, subject to review and approval by the Court. This must include, but not be limited to, provisions:

a. Remedying the effect of the aggregate shortfall of past violations of Article VIII;

b. Remedying the effects of the historic and continued racial isolation of BCPSS's primarily African-American student population;

c. Directing sufficient State funding and oversight to ensure that all BCPSS schools are brought into compliance with educational adequacy standards, including but not limited to, funding necessary for the Baltimore City Public School System's 2019 "Investing in our Future: A World-Class Education System for Baltimore City Students";

d. Ensuring that the State provides sufficient funding such that all BCPSS schools will have, among other things, adequate and reliable HVAC systems; adequate and reliable plumbing and piping systems; drinkable water; clean, well-lighted, and well-maintained facilities; adequate roofing; adequate and functioning bathrooms; adequate fire safety provisions; adequate ventilation; sufficient specialized facilities for a modern constitutionally adequate education, including computer, science, art, and music;

e. Directing on-going capital and operational funding sufficient to maintain, update, and replace BCPSS buildings as necessary, including funding necessary to bring all schools to the standards of the 21st Century Schools program;

f. Ensuring adequate resources for, and organizational structure supporting, ongoing maintenance of facilities, including but not limited to sufficient staff for maintenance, consistent with industry standards and consistent with the current aged condition of BCPSS facilities and consistent with the staffing levels of other systems in Maryland; and

g. Removing unnecessary procedural barriers to accomplishing the above as quickly as reasonably possible, including bidding and contracting requirements;

Fourth, this Court should order the final approved plan to be entered as an enforceable judicial decree of the Court along with any additional relief that the Court finds necessary and appropriate; and

Finally, this Court should order that, should Defendants not comply with these orders and decrees, Defendants may be required to pay compensatory damages, including attorney's fees incurred in enforcing the Court's orders and decrees, as well as penalties to compel compliance.

Dated: March 7, 2019

Respectfully submitted,

BAKER & HOSTETLER LLP

By: _____

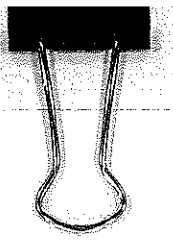
Elizabeth B. McCallum (*admitted pro hac vice*)
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
emcallum@bakerlaw.com
(202) 861-1500
Fax: (202) 861-1783

Deborah A. Jeon
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MARYLAND
3600 Clipper Mill Road
Suite 350
Baltimore, Md 21211
jeon@aclu-md.org
(410) 889-8550, ext. 120

Ajmel Quereshi
Cara McClellan
Sherrilyn Ifill
NAACP LEGAL DEFENSE FUND
700 14th Street, NW, 6th Floor
Washington, DC 20005
aquereshi@naacpldf.org
cmcclellan@naacpldf.org
sifill@naacpldf.org
(202) 216-5574

Attorneys for Keith Bradford, et al.

EXHIBIT K



KEITH BRADFORD, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION,	*	BALTIMORE CITY
Defendant.	*	Case No.: 24C94340058

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AND IN OPPOSITION TO DEFENDANT'S SECOND MOTION TO DISMISS PLAINTIFFS' PETITION FOR FURTHER RELIEF AND DISSOLVE CONSENT DECREE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

Although Defendant terms its filing a Motion to Dismiss and alleges that it is based on a change in Plaintiffs' theory of the case and supposedly new developments in the Maryland legislature, these characterizations are contradicted by the substance of its filing and the history of this case. The reality is that both Defendant's arguments regarding the impact of the legislation on this case, as well as the purported insufficiency of Plaintiffs' claims, have been raised previously by Defendant and rejected by this Court.

In its First Motion to Dismiss and at oral argument, Defendant specifically argued that pending legislation mooted and then later required staying Plaintiffs' case. As Plaintiffs explained, the legislation was insufficient because: 1) it can be eroded just as was the Bridge to Excellence in Education Act; 2) it provides for a phase-in of funding that does not fill the State's admitted adequacy gap for programmatic funding from FY 2017 until FY 2024, at earliest; and 3) it has no impact on facilities which, given a several billion dollar shortfall, remains a vital part of the case. For these reasons, the Court previously denied the First Motion to Dismiss and later refused to stay the case.

Furthermore, as stated in Plaintiffs' Petition for Further Relief (Dkt. 98/0) ("Petition"), Plaintiffs' Opposition to Defendant's First Motion to Dismiss, oral argument on that Motion, and most recently in Private Plaintiffs' and Plaintiff Baltimore City Board of School Commissioners' interrogatory responses, Plaintiffs' claims concern ongoing violations of Article VIII arising out of the current conditions affecting class members attending schools within the Baltimore City Public School System ("BCPSS"). The Consent Decree and the Court's previous decisions remain relevant because Defendant's failure to comply with them provides the basis for the Court's jurisdiction, and explains the factual circumstances that led to the current funding shortfall harming

students in BCPSS. To the extent that Defendant argues there has been any change in Plaintiffs' position, it is based on a selective reading of parts of the relevant documents and transcripts.

At base, the arguments in Defendant's Second Motion to Dismiss simply repeat its arguments from its First Motion to Dismiss (*see* Dkt. 105/0), and are an untimely attempt to either convince the Court to reconsider and reverse its previous decision on jurisdiction and the impact of the legislation on this case, or to improperly provide additional bases for Defendant to raise in an appeal of the previous jurisdictional decision. Accordingly, Plaintiffs respectfully request that the Court either: 1) strike Defendant's Second Motion to Dismiss because it amounts to an untimely motion for reconsideration, an unnecessary consumption of the Court's resources, and a premature move for summary judgment; or 2) deny Defendant's Motion for the same reasons the Court previously rejected Defendant's First Motion to Dismiss.

I. The Legislation Does Not Warrant the Dismissal of Plaintiffs' Claims.

Although Defendant titles its filing a motion to dismiss, it liberally relies on a wide array of material that is beyond the Petition, much of which is relevant to the parties' pending discovery requests and will be the subject of expert reports. Rather than have the Court consider all of these materials, Defendant asks the Court to "dismiss" Plaintiffs' claims based on a selective sampling of evidence extraneous to the Petition, supposedly supporting Defendant's position. Accordingly, the Court should strike Defendant's Second "Motion to Dismiss".

Even were the Court to consider Defendant's Second Motion to Dismiss, a quick review of Defendant's First Motion to Dismiss, as well as its presentation at oral argument regarding that Motion, reveals that its present arguments are identical to those it raised previously, as well as in its further redundant Motion to Delay Establishment of a Litigation Schedule after the Court rejected its First Motion to Dismiss. For the same reasons Plaintiffs previously expressed, the Court should again reject these arguments.

A. Plaintiffs' Motion to Dismiss Should be Stricken as a Premature Motion for Summary Judgment.

Maryland Rule 2-322(c) dictates the circumstances under which a motion to dismiss must be treated as a motion for summary judgment:

> If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.

Accordingly, "when a trial judge is presented with factual allegations beyond those contained in the complaint to support or oppose a motion to dismiss and the trial judge does not exclude such matters, then the motion shall be treated as one for summary judgment." *Okwa v. Harper*, 360 Md. 161, 177 (2000).

Although Defendant describes its motion as a Motion to Dismiss, its arguments rely heavily on a wide range of material external to the Petition. Defendant's Motion relies on, among other things, the Fiscal Note for HB 1300, an exhibit created by the Maryland Department of Legislative Services ("DLS") regarding the impact of state legislation, and a separate exhibit related to the impact of federal legislation on BCPSS, each of which allegedly posits the amount of funding that shall be provided to each local education agency ("LEA"). Mot. to Dismiss Pl.'s Pet. for Further Relief & Mot. to Dissolve Nov. 26, 1996 Consent Decree at 7-8, 13-14 (Dkt. 183/0). Relying on these materials, Defendant presumes and argues that any complaints Plaintiffs may have regarding the amount of programmatic funding for students in BCPSS have been satisfied. *Id*. at 22. To consider these materials, which are not in the Petition and the accuracy and impact of which are subject to material dispute, would be improper at the motion to dismiss stage.

Nor does the fact that Defendant has chosen to publicly post some of these materials make them a proper subject for judicial notice. Facts that are in dispute, particularly if they lay at the

center of a party's claims, are not a proper subject for judicial notice. *See Abrishamian v. Wash. Med. Grp.*, 216 Md. App. 386, 415 (2014); *Attorney Grievance Comm'n of Md. v. Bear*, 362 Md. 123, 138, 763 A.2d 175 (2000) ("[A] court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it") (citations and quotation marks omitted); *see also* Md. Rule 2-501(b) ("A judicially fact must be one not subject to reasonable dispute. . . . "). As discussed below, Plaintiffs dispute the materials because, as Defendant admits, the projected numbers in the state charts do not necessarily reflect the amounts that will in fact be provided to each LEA once Defendant completes its calculations. *See* Ex. A, Brooks Dep. at 136:5–12 (Q: "[A]re the amounts on this page the amounts that will actually be provided under HB 1300?" A: "I don't know the answer to that. I think because of the number of things that potentially would change between now and FY '30. But I believe this is what the Department of Legislative Services is projecting that it would be."). Rather, they provide only an estimate of what will be provided each year. *Id*. at 135:21–136:4 (Q: "What do you understand this page as providing?" A: "I understand this to be the Department of Legislative Purposes' [sic] estimates with regard to the recommendation of how additional funding could be phased in under the recommendations.").

Exhibit D to Defendant's Second Motion to Dismiss, related to the impact of federal funding on BCPSS, is simply an untitled document with names of LEAs and numbers. The document does not appear to be publicly available; nor has it provided any explanation how the calculations therein are made. Accordingly, the numbers in each are not undisputed facts of which courts may take judicial notice. *See Abrishamian*, 216 Md. App. at 416 (refusing to take judicial notice of facts where the party "wasn't simply asking the court to notice judicially the existence of the pleadings – he wanted the court to assume the truth of the assertions within those pleadings");

Walker v. D'Alesandro, 212 Md. 163, 169 (1957) (permitting trial court to take judicial notice that the defendant was the Mayor of Baltimore City, but finding error in its taking judicial notice that he was acting in his official capacity with respect to the underlying claims).

Defendant's Second Motion to Dismiss, with its reliance on extrinsic materials as purported facts, is more properly treated as a motion for summary judgment, albeit a premature one given the information is yet to be produced and presented to the Court. Defendant raised precisely this argument — that Plaintiffs' case was unnecessary in light of state legislation — in its First Motion to Dismiss, and then later as a basis to stay discovery in this case. *See* Ex. B, 12/12/19 Hr'g Tr. 6:10–13, 61:1–14; Def.'s Mot. to Defer Establishment of Litig. Schedule Pending Legislative Session (Dkt. 112/0). Both attempts failed. *See* Mem. Op. & Order (Dkt. 105/8) (Jan. 16, 2020) (denying Defendant's Motion to Dismiss); Order (Dkt. 112/2) (Mar. 3, 2020) (denying Defendant's Motion to Defer Establishment of Litig. Schedule Pending Legislative Session (Dkt. 112/0)); and Case Management Order No. 2 (Dkt. 118/0) (setting a timeline for discovery despite Defendant's request that the case be stayed pending completion of legislative session).

Since then, both parties have produced and undertaken significant discovery precisely as to whether the legislation satisfies Plaintiffs' complaints. Plaintiffs served several document requests related to, among other things, the calculations underlying the legislation, as well as any conclusions that the legislation provides sufficient funding for an adequate education. *See e.g.,* Ex. C, Pls.' Second Set of Reqs. for the Produc. of Docs. to Def. No. 4 ("All documents providing the data underlying the funding formula estimates (state aid and local obligation) for the revised fiscal note for House Bill 1300 during the Maryland General Assembly's 2020 Legislative Session, found here: http://mgaleg.maryland.gov/2020RS/fnotes/bil_0000/hb1300.pdf"); Ex. D, Pls.' First Set of Reqs. for the Produc. of Docs. to Md. Dep't of Legislative Servs. No. 3 ("All documents

providing the assumptions, formulas, data and calculations underlying the funding formula estimates (state aid and local obligation) for the revised fiscal note for House Bill 1300 during the Maryland General Assembly's 2020 Legislative Session"). Plaintiffs deposed the Maryland State Board of Education's corporate representative, questioning him extensively regarding the amount of funding that would be provided to each LEA in Maryland, *see* Ex. A at 136, the sufficiency of the amount of funding provided, *see id.* at 138, differences between the amount of funding provided by the Kirwan Commission and HB 1300, *see id.* at 104–41, requirements as to what that funding would be used for, *see id.* at 210, mechanisms in place to measure the sufficiency of the amount of funding, *see id.* at 172, and why the amount of funding is less than the amount that two separate state appointed commissions had determined was necessary, *see id.* at 145–46. Importantly, Defendant's representative, Mr. Stephen Brooks, refused to answer questions related to several of these matters because Defendant had not yet completed its work regarding the impact of the legislation. *See e.g., id.* at 148.

In July 2021, Plaintiffs filed a Motion to Compel the DLS to respond to discovery requests regarding the basis for the calculations in the same Fiscal Note and Chart on which Defendant now relies. *See* Pls.' Mot. to Compel DLS (Dkt. 155/0) (July 6, 2021). DLS, represented by counsel for Defendant, has refused to produce this information, thus barring Plaintiff, and the Court, from testing Defendant's current arguments that the legislation will be sufficient to provide BCPSS a constitutionally adequate education. Ex. E, DLS' Opp'n to Pls.' Mot. to Compel. Despite not producing any discovery that was not publicly available, now Defendant advances the exact argument Plaintiffs predicted it would, based on the subject matter at issue in the discovery dispute. *See* Mot. to Compel 3 (explaining discovery from DLS is necessary because "the State has indicated that it intends to argue in this case that the funding provided by HB1300 following the

Kirwan Commission's recommendations essentially moots Plaintiffs' claim in this case because the funding will provide Baltimore City with more than necessary to achieve an adequate education."). Defendant's continued and repeated reliance on the state legislation, while refusing to produce discovery because it claims that it is irrelevant, Ex. E at 8–11, is reason to deny Defendant's Second Motion to Dismiss for improper discovery gamesmanship, and also further reason to grant Plaintiffs' Motion to Compel DLS.

Even if Plaintiffs' Motion to Compel DLS is denied, the parties anticipate further expert discovery in the coming months as to the sufficiency of the amount of funding the legislation may provide. On November 22, 2021, Plaintiffs served Defendant with five separate expert reports, two of which explicitly address the amount of funding that is needed for BCPSS to provide children an adequate education. Ex. F, Report of Dr. Bruce Baker; Ex. G, Report of Dr. Kirabo Jackson. Defendant has yet to serve its responsive expert reports, which may include the final results of a state-wide assessment of all BCPSS facilities, of which the parties have previously informed the Court. Third Mot. to Modify Scheduling Order ¶ 6 (Dkt. 175/0) (Sept. 17, 2021) (seeking to extend the discovery period so that the parties may consider the preliminary results of the State's assessment of school facilities); Ex. H, MSBE Answers to City of Baltimore's Interrogs., No. 11 ("[T]he Answer to the Interrogatory can be ascertained from the documents produced to date and that will continue to be produced by the IAC relating to the ongoing study of facilities being conducted by Bureau Veritas."). Although Defendant has produced preliminary assessments of all facilities, Defendant has admitted that these scores are incomplete and will be adjusted over the course of the next four months. *See* Ex. I, Workgroup on the Assessment & Funding of School Facilities 5 (noting that the Facility Conditions Index Score must be combined with the

Educational Sufficiency Factor to determine the final score for each school). To decide this matter now would prevent either party, and in particular Plaintiffs, from accessing this vital information.

For this same reason, were the Court to consider these materials and to dismiss Plaintiffs' case at this stage, that would be an inefficient use of both the parties and the Court's resources and time. *See* Def.'s Mem. in Supp. of Mot. to Dismiss 26 (Dkt. 183/0) (arguing that allowing the case to continue would be an inefficient use of the Court's resources). The parties have spent more than 16 months conducting depositions of multiple state representatives, and requesting, receiving, and reviewing thousands of pages of documents. Plaintiffs also have incurred significant costs in engaging five separate experts to prepare reports regarding the impact of the legislation and, specifically, the sufficiency of the amount of funding provided therein. Defendant would deny Plaintiffs the opportunity to present this evidence to the Court so that it may decide based on the complete record, as opposed to what Defendant unilaterally claims will occur in future years while simultaneously refusing to provide the factual support for such claims in discovery.

B. Defendant's Attempts to Dismiss the Litigation Duplicates Its Unsuccessful Previous Attempts and, if Considered, Should Again Be Rejected Again.

As noted above, this is the third attempt by Defendant to dismiss or stay this case on account of the same legislation that has served as the basis for the prior two unsuccessful attempts. This latest duplicative attempt, less than two years after Defendant last raised this argument, violates the law of the case, and is tantamount to an untimely motion for reconsideration.

Decisions by the Court ordinarily should be followed in subsequent proceedings. "The law of the case doctrine generally provides that a 'legal rule of decision between the same parties in the same case' controls in subsequent proceedings between them" and typically "'remains binding until an appellate court reverses or modifies it.'" *Ralkey v. Minn. Mining & Mfg. Co.*, 63 Md. App. 515, 520 (1985) (quoting 21 C.J.S. § 195 at 330 (1940)).

For the same reason, Defendant's Second Motion to Dismiss is, in effect, an untimely motion for reconsideration of the Court's denial of the First Motion to Dismiss, presenting no new facts or law that the Court overlooked, while failing to acknowledge the repetitive nature of its arguments. *See Khodor v. Whiteford, Taylor & Preston*, No. 24-C-04-006528, 2005 WL 1983370, *7 (Cir. Ct. Md. June 13, 2005) ("[T]he burden of proof for the proponent on a motion for reconsideration is extremely high. A motion for reconsideration 'is a request for extraordinary relief that may be granted only upon a showing of exceptional circumstances.'" (quoting *Sanders v. Clemco Indus.*, 862 F.2d 161, 169 n.14 (8th Cir. 1998) (citation omitted)).

Defendant initially raised the state legislation at issue in its First Motion to Dismiss. It emphasized that in most recent session at the time, the legislature had "enacted the Blueprint for Maryland's Future . . . adopting the Kirwan Commission's policy recommendations as State policy for public education in Maryland." Mot. to Dismiss Pls.' Pet. for Further Relief 30 (Dkt. 105/0) (June 19, 2019). Defendant then went on, as it does in its current arguments, to emphasize the amount of funding that would allegedly flow to Baltimore as a result of the law's passage. *Id.*

The Court was well aware of the legislation at the time it denied Defendant's First Motion to Dismiss. During the December 12, 2019 argument on that Motion, this Court opened the proceedings by asking both parties "what impact, if any, does the fact that the funding issue is currently and very actively being considered by the executive and the legislative branches have on this litigation[?]" Ex. B at 6:10-13. Receiving no response from Defendant, the Court raised the point directly with its counsel on rebuttal: "And so the Court is to wait and see if the Kerwin [sic] Commission does that for this legislative session? Is that what I am to do?" *Id*. at 60:22–24. Defendant responded affirmatively: "the Kerwin [sic] Commission's recommendations, if adopted, or even if partially adopted, will revolutionize the system in such a way that would moot

many of the issues that require a completely different analysis." *Id*. at 61:1–4. The Court questioned whether this justified the dismissal of Plaintiffs' case, reasoning that "in some courtroom, at some point, somebody argued the same with the Thornton Commission[.]" *Id*. at 61:6–8. Plaintiffs, in response, explained exactly why the proposed legislation was insufficient, even if it passed. *Id*. at 42:11–43:14.

First, Plaintiffs explained there remained uncertainty as to whether the funding initially planned would actually be provided. *Id*. at 43:8–14 ("[I]t's not clear if they're actually passed into legislation whether or not there will be further cuts in the future which is a situation we dealt with in the Bridge to Excellence Act where it called for increases in funding all the way until 2008, but by 2007 the State was already cutting the inflation adjustments for Fiscal Year 2009 and Fiscal Year 2010."). As noted above, Defendant's corporate representative has conceded this remains the case.

Second, Plaintiffs explained that while the amount of funding proposed in the legislation is significant, it pales in the face of the even larger amount needed to close the adequacy gap required to provide students in BCPSS a thorough and efficient education. *Id*. at 44:1–5 ("[A]ssuming that they're actually passed sometime soon and assuming that they're not cut in the future as was done with the Bridge to Excellence in Education Act[, they] don't provide a sufficient amount to cover the 342 million dollar annual adequacy gap until 2030.").

Finally, Plaintiffs explained that the legislation upon which Defendant was relying, and now again relies, does not cover the separate $3 to $5 billion shortfall needed to ensure BCPSS school facilities are in adequate condition. *Id*. at 43:15–23 ("Our case also addresses facilities. Facilities are not taken into consideration for the Kerwin [sic] Commissions [sic] work. So that's a huge problem especially given by -- given the school districts numbers based on a 2012 report.

There's somewhere between a $3 billion and $5 billion shortfall for Baltimore City Public Schools and that's based on the results of the Jacobs report which we put in as an exhibit in our petition."). The Court ultimately allowed the case to go forward, despite Defendant's arguments regarding the alleged impact of the proposed legislation. *See* Mem. Op. &Order (Dkt. 105/8) (Jan. 16, 2020) (denying First Motion to Dismiss).

Nonetheless, Defendant again attempted to use legislation to delay the litigation after the Court denied its First Motion to Dismiss. On February 14, 2020, Defendant filed a Motion to Defer Establishment of a Litigation Schedule Pending the Legislative Session. (Dkt. 112/0). The arguments therein mirrored those Defendant duplicates now. Defendant noted that the Speaker of the House had recently introduced HB 1300, which allegedly "addresses matters that go to the heart of the relief Plaintiffs seek, including a new formula for education funding[.]" *Id*. at 1–2. As it does here, Defendant then went on to cite DLS estimates on the amount of funding that would be provided to BCPSS. *Id*. at 2. Defendant also cited the Built to Learn Act and made similar arguments as it does here, noting that "the[] work on the pending legislation may resolve some and potentially all of the material issues in the case." *Id*. at 3.

In response, Plaintiffs clearly stated that the legislation did not "justify a stay of discovery because it will not resolve this case." Pls.' Opp'n to Mot. to Defer at 5 (Dkt. 112/1). They explained further:

> It is undisputed that the legislation even if passed, in spite of Defendant's efforts to the contrary, will not satisfy the $342 million operations deficit affecting children attending BCPSS for more the decade. *See* Plaintiffs' Opposition to Defendant's Motion to Dismiss, at 23-24 (citing Dep't of Legis. Servs., Follow-up from July 24, Meeting, Aug. 1, 2019, at 2); Def's Motion to Stay, at 2 (explaining that the legislation will only provide $90 million in additional funding in FY 2021, while the total amount will be phased in "over the rest of the decade"). Likewise, the facilities legislation referenced in Defendant's motion will not fulfill the $3 billion

> facilities shortfall affecting students attending BCPSS. *See* Plaintiffs' Petition for Further Relief, at 42; Def's Motion to Stay, at 2 (outlining $420 million in additional school construction funding).

Id. The Court denied Defendant's Motion to Defer and set a schedule for discovery which the parties have relied upon during the last 16 months and have devoted enormous resources towards completing. Case Management Order No. 2 (Dkt. 118/0).

Accordingly, Defendant's arguments, though it frames them as novel and thereby meriting a second motion to dismiss, are in fact just an attempt to reargue positions the Court has already rejected. Defendant has established no good cause to consume this Court's valuable resources dealing with redundant arguments for the third time. The Second Motion to Dismiss should be stricken as improper, or again denied for the same reasons as the prior motions.

C. Plaintiffs Have Sufficiently Alleged and Can Prove That the Legislation Does Not Moot Plaintiffs' Claims.

Even were the Court to take the unnecessary step of entertaining Defendant's arguments on the merits again, they would fail again. Plaintiffs have sufficiently alleged and, as discussed below, can prove that there remain serious inadequacies that remain unresolved despite the passage of the legislation that Defendant relies upon. As Plaintiffs noted in the Petition and in response to the First Motion to Dismiss, the legislation is insufficient to address the Article VIII violations alleged given the size of the adequacy gap, the delay before the amounts pledged will be provided and fully phased in, and language in the legislation allowing the amounts forecasted to be reduced.

Likewise, although Defendant vaguely asserts that the Built to Learn Act addresses Plaintiffs' claims regarding the facility conditions in BCPSS, the entire state-wide value of the Act is less than the amount Plaintiffs allege is needed to repair BCPSS facilities alone. Although Plaintiffs' allegations are sufficient to defeat Defendant's Second Motion to Dismiss, materials

produced in discovery further support the conclusion that the legislation is insufficient to address Plaintiffs' claims.

1. The Legislation Does Not Resolve Plaintiffs' Claims Regarding the Lack of Sufficient Programmatic Funding for BCPSS.

Although Defendant claims that the purpose of Plaintiffs' Petition was the passage of HB 1300, *see* Second Mot. to Dismiss 26 (Dkt. 183/0), Defendant's argument is undercut by the explicit terms of Plaintiffs' Petition and Memorandum in Support, which make clear that the amounts provided for in the legislation are insufficient to address the lack of funding for programs in BCPSS.

Plaintiffs' Memorandum in Support of the Petition devotes an entire section to outlining the amount of programmatic funding needed to address the constitutional deficiencies identified in the Petition — amounts that are well beyond those the legislation supposedly will provide BCPSS in the future. *See* Mem. in Supp. of Pet. at 15–24 (Dkt. 98/0). According to the Petition, by Defendant's own estimates, the State has underfunded BCPSS programs by somewhere between $290 and $353 million annually, as of FY 2015. *Id*. at 16. As Plaintiffs noted, this amount was merely one measure of the programmatic funding that may be needed. Plaintiffs also noted that BCPSS has provided the State a comprehensive plan outlining the types of programs and services required to provide students in BCPSS an adequate education. *Id*. at 21. Ultimately, as Plaintiffs' request for relief made clear, the $290 million to $353 million estimate was just the minimum of what the constitutional standard requires, and, therefore, the Court should order Defendant to develop a comprehensive plan for full compliance with Article VIII of the Maryland Constitution, which would take into account seven different measures to determine the amount of funding needed, including, among other things, the amount necessary to bring BCPSS into full compliance with the terms of BCPSS' World Class Plan. *Id*. at 75–76.

Although the Memorandum in Support of the Petition mentioned the delay of the Kirwan Commission's work, it did so to highlight that this delay "compound[ed]" the harm from the ongoing failure to provide sufficient funding. *Id*. at 19. In fact, Plaintiffs' Petition explicitly noted that even once the Commission completed its work, there was "no promise of adequate funding at the end." *Id*. at 20.

Defendant's Second Motion to Dismiss, unsurprisingly, makes no mention of these facts, but instead focuses on a discussion of Plaintiffs' legislative efforts to support passage of the legislation based on the Kirwan Commission's work. Second Mot. to Dismiss 25–26 (Dkt. 183/0). Defendant's argument is flawed for two reasons. First, although Plaintiffs discussed their efforts in support of the legislation, the discussion arose in the context of responding to Defendant's argument that Plaintiffs' claim should be barred by laches because of their alleged failure to seek relief since 2004 — not because it circumscribes the relief Plaintiffs seek. Pls.' Opp'n to First Mot. to Dismiss at 38 (Dkt. 105/1) (Aug. 23, 2019). The relief Plaintiffs seek is, as discussed, described in detail in the portion of the Petition explicitly claiming to do so. Mem. in Supp. of Pet. at 74–77 (Dkt. 98/0).

Second, merely because Plaintiffs, in a non-litigation capacity, sought passage of legislation does not foreclose them from later seeking greater relief in litigation. To hold otherwise would encourage an all-or-nothing approach, in which Plaintiffs would be discouraged from using the legislative process for fear that engaging in such a process would later foreclose them from fully vindicating their constitutional rights. As with Defendant's other arguments, this is a position which the parties previously disputed at the hearing on its First Motion to Dismiss, s*ee* Ex. B at 41:18–25 ("I think normally the State complains when civil rights lawyers are quick to run to court and essentially call for use of the legislative and executive process. I mean, there's some

inconsistency in the State at once arguing that this is a political question, that it's something for the legislature and then at the same time faulting us for using precisely legislative mechanisms that we did."). The Court ultimately rejected Defendant's argument. *See* Mem. Op. & Order at 7–8 (Dkt. 105/8) (Jan. 16, 2020) (noting that laches was inapplicable because Plaintiffs "have continued to raise the issue of inadequate funding through numerous methods over the years.").

Even if Plaintiffs had limited their request for relief to only the $353 million in annual additional funding that the State's own contractor conceded was necessary in FY 2015, HB 1300 would not resolve Plaintiffs' claims. As discussed above, Defendant conceded that the projections on which it now relies are merely DLS's estimates of the amount of funding that may be provided, and do not in fact guarantee that the amounts of funding projected will actually be provided. Should Defendant provide less than what it estimates, as Defendant admits it may, Plaintiffs would have no judicially enforceable commitment to seek the amounts estimated.

Even if these projections turn out to be accurate, HB 1300 explicitly provides that any increases in funding provided may be abandoned if the state's economy is estimated to grow less than 7.5% over the course of any year. *See* HB 1372, Section 19. Furthermore, the Governor has stated that he would like to revisit the legislation in the next legislative session, because he has concerns about how to pay for it. *See* Elizabeth Shwe, *Hogan Allows 'Kirwan 2.0' to Become Law Without His Signature*, Maryland Matters (Apr. 2, 2021), https://www.marylandmatters.org/2021/04/02/hogan-allows-kirwan-2-0-to-become-law-without-his-signature/ (quoting the Governor saying: "The General Assembly will need to once again rewrite the original legislation to address these critical fiscal flaws in the 2022 legislative session."). As Defendant conceded, the lack of economic growth led to the State's failure to increase funding in accordance with the Bridge to Excellence in Education Act which was passed

to allegedly resolve Plaintiffs' claims in 2000, exacerbating the adequacy gap of which Plaintiffs now complain. APA Consulting, *Final Report of the Study of Adequacy of Funding for Education in Maryland* at ii (Nov. 30, 2016), https://www.marylandpublicschools.org/Documents/adequacystudy/AdequacyStudyReportFinal112016.pdf. Nonetheless, Defendant again asks the Court to dismiss Plaintiffs' Petition notwithstanding the Court's prior rejection of the same arguments, and while admitting that the same problems which led to the Petition will likely repeat themselves.

Furthermore, assuming for sake of argument that the projections are accurate and that the projected amounts are actually provided, despite language in the legislation and the Governor's explicit statements to the contrary, the FY15 $353 million annual adequacy gap would be met no sooner than FY 25. *See* Second Mot. to Dismiss (Dkt. 183/0), App. C (projecting that $356.4 million in additional state aid will supposedly be provided in FY 25). As explained in the Petition, and in keeping with common sense, the cost of education increases over time. Mem. in Supp. of Pet. 13 (Dkt. 98/0) (noting that the Court has previously "found that due to increased costs, the funding increases previously determined to be necessary should be adjusted to reflect the increased costs of education." (internal quotations and citations omitted)). Accordingly, by FY25, the $353 million estimate will be much larger than it was almost a decade earlier. Thus, the actual adequacy gap will not be met, even hypothetically, until several years thereafter.

Finally, as noted in Plaintiff BCPSS's interrogatory response, even if this adequacy gap were to be filled in the future, it would not remedy the cumulative effects of almost fifteen years of ongoing and increasing adequacy gaps. *See* Ex. J, BCPSS' Answers to Def.'s Interrogs. 22 ("And the Kirwan legislation still does not make up for accumulated gaps in baseline funding for

City Schools over numerous years, as determined by the Court in its Orders and described further in this response.").

The evidence currently produced in discovery and the work of Plaintiffs' experts support this conclusion. According to the preliminary projections of Plaintiffs' programmatic funding expert Dr. Bruce Baker, BCPSS needs at least $429 million additional annually as of FY22. *See* Ex. F at 9, Figure E1. By FY24, this number will have increased to at least an additional $528 million. *Id*.

2. The Legislation Does Not Resolve Plaintiffs' Claims Regarding the Lack of Funding for BCPSS Facilities.

Defendant's argument that the Built to Learn Act resolves Plaintiffs' claims regarding the inadequacy of BCPSS facilities is similarly ill-founded. Second Mot. to Dismiss 6, 13 (Dkt. 183/0). In support of their Petition, Plaintiffs identify a series of facility-related deficiencies affecting students in BCPSS, including such basics as the lack of working heating and air condition systems, aging plumbing and structural systems, and the lack of funding for ongoing maintenance. Mem. in Supp. of Pet. 41–49 (Dkt. 98/0). Altogether, as alleged in the Petition, 85 percent of the buildings in BCPSS are in poor or very poor condition. *Id*. at 42. Plaintiffs estimate that based on a recent assessment by a third-party contractor, somewhere between $3.1 and $5 billion will be needed to make necessary repairs and improvements to BCPSS facilities. *Id*. at 52. Defendant concedes that the entire value of the Built to Learn Act — which is to be split among all school systems in Maryland — is $2.2 billion, barely over half of the amount needed to address deficiencies in BCPSS alone. Second Mot. to Dismiss 14 (Dkt 183/0). Furthermore, as Defendant concedes, only $420 million, at most, would be directed towards BCPSS. *Id*. This amount is nowhere near what is necessary to make the necessary improvements Plaintiffs allege are needed.

This amount is barely enough to renovate three schools, let alone the 85 percent of BCPSS facilities that Plaintiffs allege in their Petition that are in poor or very poor condition. Ex. J at 28.

As with Plaintiffs' claims regarding the inadequacy of programmatic funding for BCPSS, the evidence produced in discovery supports this conclusion. Robert Gorrell, the Director of the State's Inter-Agency Commission on Facilities, conceded that the State regularly provides BCPSS less funding than it requests to address facility-related deficiencies. For example, "in fiscal year 2022, Baltimore City requested $97,697,000 through the Capital Improvement Program" but the State "Capital Improvement Program funded [only] $29,829,000[.]" Ex. K, Gorrell Dep. 132:22–33:5. Furthermore, in addition to money needed for repairs, the State consistently provides insufficient funds for maintenance, as alleged in Plaintiffs' Petition. Mem. in Supp. of Pet. 48–49 (Dkt 98/0). As Director Gorrell also conceded, BCPSS needs on average 2 percent of its buildings' capital reported value yearly to provide routine maintenance on its facilities. Ex. K, Gorrell Dep 221. This would amount to nearly $100 million annually, far more than the approximately 23 million currently provided. Mem. in Supp. of Pet. 48–49 (Dkt. 98/0). *See also* Ex. J 39–40 (stating that BCPSS needs approximately $200 million annually to perform recommended maintenance); Ex. L, Roseman Report 12 (explaining that BCPSS needs 4% of CRV, as opposed to 2%, to perform adequate maintenance).

3. Defendant's Remaining Arguments Are Unpersuasive.

In effect, Defendant acknowledges the inadequacy of the state legislative efforts, but points to a provision of COVID-related federal funds to BCPSS to justify the deficiency. Second Mot. to Dismiss 14–15 (Dkt. 183/0). As even a preliminary discussion makes clear, however, the impact of federal funds are matters of dispute upon which the parties should be allowed to present evidence, not resolved at the motion to dismiss stage. Defendant's arguments fail to recognize the context that led to the need for the federal funds, as well as the limitations on the funding. The

funding was provided to school districts around the country, including those without adequacy gaps, as a means of addressing the profound education-related impacts of the COVID pandemic, which exacerbated the deficits facing students in low-wealth districts such as BCPSS. *See* U.S. Dep't. of Ed., Office of Elementary and Secondary Ed., *Elementary and Secondary School Emergency Relief Fund*, https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/ ("[T]he Department awarded these grants to State educational agencies (SEAs) for the purpose of providing local educational agencies (LEAs), including charter schools that are LEAs, with emergency relief funds to address the impact that COVID-19 has had, and continues to have, on elementary and secondary schools across the Nation."); SB 3548 ("To provide emergency assistance and health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic."); *see also* Mike Cummings, *COVID School Closures Most Harm Students From Poorest Neighborhoods*, Yale News (Jan. 5, 2021), https://news.yale.edu/2021/01/05/covid-school-closures-most-harm-students-poorest-neighborhoods ("Pandemic-related school closures are deepening educational inequality in the United States by severely impairing the academic progress of children from low-income neighborhoods while having no significantly detrimental effects on students from the county's richest communities").

For example, by May 2020, BCPSS had prepared, served, or delivered over 700,000 meals, as well as distributed several tons of shelf-stable food or produce through partnerships with the City and the Maryland Food Bank. Ex. M, Education Stabilization Fund Program Elementary and Secondary Sch. Emergency Relief Fund, Md. Local School Sys. Appl. and Cert. 4. Throughout these efforts, BCPSS lost an estimated $16 to $20 million. *Id*. Additionally, in just the first five months of the pandemic, BCPSS spent approximately $9 million from its general reserves to

purchase computers and internet hotspots for BCPSS students who could not afford these items and thus would not have been able to participate in virtual school without them. Ex. N, Baltimore City Public Schools, Presentation to the Maryland Philanthropy Network (August 20, 2020). These are just a few examples. Additional COVID-related expenditures included costs related to: personal protective equipment & PPE distribution; disinfecting facilities, including increasing the number of custodians, purchasing disinfectant supplies, and increased overtime cost for weekly deep cleaning; adjusting the number of students in each classroom pursuant to public health guidance; modifying buildings to promote public health through investments such as plexiglass shields for student desk; enhancing ventilation through strategies such as carbon filters in classrooms and school busses; modifying transportation plans to support hybrid learning scenarios; and hiring additional staff and contractors to support COVID-related work. Ex. M 22. BCPSS anticipates additional funding is required going forward for, among other things, resources for: students with disabilities who face unique challenges engaging in appropriate grade-level content as a result of extended school closures; the homeless student population requiring additional supports for academic recovery work; and additional supports for student social and emotional learning addressing the disparate impact of the pandemic on racially diverse and socio-economically depressed communities. *Id*. at 34–39.

Furthermore, the CARES Act and ESSER funding are a one-time influx of funds while, as explained in Plaintiffs' Petition, the adequacy gap faced by the schools is an annual repeating deficit. *See* U.S. Dep't. of Ed., *Frequently Asked Questions About the Elementary and Secondary School Emergency Relief Fund (ESSER Fund)*, https://oese.ed.gov/files/2020/05/ESSER-Fund-Frequently-Asked-Questions.pdf ("ESSER funds are available for obligation by LEAs and other subrecipients through September 30, 2022"); Mem. in Supp. of Pet. 16 (Dkt. 98/0). Accordingly,

BCPSS cannot significantly increase expenditures, when similar levels of funding from the State may not become available until several years thereafter.

Finally, Defendant points to provisions of HB 1300 that require Defendant to take certain measures, which it alleges mirror the Petition's requests for relief. Second Mot. to Dismiss 24–25 (Dkt. 183/0). However, as Defendant concedes, the required implementation plans have yet to be completed and need not be completed until June 15, 2022. *Id*. at 24. Even if they are completed at that time, neither Plaintiffs nor the Court have any means of knowing at this time whether the plans will sufficiently address Plaintiffs' concerns. It would be inappropriate to dismiss Plaintiffs' claims upon Defendant's unsupported assertion that it will satisfy Plaintiffs' claims somehow next year or later, particularly in light of the history of the case in which Defendant has repeatedly pledged to resolve Plaintiffs' claims only to either delay the changes promised or subsequently amend previous plans to improve the quality of education provided students in BCPSS. *See* Pls.' Opp'n to First Mot. to Dismiss 16–26 (Dkt. 105/1) (Aug 23, 2019).

4. The Cases Cited by Defendant Do Not Support Its Argument.

The fact that the legislation at issue does not actually resolve Plaintiffs' claims easily distinguishes this case from the cases Defendant cites in its brief. *See Hill v. Snyder*, 878 F.3d 193, 204 (6th Cir. 2017) (rejecting plaintiffs' claim challenging the constitutionality of a statute because they "provide[d] no specific information regarding the continued enforcement or application" of the legislation which they challenged). Furthermore, *Kranz v. State*, 459 Md. 456 (2018), upon which Defendant relies, actually supports Plaintiffs' position. In *Kranz*, the state, as Defendant does here, argued that the plaintiff — an individual who had been previously incarcerated, but had been released from custody, sought habeas relief overturning his conviction — no longer had a live claim. *Id*. at 471. However, the Court rejected the state's defense, explaining that although the state had taken the action it claimed, other negative collateral

consequences such as the loss of the ability to serve on a jury and the limitations on employment continued to hinder the plaintiff going forward. *Id*. at 473. Likewise, here, Plaintiffs do not dispute, and have not previously disputed, that Defenant has taken some action that is relevant to Plaintiffs' claims, but that action does not automatically resolve Plaintiffs' claims. *See e.g.,* Pls.' Opp'n to First Mot. to Dismiss 13–16 (Dkt. 105/1) (Aug. 23, 2019) (discussing the passage of the Bridge to Excellence in Education Act in response to the *Bradford* litigation). As Defendant has conceded, necessary funding will not be provided until several years into the future, and even then the amount that will be provided, as well as its sufficiency, remain unresolved and a matter of dispute.

Several other cases Defendant cites are entirely irrelevant to this case, as they arise in different factual circumstances in which either plaintiffs did not seek relief in a timely manner or in which a plaintiff specifically limited its challenge to a statute which was then repealed or altered. *See Voters Organized for the Integrity of City Elections v. Balt. City Elections Bd.*, 451 Md. 377, 394 (2017) (dismissing plaintiffs' claims as moot, not because of intervening legislative change, but because plaintiffs filed their claim too late to impact the election which they were challenging); *Hill*, 878 F.3d at 203–04 (dismissing plaintiffs' claims as moot after legislative repeal where plaintiffs request for relief was explicitly limited to achieving the legislative change which had occurred); *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 645–46 (D.C. Cir. 2011) (dismissing plaintiffs' claim where subsequent legislative action altered the policy definition challenged such that it no longer explicitly covered the plaintiffs).

II. Plaintiffs Have Not Altered Their Litigation Position in the Case.

Defendant's secondary argument — that the Petition should be dismissed because Plaintiffs supposedly "concede" their claims are "not based on any alleged violation of or failure to comply with either the Consent Decree or any Court order," Second Mot. to Dismiss at 27 (Dkt. 183/0) —

is premised on an incomplete and misleading presentation of the record. Contrary to Defendant's argument, the discovery record is consistent with the Petition and Plaintiffs' subsequent filings and arguments. Plaintiffs have consistently asserted that they seek relief related to current conditions in BCPSS, but that Defendant's continuing violations of the Consent Decree through the Court Orders following that Decree are part of this case because: 1) they establish this Court's jurisdiction to hear the Petition and to ensure that Defendant's funding of BCPSS reaches constitutionally adequate levels; and 2) they establish the causes of the existing adequacy gap — Defendant's longstanding failure to fund BCPSS in the amounts this Court previously declared are necessary — and include important conclusions regarding the amount of funding needed to adequately fund BCPSS.

Moreover, even if Defendant's portrayal of the out-of-context snippet from Plaintiffs' interrogatory response were accurate, it would not provide a basis to dismiss Plaintiffs' entire case. The dispute over a single interrogatory — which itself was improper because it did not concern a factual issue of which a named Plaintiff would have personal knowledge — is properly resolved by a follow up request for supplementation, not another duplicative motion to dismiss. Although Defendant terms its filing a Motion to Dismiss, it is, in actuality, better styled as a motion to compel a more detailed response.

Finally, Defendant's Second Motion to Dismiss, as it concedes, is just an attempt to re-argue its previous position from its First Motion to Dismiss that it has satisfied the Consent Decree and the Court's previous Orders and, thus, this Court should supposedly dismiss the case. Defendant's arguments in its Second Motion to Dismiss should be either be struck as being repetitively and untimely raised or rejected again.

A. Private Plaintiffs' and BCPSS' Interrogatory Responses Have Not "Disclaimed" Defendant's Noncompliance Alleged in the Petition.

The lynchpin of Defendant's argument is its representation that Private Plaintiffs and Plaintiff BCPSS have "conceded" or "disclaimed" all allegations of Defendant's noncompliance with the Consent Decree and the Court's prior declarations which, in turn, Defendant argues, eliminates all "good cause" for this Court's jurisdiction and justifies termination of the Decree. Second Mot. to Dismiss at 18, 27 (Dkt. 183/0). To make this argument, however, Defendant omits relevant and critical discovery responses, and presents even the limited responses quoted out of context. Defendant does so because it is, in reality, attempting to re-argue its position from its First Motion to Dismiss that Plaintiffs may not pursue relief for current conditions affecting students attending BCPSS.

1. Private Plaintiffs' Interrogatory Responses Identify Defendant's Violations of the Consent Decree and Previous Court Orders and Do Not Disclaim Their Petition Allegations.

The single snippet of one interrogatory response cited by Defendant fails to establish that Plaintiffs have "conceded" or "disclaimed" all of their Petition and additional allegations. Second Mot. to Dismiss at 18 (Dkt. 183/0). Indeed, in response to Defendant's objectionable interrogatory seeking Plaintiffs to identify "the specific paragraph numbers" of each Court order violated by Defendant, "each act or omission" for each paragraph, and "all corresponding facts, communications, and documents,"[1] Plaintiffs stated that their "Petition concerns Defendant's ongoing violations of Article VIII of the Constitution of Maryland, not the violation of ***specific*** terms of the Consent Decree or the Court's subsequent orders." Second Mot. to Dismiss (Dkt. 183/0), Ex. A at 12 (emphasis added). In the same response, Plaintiffs also stated that "*as of*

[1] Defendant omitted that Plaintiffs objected to the interrogatories that improperly demanded specification and identification of every know act, omission, fact, or document. Second Mot. to Dismiss (Dkt. 183/0), Ex. A at 1–5.

2017 [Defendant] was providing BCPSS with over $300 million less annually ***than was required by the Court's earlier orders***" — which is an express statement of violation of the Court's Orders. *Id*. (emphasis added). Incredibly, the Second Motion to Dismiss omitted this last statement of the interrogatory response because it contradicts Defendant's entire argument, instead replacing it with ". . . ." in the portion quoted for the Court. *Id*.

In the same interrogatory response, Private Plaintiffs go on to cite various specific provisions of the Consent Decree, as well as the Court's previous Orders that Plaintiffs allege have been violated and continue to be violated, thus giving the Court jurisdiction, and creating the conditions which currently deprive students of a constitutionally adequate education:

> The Court's continuing jurisdiction is fully consistent with the terms of the 2004 Order. Declaration Six of the 2004 Order stated that the Court would continue to ensure compliance with its Orders and constitutional mandates until necessary funding had been provided. As the Court concluded in its 2020 Order, this continuing jurisdiction is also consistent with paragraphs 53, 68, and 69 of the Consent Decree, as well as language on page 5 of the Court's 2002 Order. Plaintiffs note, further, that the State admits as of 2017 it was providing BCPSS with over $300 million less annually than was required by the Court's earlier orders.

Ex. O, Pls.' Answers to Def,'s Interrogs. at 12. As discussed below, this framing is entirely consistent with that in Plaintiffs' Petition, Plaintiffs' Memorandum in Support of their Petition for Further Relief and Plaintiffs' Opposition to Defendant's First Motion to Dismiss.

Equally misleading, Defendant completely omits Private Plaintiffs' other interrogatory responses detailing Defendant's failure to comply with the Consent Decree and the Court's previous Orders, because they further contradict Defendant's argument. For example, Private Plaintiffs' responses expressly incorporate DLS' analyses showing Defendant underfunded BCPSS in the amount of $342.2 million during 2002 through 2017, in violation of the funding levels set in the Court's previous orders. *Id*. at 16–17, 27. Plaintiffs also repeatedly incorporate

documents cited by the Petition (as well as numerous other documents), *id*. at 9, 11, 14, 17 — which include DLS and Thornton Commission documents analyzing Defendant's underfunding of BCPSS from 2000 through 2017 and Defendant's failure to provide the "full Thornton funding . . . as adjusted for subsequent inflation," in violation of the funding levels set by the Court's previous orders. *Id.* at 8; *see also* Mem. in Supp. of Pet. 16–18 (Dkt. 98/0).

2. Plaintiff BCPSS's Interrogatory Responses Identify Defendant's Violations of the Consent Decree and Previous Court Orders and Do Not Disclaim the Petition's Allegations.

Defendant's representation that BCPSS' discovery responses "confirmed that they are no longer contending that the relief sought by the petition is based on any failure to comply with orders previously issued by this Court" is even more disingenuous. Second Mot. to Dismiss at 2 (Dkt. 183/0). Defendant quotes portions of BCPSS's responses to ***document requests*** — which did not request a narrative response and are not admissions in any event — *see, e.g.*, *Beck v. Beck*, 112 Md. App. 197, 205 (1996) — while completely ignoring BCPSS's ***interrogatory responses*** that disprove Defendant's representation and undercut its repetitious argument for dismissal.

In response to the same interrogatory posed to Private Plaintiffs above, Plaintiff BCPSS answered that it understands "Plaintiff's Petition concerns Defendant's ongoing violations of Article VIII of the Constitution of Maryland, not the violation of specific terms of the Consent Decree or the Court's subsequent orders." Ex. J, Interrog. No. 6 at 16. Similar to Private Plaintiffs, BCPSS also stated that Defendant "*has* ***failed to provide sufficient funding*** *to comply with the Maryland Constitution* ***and this Court's repeated declarations in 1996, 2000, 2002, and 2004*** *regarding insufficient funding of City Schools*." *Id.* at 17 (emphasis added).

Plaintiff BCPSS' interrogatory answer also provides more than thirteen pages of detailed explanation of Defendant's failures to comply with Article VIII, the Consent Decree, and this

Court's prior Orders — all ignored by Defendant in its representations to the Court. *Id.* at 16–30.

BCPSS' explanation includes:

> The interim independent evaluation ordered by the Consent Decree (the "Metis Report") found that, although progress was being made, an additional $2,698 per child (for a total per pupil expenditure of $10,274), or $270 million a year, in operational/educational funding was then needed for adequacy.

Id. at 18.

> In 2000, this Court found that City Schools students continued to be deprived of "an education that is adequate when measured by contemporary standards" and "still are being denied their right to a 'thorough and efficient' education" as constitutionally required.

Id. (quoting Mem. Op. 25 (Dkt. 10) (June 30, 2000)).

> In 2002, this Court extended the term of the Consent Decree until the State's constitutional violations were remedied and ruled that it would "retain jurisdiction and continue judicial supervision of this matter until such time as the State has complied with this Court's June 2000 Order."

Id. (quoting Mem. Op. 3, 5 (Dkt. 25) (June 25, 2002)).

> In 2004, this Court ruled that the State was continuing to violate Article VIII because it still had not provided the $2,000 to $2,600 per pupil that the Court had found necessary in 2000. In the aggregate, this Court found, "the State ha[d] unlawfully underfunded [City Schools] by an amount ranging from $439.35 million to $834.8 million" for FY 2001, 2002, 2003, and 2004. The Court found that compliance with its 2000 order would not occur until at least full funding of a formula established by the [Thornton Commission].

Id. at 18–19 (quoting Mem. Op. 64–65 (Dkt. 50) (Aug. 20, 2004)).

> Starting with the 2007 legislative session, the State acted to halt implementation of full Thornton funding. These actions have caused a steadily increasing "adequacy gap" for City Schools. By FY 2013, DLS calculated an adequacy gap of $156 million, and for FY 2015, that gap had risen to $290 million. A state-required evaluation separately calculated a $358 million annual 'adequacy gap' in FY 2015…. And for FY 2017, DLS found that the State had

> underfunded City Schools for adequate educational instruction by $342.2 million.

Id. at 19–20.

> Even if the Thornton Commission's funding formula had been followed, as this Court recognized in 2004, it fell far short of the amount needed for constitutional adequacy then and that is even more apparent nearly twenty years later.

Id. at 20. Given Plaintiff BCPSS's detailed explanation of Defendant's noncompliance with the Maryland Constitution, the Consent Decree, and this Court's prior Orders, Defendant's attempt to induce the Court into finding that Plaintiff BCPSS has changed its theory of the case, based on a single line in a document request response, should be rejected.

3. Defendant Mischaracterizes Plaintiffs' Interrogatory Responses to Support Its Actual and Previously Rejected Argument that Plaintiffs' Claims Concerning Current Conditions Are Improper.

At bottom, Defendant's complaint is not that Private Plaintiffs and Plaintiff BCPSS have failed to identify relevant provisions of the Consent Decree or the Court's previous Orders in interrogatory responses – because, as noted above, the specific provisions are in Private Plaintiffs' and Plaintiff BCPSS' responses, as well as in the Petition and subsequent filings and arguments. Rather, Defendant's actual complaint is that Plaintiffs seek relief for current conditions arising out of these ongoing violations. As it argued in support of its First Motion to Dismiss, and as it argues again in this Second Motion to Dismiss, Defendant believes that any claims regarding current conditions should be barred because they are allegedly not authorized under the Consent Decree and the Court's previous Orders. *See* Second Mot. to Dismiss 2 (Dkt. 183/0) (arguing Plaintiffs' claims regarding current conditions are not authorized); Ex. B, 12/12/19 Hr'g Tr. 11:5–8 (counsel for the Defendant arguing that "in this case, particularly in the petition for further relief, [Plaintiffs] are seeking relief that goes beyond the terms of the consent decree."); *id*.at 11:19–22 (arguing the Court does not have authority to order relief beyond the terms of the Consent Decree); *id*.at 12:15–

19 (complaining that Petition supposedly did not identify anything in the Consent Decree that authorized the Petition); *id*.at 13:5–14 (arguing the Petition did not rely on the Consent Decree); First Mot. to Dismiss Pls.' Pet. for Further Relief 3 (Dkt. 105/0) (June 19, 2019) (complaining that Plaintiffs' requested relief is based on the Petition and not the Consent Decree); *id*. at 31 (acknowledging that Petition concerns current conditions and arguing, as a result, it is not authorized under the Consent Decree); *id*. at 38 (arguing that Petition is not authorized by the Consent Decree); *id*. at 43 (same). Despite the denial of its First Motion to Dismiss, Defendant has continued to maintain this position, even asserting it as a basis to deny Plaintiffs' Notice of Substitution, Def.'s Mot. to Strike Pls.' Notice of Substitution 6 (Dkt. 162/0), which the Court denied. Order (Dkt. 162/2) (Sept. 10, 2021) (Granting Plaintiffs' Notice of Substitution).

However, having been unable to convince the Court on its first or second try that Plaintiffs' claims should be barred, Defendant now seeks yet another bite at the same apple by attempting to twist a small part of lengthy interrogatory responses into some sort of newfound "concession" that Plaintiffs' claims are limited to current claims and have nothing to do with the Consent Decree and the Court Orders under it. In order to recycle its prior, denied arguments, Defendant asserts that Plaintiffs' claims previously were limited to the Consent Decree and did not extend to current conditions, and that Plaintiffs have somehow changed their position to limit their claims to current conditions only. But Plaintiffs have consistently made plain that they seek a remedy for current conditions rooted in Defendant's ongoing violations of Court Orders, which both provide this Court with its jurisdiction and caused the current unconstitutional state of affairs. This was Plaintiffs' position when they filed the Petition, when the Court denied Defendant's First Motion to Dismiss, and now.

B. Plaintiffs' Discovery Responses are Consistent with Their Litigation Positions.

Defendant tries to bolster its argument by claiming Plaintiffs have also taken inconsistent litigation positions. Second Mot. to Dismiss 18–19, 27–36 (Dkt. 183/0). But Defendant's characterization is belied by the record in this case, which demonstrates that Plaintiffs' discovery responses and litigation positions have been consistent throughout.

The present litigation arises out of the Petition filed in 2019, to enforce the Consent Decree and the Court's follow-on Orders. The impetus for Petition was the ***current*** conditions in Baltimore City Public Schools, resulting from Defendant's continuing failure to fund BCPSS at a constitutionally adequate level, as required by Article VIII and by this Court's Orders arising out of the Consent Decree. Petition 4–5 (Dkt. 98/0); *see also* Mot. in Supp. of Pet. at 5–41 (Dkt. 98/0).

1. Plaintiffs Have Consistently Alleged That They Seek Relief for Ongoing Violations of Article VIII.

Plaintiffs have consistently alleged that although they seek relief for ongoing violations of Article VIII, these ongoing violations resulted from Defendant's failure to comply with the Court's previous Orders issued under the Consent Decree, the violation of which also gives the Court jurisdiction to hear the Petition.

As explained in Plaintiffs' previous filings and at oral argument on Defendant's First Motion to Dismiss, Plaintiffs have consistently sought relief for ongoing violations of Article VIII. At oral argument, the Court explicitly questioned Plaintiffs as to whether the Court should just dismiss the case so the Court would not be forced to make determinations about what occurred "20 years ago, 15 years ago." Ex. B, 12/12/19 Hr'g Tr. 38:22–23. Plaintiffs responded:

> The Plaintiffs arguments are about what is happening today. It's not about what happened 20 years ago. The only reason we are talking about what happened 20 years ago is because the state filed a motion to dismiss and tied it to us not having the right to come back into court. That's the reason we are talking about what happened 20

> years ago. Our petition for further relief is all about the facility conditions now. It's about the fact that in 2012, 85 percent of schools were found to be in poor or very poor condition.

Id. at 38:25–39:10; s*ee also id*. at 46:3–5 ("And so plaintiffs seek equitable relief for ongoing violations of Article 8 of the Maryland Constitution."); *id*. at 45:4–7 (noting that the case concerned an ongoing constitutional violation); *id*. at 54:6–8 (same). This was entirely consistent with Plaintiffs' Petition, as well as their Opposition to the Defendant's First Motion to Dismiss. *See* Pls.' Opp'n to First Mot. to Dismiss 1 (Dkt 105/1) (Aug. 23, 2019) (alleging that this is a case about ongoing violations); *id*. at 2 ("Neither applies to Plaintiffs' claims for prospective relief upon *current* constitutional violations.") (emphasis in original); Mem. in Supp. of Pet. 2 (Dkt. 98/0) ("tens of thousands of Baltimore City school children . . . are denied the adequate education mandated by Article VIII"); *id*. at 3 ("Plaintiffs now return to this Court to compel compliance with the mandate of Article VIII"); *id*. at 15 (arguing that the current funding levels despite the Court's prior rulings are too low, and that the Court's prior rulings prove the current funding level is inadequate); *id*. at 24 ("whatever the measure, the State's current funding levels for BCPSS do not come close to meeting the requirements of Article VIII"); *id*. at 40 (concluding that violations of Article VIII persist today); *id*. at 59 (alleging that the various deficiencies identified prove that the state is violating Article VIII); *id*. at 60 (arguing that the Court has authority to order remedies for violations of Article VIII); *id*. at 63 (same); *id*. at 62 (discussing what Article VIII requires of the State in terms of raising additional funding for schools attended by students receiving an inadequate education).

In response to questions as to what standards the Court would use in determining whether Plaintiffs should prevail, Plaintiffs explained that the Court should look to current state regulations governing the provision of education in Maryland. Ex. B, 12/12/19 Hr'g Tr. 36:5–8; *see also id*. at 38: ("we would be asking the Court to apply" these standards were the litigation allowed to go

forward). Similarly, in response to questioning from the Court as to whether a determination of inadequate funding should be "based on today's numbers", Plaintiffs responded, "That is correct, your honor." *Id*. at 39:17. Likewise, Plaintiffs confirmed that any experts Plaintiffs would engage would examine current conditions in the schools. *Id*. at 40:12; 74:25–75:4 ("As we've talked about earlier, the work that the experts would be doing if we're allowed to proceed with our discovery schedule would relate to the conditions in the schools as they are now.").

Further, throughout the oral argument, Plaintiffs repeatedly cited to current conditions in the system as the basis for relief. *Id*. at 37:7–23 (citing to test scores, graduation rates, and the state's revised "star system" to make the point that the Court has a basis to assess the current conditions in the school); *id*. at 47:23–25 (discussing the fact that several BCPSS schools were closed in 2018 due to inadequate facilities). This was consistent with Plaintiffs' Memorandum in Support of their Petition and in Opposition to the Defendant's First Motion to Dismiss. (Dkt. 105/1) (Aug. 23, 2019) (noting that the ongoing constitutional violation is exhibited by, among other things, current lack of staff, lower test scores); *id*. at 33 (noting the present facilities problems); Petition ¶ 12 (Dkt. 98/0) (noting the ongoing violations arising out of current conditions); *id*. at ¶ 14 (noting that BCPSS facilities are in poor condition in violation of Article VIII); Mem. in Supp. of Pet. at 24 (Dkt. 98/0) (analyzing several metrics regarding current programmatic resources and the impact on current student performance); *id*. at 41 (arguing that current facility conditions violate Article VIII); *id*. at 46 (describing BCPSS facilities that are currently in poor condition); *id*. at 74 (explaining that the current conditions in BCPSS violate Article VIII and citing specific facts regarding current conditions in support).

As relief, Plaintiffs specifically requested at oral argument, and in their filings, a comprehensive plan for compliance with the Court's previous Orders and Article VIII going

forward. Ex. B, 12/12/19 Hr'g Tr. 51:21–52:1; Pls.' Opp'n to First Mot. to Dismiss 26 (Dkt. 105/1) (Aug. 23, 2019) (seeking a declaration that the State is violating Article VIII); *id*. at 27 (asking the Court to close the adequacy gap as it currently exists, not as it existed at the time of the Court's previous orders or the Consent Decree); *id*. at 42 (explicitly noting that we are seeking payments to BCPSS to address problems going forward); Mem. in Supp. of Pet. at 74–75 (Dkt. 98/0) (requesting, first, a declaration that the State is "violating Article VIII by failing to provide a thorough and efficient education"); Petition ⁋ 20.a. (Dkt. 98/0) (same).

Plaintiffs' framing was not lost on Defendant which, at oral argument, explicitly acknowledged that Plaintiffs' case concerned ongoing violations of the Article VIII. Ex. B, 12/12/19 Hr'g Tr. 57:25 (Defendant's counsel acknowledging Plaintiffs have argued that the case is about the "here and now").

As noted above, the issue additionally arose in the context of Defendant's argument that Plaintiffs' claim should be dismissed because Defendant would be prejudiced by having to defend a claim alleging violations of matters occurring over a decade ago. First Mot. to Dismiss 37–38 (Dkt. 105/0) (June 19, 2019). In response, Plaintiffs repeatedly explained that Defendant would not be prejudiced because the case concerned current conditions in BCPSS. Opp'n to First Mot. to Dismiss 41 (Dkt. 105/1) (Aug. 23, 2019) ("the central questions are systemic questions related to the funding of BCPSS at present and in the interim, and the resulting quality of education provided throughout the system today."); *id*. (arguing that what is important is the many individuals available who have knowledge of how BCPSS is funded today).

In sum, Defendant's argument that Plaintiffs' interrogatory response, focused on seeking relief for ongoing violations of Article VIII arising out of current conditions, represents a

"fundamental change," Second Mot. to Dismiss 2 (Dkt. 183/0), overlooks overwhelming record evidence to the contrary.

2. Plaintiffs Have Also Consistently Alleged, as They Did in the Interrogatory Response, that Defendant Violated the Court's Prior Rulings Arising Out of the Consent Decree and Those Violations Caused the Current Conditions and Give the Court Jurisdiction.

Consistent with their interrogatory response, Plaintiffs have also consistently argued that although their claims and prayer for relief concerns ongoing violations of Article VIII, the Consent Decree and previous Orders are an important part of the case. First, Plaintiffs have consistently argued, including in the interrogatory response, that Defendant's failure to comply with the Consent Decree and the Court's previous Orders provides jurisdiction for the Court to hear the Petition and determine its authority to decide the questions at the heart of the case. Ex. B, 12/12/19 Hr'g Tr. 33:19–34:8 (explaining that the history of the case is all relevant to whether there is "finality to the consent decree"); *id*. at 39:20–24 ("I think the reason that [Plaintiffs] are talking about what happened 20 years ago is [that] the State is arguing that we don't have the right to bring this case and it doesn't tie back at all to what happened before"); *id*. at 57:4–10 (arguing, as Plaintiffs did in their Interrogatory Response, that paragraph 53 of the Consent Decree authorized the Petition); Petition ⁋⁋ 6–8 (Dkt. 98/0) (walking through the Court's previous declarations as a means of explaining why the Court retains jurisdiction to hear Plaintiffs' Petition); Pls.' Opp'n to First Mot. to Dismiss 52, 55 (Dkt. 105/1) (explaining that the Petition flows out of the Consent Decree and the Court's previous declarations). *See also supra* at pages 24–29 (discussing Interrogatory responses).

Second, as Plaintiffs have consistently argued, the current conditions for which Plaintiffs seek relief are the product of Defendant's failure to comply with previous Orders of the Court and the Consent Decree, and thus the prior rulings and Defendant's conduct in violating them evidence

the causes of the current violation, the party responsible for them, and the amount of funding needed to remedy them. Plaintiffs made this point, as they did in the interrogatory responses, at oral argument. Ex. B, 12/12/19 Hr'g Tr. 39:24–40:3 ("[T]he reason that we're talking about what happened 20 years ago is I'm trying to explain the connection between why we have a 342 million dollar shortfall and how that ties to what happened in the case 20 years ago."); *id*. at 74–75 (explaining that the prior rulings remained relevant because they indicate the amount of funding that is needed for BCPSS). Plaintiffs did so as well in their post-Petition filings with the Court, including those leading this Court to deny the State's First Motion to Dismiss. Mem. in Supp. of Pet. 7 (Dkt. 98/0) (explaining that the Court's prior rulings evidence the amount of funding needed for BCPSS); Pls' Opp'n to First Mot. to Dismiss 4 (Dkt. 105/1) (Aug 23, 2019) (noting that the Petition is grounded in the previous decisions of the Court and that the failure to comply with them led to the current violation); *id*. at 32 ("Plaintiffs expressly argue that the State is failing today to comply with this Court's declarations regarding the level of funding necessary to comply with constitutional mandates."); Mem. in Supp. of Pet. 3 (Dkt. 98/0) (noting that these violations have occurred despite numerous orders that require the Defendant to comply with article VIII); *id*. at 5 (walking through the history of the case to explain how the current constitutional violations came to be); Petition ¶ 10 (Dkt. 98/0) (explaining that the State's previous failures to comply with the Court's prior orders created the adequacy gap affecting students currently attending BCPSS); *id*. at ¶ 18 (explaining that the Court's declarations required it to comply with the Constitution which it has failed to).

As explained in Plaintiffs' previous filings, under the terms of the Consent Decree, the State was required to provide BCPSS with additional funding, beginning in fiscal year 1998, and the Plaintiffs were permitted to return to Court to seek additional funding if an Independent

Evaluation found it was necessary. *See* Mot. to Dismiss Pls' Pet. for Further Relief (Dkt. 105/0), Ex. 1 ("Consent Decree") at ⁋⁋ 47–49, 68–69. In the ensuing years, Defendant never adequately funded the BCPSS. The Court recognized this in its 2000, 2002, and 2004 decisions, ultimately holding that Defendant had underfunded the BCPSS by an aggregate of $439.35 million to $834.68 million from FY 2001–2004. Mem. Op. 64–65 (Dkt. 50/0) (Aug. 20, 2004). Rather than work to implement full Thornton funding, including annual inflation adjustments due to budgetary constraints beginning in 2007, the State refused to implement the adjustments called for by the Bridge to Excellence in Education Act, and funding of the BCPSS stagnated. *See* Mem. in Supp. of Pet. 16–17 (Dkt. 98/0). This dramatically increased the "adequacy gap" between required and actual funding. *See id.* at 17. To this day, funding of BCPSS *still* is not constitutionally adequate. *See id.*at 17–19.

BCPSS, in its opposition to the State's First Motion to Dismiss made these same points. BCPSS' Opp'n to First Mot. to Dismiss Pls.' Pet. for Further Relief 4 (Dkt. 105/1) ("The state's continuing failure to provide funding to BCPSS at levels required by Article VIII of the Maryland Constitution has deprived BCPSS students of at least $2 billion that this Court has ordered over the past decades."); *id*. at 12 (discussing the Consent Decree in response to Defendant's argument that the Consent Decree does not allow the Petition).

Defendant's failure to address, let alone cite, the numerous instances in which Plaintiffs made clear their position, and its own prior statements acknowledging such, is another reason enough to deny the Second Motion to Dismiss.

3. Even if the Defendant's Inaccurate Description of the Interrogatory Response Was True, This Does not Provide a Basis to Dismiss the Entire Case.

Even if Defendant's attempt to misconstrue a single incomplete phrase from an interrogatory response into a fundamental change in Plaintiffs' position were accurate (it is not,

see supra at pages 24–29, that would not justify the dismissal of Plaintiffs' case. As an initial matter, the interrogatory is improper as it does not seek factual information that an individual plaintiff would be positioned to answer, but rather concerns the theory of Plaintiffs' case. *Blankenship v. Wagner*, 261 Md. 37, 47 (1971) ("The appellees on appeal have raised the question as to whether the appellant . . . should not have been required to amend his answer to the defendant's interrogatories so as to advise them that he was abandoning his claim of specific negligence and relying on the doctrine or res ipsa loquitur. We find no merit to this contention. Interrogatories relate to the facts and the doctrine of res ipsa loquitur is not a fact but a theory of the case.").

Second, if Defendant believed these responses were inadequate, it should have met and conferred with Plaintiffs and, if necessary, moved to compel. Moving to dismiss, however, is not a proper or recognized request from Defendant, confirmed by its failure to cite any authority supporting dismissal of an entire case based on a partial interrogatory response.

Moreover, one supposedly incomplete or inconsistent interrogatory response does not justify the dismissal of a party's case. A party who submits an incomplete or incorrect interrogatory response may "seasonably" supplement its responses. *See Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 320–21 (C.D. Cal. 2004). However, Defendant provides no authority that a court should dismiss a lawsuit because of one phrase from one interrogatory response. Furthermore, to the extent this Court finds the interrogatory response is inconsistent, an inconsistent interrogatory response, at worst, creates an issue of fact, not a basis for an adverse inference as a matter of law. *See Lawrence v. United States*, 679 F. Supp. 2d 820, 826–27 (E.D. Mich. 2010); *Goh v. Nori O Inc.*, No. 2:16-cv-02811 (KSH) (CLW), 2020 WL 7640518 at *6 (D.N.J. Dec. 23, 2020). Thus, there is no basis to dismiss the case, *as a matter of law*, due to the

single interrogatory response, let alone one that Defendant has cherry-picked and selectively quoted.

C. The Court Has Previously Rejected Defendant's Argument That This Case Should Be Dismissed Because It Has Satisfied the Consent Decree and the Court's Prior Rulings.

Towards the end of its filing, Defendant seeks to re-package another of its central arguments from its First Motion to Dismiss – that Plaintiffs' claim is not authorized under the Consent Decree and the Court's prior rulings, because it has supposedly satisfied all of its obligations under each, including supposedly having provided the required funding. Second Mot. to Dismiss 38 (Dkt. 183/0). Defendant's attempt to raise this same argument again, more than two years after it was rejected, is essentially another untimely motion for reconsideration that should be struck.

In its First Motion to Dismiss, in 2019, Defendant argued it had "satisfied all of the requirements of the Consent Decree." First Mot. to Dismiss 7–10 (Dkt. 105/0) (June 19, 2019); *id.* at 2 (arguing that State resources to BCPSS have increased significantly, supposedly far more than required by the Court's 2000 Order). Based on its purported full compliance, Defendant argued there is no "good cause" to extend the Consent Decree pursuant to Paragraph 68 or to authorize the Court to take up the Petition pursuant to Paragraph 69. *Id*. at 46. Defendant also argued it was in "full compliance with the Court's 2000, 2002, and 2004 Orders", *id*. at 22–27,[2] including having supposedly provided the funding required, which, Defendant asserted, deprived this Court of the authority to hear the Petition, *id*. at 46–50.

[2] Notably, despite its laudatory language, Defendant could not avoid admitting that it had failed to provide inflation increases for BCPSS funding. First Mot. to Dismiss 24 (Dkt. 105/0) (June 19, 2019).

Defendant repeated these arguments during the 2019 hearing on Defendant's First Motion to Dismiss. Defendant asserted that it had "complied with fully" all of the school funding obligations relating to the Consent Decree. Ex. B 25:3–7 ("In this case, this is an unusual case where a consent decree has been extended. In every other case I'm aware of consent decrees are extended because the terms have not been complied with fully. Not true here."). And based on this purported compliance, Defendant argued "there was no good cause" for extending the Consent Decree or this Court's jurisdiction. *Id.* at 25:14; *see also id.* at 25:19–23 ("it would still be a very unusual case perhaps one of a kind in the state where the consent decree was complied with but we're still having to litigate what the consent decree provided and, of course, we argue that that's improper."). In response, Plaintiffs explained that "[b]efore the . . . full Thornton funding had been provided in 2008, the State began to make cuts capping inflation increases. That occurred in fiscal 2007 for the fiscal 2009 and 2010 years. And as Defendant acknowledges in its briefing, that sort of capping continued all the way until 2015. *Id.* at 32:15–20.

The Court ultimately denied Defendant's First Motion to Dismiss, and thus rejected its argument that its purported full compliance with the Consent Decree and subsequent Court Orders eliminated the Court's authority to hear the Petition. Mem. Op. 10–11 (Dkt. 105/8) (Jan. 16, 2020). This Court recognized that "Judge [] Kaplan lengthen[ed] the timeframe of judicial supervision until such time as compliance with the 2000 Order. This Court retains jurisdiction under the Consent Decree." *Id*. at 9.

Defendant's present argument that it has satisfied the Consent Decree and the Court's subsequent Orders recycles its arguments from 2019 that it has achieved full compliance. The Court need not devote its limited resources to entertaining repeated arguments. And if it does, the Court should reject them for the same reasons it previously did.

III. Further Relief Under the Maryland Uniform Declaratory Judgments Act Is Available and Warranted.

Plaintiffs have consistently made plain what relief they seek: the Consent Decree and the Court's prior Orders, and Defendant's violation of those Orders, establish jurisdiction for this Court to address Defendant's continuing failure to fund the BCPSS at a constitutionally adequate level. In failing to do so, Defendant has infringed not only its obligations under the Maryland Constitution, but also the duties affirmatively imposed upon it by the Consent Decree and its follow-on Orders by this Court, as discussed *supra*.

The Maryland Uniform Declaratory Judgments Act enables a party to petition for further relief under a consent decree, provided the circumstances for such relief are "necessary or proper" and the adverse parties are properly notified. Md. Code, Cts. & Jud. Proc. § 3-412. As explained in Plaintiffs' Memorandum in Support of the Petition, and consistent with Plaintiffs' interrogatory responses, Plaintiffs returned to this Court to vindicate several of the Court's previous findings as they relate to current conditions in BCPSS, namely that Article VIII requires Defendant to provide adequate funding; Defendant is responsible for ensuring that students receive an adequate education; and the amount of State funding currently provided falls below the thresholds previously set. Mem. in Supp. of Pet. 68 (Dkt. 98/0).

Defendant takes issue with this Court hearing the instant litigation because it claims several alleged deficiencies: lack of jurisdiction, new parties and claims, and re-litigation of an already-resolved claim. Second Mot. to Dismiss 37–38 (Dkt. 183/0). None of these contentions have merit, however, and each is an argument that Defendant already raised during the last two years and the Court has rejected. Defendant fails to acknowledge such, let alone explain why the Court should hear Defendant's repeat arguments again and reach a different conclusion now.

First, as stated in the Court's 2020 Order, this Court retains jurisdiction in this case. Jurisdiction in this case arises from the Consent Decree and its follow-on Orders. Specifically, the Consent Decree provides this Court continuing jurisdiction over this case, through at least June 30, 2002. Consent Decree ⁋⁋ 68–69. In 2000, this Court found that Defendant was not complying with the Consent Decree and ordered additional funding for the BCPSS. Order 1–2 (Dkt. 10) (June 30, 2000). In 2002, this Court, finding Defendant *still* not in compliance with the Consent Decree or the 2000 order, determined it would retain jurisdiction until the State complied with the 2000 order. Order 1 (Dkt. 25) (June 25, 2002). Finally, in 2004, this Court determined that jurisdiction would continue under the Consent Decree *until such time* as the State funds the BCPSS at the constitutionally adequate "Thornton" level. Order 2 (Dkt. 50) (Aug. 20, 2004). The funding never reached that level because, as the Petition alleges, Defendant began to cut inflation increases before it had fully complied with the Court's Orders, resulting in the adequacy gap currently affecting students attending BCPSS. *See* Petition ⁋ 10 (Dkt. 98/0). Thus, this Court retains jurisdiction to hear the instant litigation.

There are no new parties nor claims in this ongoing litigation. Over the course of this litigation, Plaintiffs have been substituted as needed when they have become unavailable because their children have aged out of the BCPSS or other personal issues have caused unavailability. *See, i.e.* Notice of Substitution (Dkt. 149/0) (June 21, 2021). Under a 1995 stipulated order, the parties decided to treat this litigation as a class action and allow substitution of representative plaintiffs "as necessary and reasonable if representative plaintiffs become unavailable[.]" Stipulation for Representative Pls. ¶¶ 1–3 (Dkt. 1-41) (Dec. 14, 1995). Defendant recently attempted to strike such a substitution, a motion that this Court properly denied. *See* Minute Order (Dkt. No. 162/2) (Sept. 10, 2021).

Furthermore, the claim remains the same as it was in 1994 because Defendant, in violation of Article VIII, has continuously failed to fund BCPSS as necessary to provide a thorough and efficient education to the school children of Baltimore City. The violation is ongoing, and although Defendant claims it has remedied the issue through legislation, Second Mot. to Dismiss 1–15 (Dkt. 183/0), the funding proposed by recent legislation is not currently in place, and there is no guarantee Defendant actually will provide these funds, and not reduce them as it has done numerous times since this litigation was first instituted in the 1994. Nor, as explained above, does the Built to Learn Act provide sufficient funding for BCPSS' inadequate facilities. *See supra* pages 17–18.

Finally, Defendant is wrong, as this Court already found it was in 2019, that the claim here is rendered final by the Consent Decree. While a consent decree operates both as a settlement and a court order, *see, e.g., Long v. State*, 371 Md. 72 (2002), this Consent Decree contains provisions for further relief should a party fail to meet its obligations thereunder. Consent Decree ⁋⁋ 68–69; *accord* Md. Code, Cts. & Jud. Proc. § 3-412 (enabling a party to seek further relief under a consent decree). When Plaintiffs returned to court, as the Consent Decree permitted, the Court found that Defendant was violating the Maryland Constitution by underfunding BCPSS, and ordered Defendant to bring itself into constitutional compliance by dramatically increasing said funding. Order 1–2 (Dkt. 10) (June 30, 2000). As noted above, the Court subsequently extended its jurisdiction to achieve full compliance with the 2000 Order, as well as subsequent Orders of the Court. Order 1 (Dkt. 25) (June 25, 2002); Order 1–4 (Dkt. 50) (Aug. 20, 2004). Before the ordered funding could be fully implemented, Defendant capped the necessary inflation adjustments resulting in the adequacy gap facing BCPSS today. *See* Petition ⁋ 10 (Dkt. 98/0). Additionally, Defendants, at no point, addressed the outstanding facilities deficiencies affecting students

attending BCPSS. Thus, Defendant remains in derogation of Article VIII and of its obligations under several Orders of this Court, rendering this issue unresolved. Plaintiffs remain in need of further relief from this Court.

IV. Conclusion

For the aforementioned reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion to Strike and deny Defendant's Second Motion to Dismiss Plaintiffs' Petition for Further Relief and Motion to Dissolve November 26, 1996 Consent Decree.

Dated: December 22, 2021

/s/ Ajmel Quereshi

Ajmel Quereshi
NAACP Legal Defense Fund
700 14th Street, NW, 6th Floor
Washington, DC 20005
Phone: (202) 216-5574
Email: aquereshi@naacpldf.org

Elizabeth B. McCallum
Baker & Hostetler LLP
1050 Connecticut Ave., NW, Suite 1100
Washington, DC 20036
Phone: (202) 861-1522
Email: emccallum@bakerlaw.com

Sherrilyn Ifill
Cara McClellan
NAACP Legal Defense Fund
40 Rector Street, 5th Floor
New York, NY 10006
Phone: (212) 965-2200
Email: Sifill@naacpldf.org
Cmclellan@naacpldf.org

Deborah Jeon
Tierney Peprah
ACLU of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Phone: (410) 889-8550

Email: jeon@aclu-md.org
tpeprah@aclu-md.org

Counsel for Plaintiffs

EXHIBIT L

KEITH BRADFORD, *et al.*,	*	**IN THE**
***Plaintiffs*,**	*	**CIRCUIT COURT**
v.	*	**FOR**
MARYLAND STATE BOARD OF EDUCATION,	*	**BALTIMORE CITY, PART 23**
	*	**Case No.: 24-C-94-340058**
***Defendants*.**		

CASE MANAGEMENT ORDER NO. 6

Upon consideration of *Case Management Order No. 5* (docket#00177000), filed October 1, 2021, and Keith Bradford's *et al.* (Plaintiffs') and Defendant's (collectively, the "Parties") *Joint Motion to Modify Schedule* (docket #00194000), filed on March 4, 2022, the contents of the record herein, and the current status of this action, this Court hereby enters the following Case Management Order No. 6, this 7th day of March 2022:

I. CASE SCHEDULE

a. Any rebuttal experts shall be disclosed by May 1, 2022.

b. Third-Party Defendant's expert response to Plaintiff's experts due May 1, 2022.

c. The Parties shall complete any expert discovery, including requests for production, depositions, and resolution of any disputes by May 20, 2022.

d. Any motions for summary judgement, or motions challenging expert opinion testimony, shall be filed by July 1, 2022. Any opposition to such motion shall be filed by August 1, 2022. Any

reply shall be filed by August 15, 2022.

e. A date for a hearing on motions for summary judgement or motions challenging expert opinion testimony, if necessary, shall be determined at a later date.

f. If no summary judgement motion or motion challenging expert testimony is filed, the parties shall submit a Joint Proposed Pre-Trial by July 1, 2022. If a motion for summary judgment or a motion challenging expert testimony is filed, the deadline for the Joint Proposed Pre-Trial order, if necessary, shall be within thirty (30) days of the Court's decision regarding any such motion.

g. The Joint Pre-Trial Order shall state the estimated length of the trial.

h. The final Pre-Trial Conference shall be set within thirty (30) days from the filing of the Joint Proposed Pre-Trial Order.

i. This *Case Management Order No. 6* may be modified only upon a written motion for modification setting forth a showing of good cause that the schedule cannot reasonably be met despite the diligence of each party seeking modification.

j. All other deadlines defined in *Case Management Order No. 5* (docket #00177000), filed October 1, 2021, not modified herein shall remain in full force and effect.

This Order is subject to further modification by this Court.

AUDREY J.S. CARRION
Part 23
Judge's Signature appears on the original document

Judge Audrey J.S. Carrión
Circuit Court for Baltimore City
Case No.: 24-C-94-340058

CC:

Elizabeth McCallum, Esq.,
Baker & Holstetler, LLP
1050 Connecticut Ave. NW
Washington, DC 20036
Counsel for Plaintiffs

Deborah Jeon, Esq.,
ACLU of Maryland
3600 Clipper Mill Rd., Suite 350
Baltimore, MD 21211
Counsel for Plaintiffs

TRUE COPY
TEST
Marilyn Beardley

Ajmel Quereshi, Esq.,
NAACP Legal Defense Fund
700 14th St. NW, 6th Floor
Washington, DC 20005
Counsel for Plaintiffs

Sherrilyn Ifill, Esq.,
Cara McClellan, Esq.,
NAACP Legal Defense Fund
40 Rector St., 5th Floor
New York, NY 10006
Counsel for Plaintiffs

Steven M. Sullivan, Esq.,
Elliot L. Schoen, Esq.,
Assistant Attorneys General
200 Saint Paul Pl., 19th Floor
Baltimore, MD 21202
Counsel for Defendant Maryland State Board of Education

Charles Monk, II, Esq.,
Jason St. John, Esq.,
Mark Simanowith, Esq.,
Saul Ewing Arnstein & Lehr LLP
500 E. Pratt St., Suite 800
Baltimore, MD 21202
Counsel for Defendant Maryland State Board of Education

Warren Weaver, Esq.,
Ilana Subar, Esq.,
Whiteford, Taylor & Preston, L.L.P.
7 Saint Paul St., Suite 1500
Baltimore, MD 21202
Counsel for Defendant Baltimore City Board of School Commissioners

Clerk to send copies via U.S. Mail
Case No.: 24-C-94-340058

EXHIBIT M

F. Williams

KEITH BRADFORD, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION,	*	BALTIMORE CITY
	*	Case No.: 24C94340058
Defendants.	*	

* * * * * * * * * * * * *

MOTION TO DEFER ESTABLISHMENT OF LITIGATION SCHEDULE PENDING LEGISLATIVE SESSION

The defendant, the Maryland State Board of Education (the "State Board"), moves to defer the establishment of a litigation schedule for this case pending completion of the current legislative session. The State Board believes this deferral is appropriate and will not cause any meaningful prejudice to the parties, for the following reasons.

1. The Court has not yet adopted a litigation schedule for this case. In its January 16, 2020 Order denying the State Board's motion to dismiss plaintiffs' petition for further relief, the Court directed the parties to "confer and provide a proposed scheduling order to this Court within thirty (30) days[.]"

2. On February 7, 2020, the Speaker of the House of Delegates introduced House Bill 1300 (cross-filed as Senate Bill 1000), entitled "Blueprint for Maryland's Future — Implementation." The 172-page bill, which seeks to implement school funding and other recommendations of the Kirwan Commission, is widely considered to be Maryland's most significant piece of public school legislation in a generation. The

legislation addresses matters that go to the heart of the relief plaintiffs seek, including a new formula for education funding and a commitment to a substantial increase in State funding for public schools. Under the legislation's provisions, funding for Baltimore City Public Schools will increase by more than $90 million in Fiscal Year 2021, and funding increases to be phased in progressively over the rest of the decade will achieve annual funding for Baltimore City Public Schools that is approximately $500 million per annum greater than current levels. *See* Dept. of Legislative Services, Office of Policy Analysis, Overview of the Maryland Commission on Innovation and Excellence in Education Final Recommendations (Jan. 2020) at 23, http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/OverviewoftheRecommnedations.pdf.

3. Also pending is House Bill 1 (cross-filed as Senate Bill 1), the Built to Learn Act, which will increase funding for public schools construction, including an increase of $420 million in school construction funding for Baltimore City Public Schools, representing its share of a $2.2 billion bond issue. Fiscal and Policy Note, H.B. 1 at 4, http://mgaleg.maryland.gov/2020RS/fnotes/bil_0001/hb0001.pdf. That increase in public school construction funding for Baltimore City would augment an already ambitious program of construction funding for Baltimore City Public Schools, the $1.1 billion Baltimore City 21st Century Schools Program, 2013 Md. Laws, ch. 647 of 2013, which has already completed more than a third of the 23 to 28 school facilities to be built or revitalized under the program. Fiscal and Policy Note, H.B. 1 at 8. Today, House Bill 1 passed in the House of Delegates by a vote of 128-6.

4. The State Board and Maryland State Department of Education staff are working with legislators in an effort to achieve passage of these important legislative initiatives, and members of the Office of the Attorney General are advising multiple client entities and officials with regard to the legislation.

5. At this juncture in this case, deferring establishment of a litigation schedule for at least the short remaining duration of the legislative session would be prudent, to permit the political branches to do the work of legislating with respect to public school education. Their work on the pending legislation may resolve some and potentially all of the material issues in this case. At a minimum, what happens in the legislative session will affect the scope and substance of this case going forward. Moreover, the Consent Decree entered in this case is a testament to the reality that resolution of claims involving education funding cannot be achieved without action by the legislature.

6. The State Board's counsel have conferred with counsel for the plaintiffs and the Baltimore City Board of School Commissioners, who have declined to consent to this motion, on the ground that the prehearing schedule of discovery and other proceedings they would propose cannot await the outcome of the legislative session. Previously, plaintiffs and the City Board have maintained that their involvement with various legislative initiatives justified more than 12-years of delay in pursuing the current petition for further relief. *See* Plaintiffs' Opposition to Motion to Dismiss Petition for Further Relief (Aug. 23, 2019) at 35-37; Board of School Commissioners of Baltimore City's Opposition to Motion to Dismiss Petition for Further Relief (Sept. 17, 2019) at 5-10. Given that claim, it should be reasonable to conclude that the momentous legislative efforts now in progress

warrant a brief pause of less than two months before setting a schedule for future proceedings.

7. For these reasons, the State Board request that the Court defer setting a litigation schedule pending completion of the legislative session. A proposed Order is submitted with this motion.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

STEVEN M. SULLIVAN
ELLIOTT L. SCHOEN
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, Maryland 21202
(410) 576-6465 (Telephone)
(410) 576-6309 (Facsimile)
ssullivan@oag.state.md.us
eschoen@oag.state.md.us

Attorneys for
Maryland State Board of Education

February 14, 2020

CERTIFICATE OF SERVICE

I certify that on this 14th day of February, 2020, a copy of the foregoing Motion to Defer Establishment of Litigation Schedule Pending Legislative Session, with proposed Order, was sent electronically by email and a hard copy was mailed, postage prepaid, to:

Elizabeth B. McCallum, Esquire
(admitted pro hac vice)
Baker & Hostetler LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
emcallum@bakerlaw.com

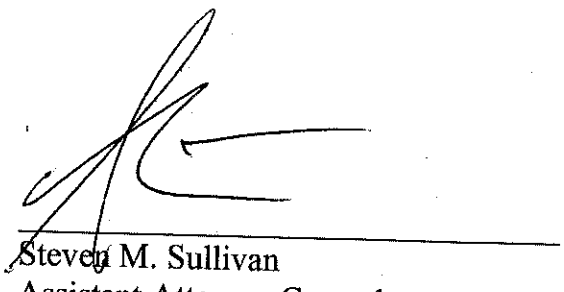
Deborah A. Jeon, Esquire
American Civil Liberties Union
Foundation of America
3600 Clipper Mill Road
Suite 350
Baltimore, MD 21211
jeon@aclu-md.org

Ajmel Quereshi, Esquire
Cara McClellan, Esquire
Sherrilyn Ifill, Esquire
NAACP Legal Defense Fund
700 14th Street, NW, 6th Floor
Washington, DC 20005
aquereschi@naacpldf.org
smcclellan@naacpldf.org
sifill@naacpldf.org

Attorneys for Bradford Plaintiffs

Warren N. Weaver, Esquire
Ilana Subar, Esquire
Whiteford, Taylor & Preston, L.L.P.
Seven Saint Paul Street, Suite 1500
Baltimore, Maryland 21202
wweaverf@wtplaw.com
isubar(@wtulaw.com

Attorneys for Baltimore City Board of School Commissioners



Steven M. Sullivan
Assistant Attorney General

EXHIBIT N

Serve us
please

KEITH A. BRADFORD, et al.,	*	**IN THE**
Plaintiffs,	*	**CIRCUIT COURT**
v.	*	**FOR**
MARYLAND STATE BOARD OF EDUCATION	*	**BALTIMORE CITY, PART 23**
	*	**Case No.: 24-C-94-340058**
Defendant.		

* * * * * * * * * * * * * *

AMENDED ORDER

Upon consideration of the Maryland State Board of Education's ("Defendant") Motion to Defer Establishment of Litigation Schedule Pending Legislative Session (docket #00112000), filed February 14, 2020, Keith A. Bradford et al.'s ("Plaintiff") Opposition to Defendant's Motion to Defer Establishment of Litigation Schedule Pending Legislative Session (docket #00112001), filed March 3, 2020, Plaintiff's Notice of Submission of Proposed Schedule (docket #00113000), filed February 19, 2020, Plaintiff's Motion for Permission to File Proposed Scheduling Order Out of Time (docket #00114000), filed February 19, 2020, Defendant's Reply in Support of Motion to Defer Establishment of Litigation Schedule Pending Legislative Session (not yet docketed), filed March 6, 2020, and the record herein, it is this 10th day of March, 2020, by the Circuit Court for Baltimore City, Part 23, hereby

ORDERED that Defendant's Motion to Defer Establishment of Litigation Schedule Pending Legislative (docket #00112000), be, and the same is, hereby **DENIED**; and it is further

ORDERED that the parties shall confer and provide a proposed joint scheduling order that includes, but is not limited to, addressing available dates for a dispositive motions hearing, pretrial conference, and trial to this Court within ten (10) days from the date of this Order.

AUDREY J.S. CARRION
Part 23
Judge's Signature appears on the original document

Judge Audrey J.S. Carrión
Case No.: 24-C-94-340058

CC:
Elizabeth A. McCallum, Esq.,
Baker & Holstetler, LLP
1050 Connecticut Avenue NW
Washington, DC 20036
Attorneys for Plaintiffs

TRUE COPY
TEST
Marilyn Bentley
MARILYN BENTLEY, CLERK

Deborah A. Jeon, Esq.,
American Civil Liberties Union Foundation of American
3600 Clipper Mill Road, Suite 350
Baltimore, Maryland 21211
Attorney for Plaintiffs

Ajmel Quereshi, Esq.,
Cara McClellan, Esq.,
Sherrilyn Ifill, Esq.,
NAACP Legal Defense Fund
700 14th Street, NW, 6th Floor
Washington, DC 20005
Attorneys for Plaintiffs

Steven M. Sullivan, Esq.,
Elizabeth M. Kameen, Esq.,
Elliot L. Schoen, Esq.,
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, Maryland 21202
Attorneys for Defendant Maryland State Board of Education

Warren N. Weaver, Esq.,
Ilana Subar, Esq.,
Whiteford, Taylor & Preston, LLP
7 Saint Paul Street, Suite 1500
Baltimore, Maryland 21202
Attorneys for Baltimore City Board of School Commissioners

Sent via U.S. Mail
Case No.: 24-C-94-340058

EXHIBIT O

KEITH BRADFORD, et al.,	*	**IN THE**
Plaintiffs,	*	**CIRCUIT COURT**
v.	*	**FOR**
MARYLAND STATE BOARD OF EDUCATION	*	**BALTIMORE CITY, PART 23**
	*	**Case No.: 24-C-94-340058**
Defendant.		

* * * * * * * * * * * * * * *

CASE MANAGEMENT ORDER NO. 2

This Case Management Order No. 2 ("CMO2") is entered following the Court's ruling on Maryland State Board of Education's ("Defendant") Motion to Dismiss on January 16, 2020 (Docket #00105008). Parties having been given the order to submit a joint scheduling order and having failed to do so, it is hereby entered this 11th day of June, 2020.

I. CASE SCHEDULE

a. All fact discovery, including but not limited to requests for production, requests for inspection, and depositions shall be completed within 200 days from August 30, 2020. All discovery, including all discovery disputes, shall be completed by March 18, 2021.

b. Plaintiffs shall disclose reports of any experts that they intend to use at trial within sixty (60) days from the close of non-expert discovery.

c. The Defendant shall disclose reports of any experts that they intend to use at trial within sixty (60) days from deadline for Plaintiffs' disclosure of experts.

d. Any rebuttal experts shall be disclosed within thirty (30) days from Defendant's expert disclosure.

e. The parties shall complete any expert discovery, including requests for production, depositions, and resolution of any disputes, within sixty (60) days from the deadline for the disclosure of any rebuttal reports.

f. Any motions for summary judgement, or motions challenging expert opinion testimony, shall be filed within sixty (60) days from the close of expert discovery. Any opposition to such motion shall be filed within thirty (30) days of filing of an affirmative motion for summary judgment or motion challenging expert opinion testimony. Any reply shall be filed within fifteen (15) days of the opposition.

g. A hearing on motions for summary judgement or motions challenging expert opinion testimony shall take place on April 1, 2022.

h. If no summary judgement motion or motion challenging expert testimony is filed, the parties shall submit a *Joint Proposed Pre-Trial Order* within thirty (30) days from the deadline for the completion of expert discovery. If a motion for summary judgment or a motion challenging expert testimony is filed, the deadline for the Joint Proposed Pre-Trial order, if necessary, shall be within thirty (30) days of the Court's decision regarding any such motion.

i. The Joint Pre-Trial Order shall state the estimated length of the trial.

j. The final Pre-Trial Conference shall be set within thirty (30) days from the filing of the Joint Proposed Pre-Trial Order.

k. This CMO2 may be modified only upon a written motion for modification setting forth a showing of good cause that the schedule cannot reasonably be met despite the diligence of the party/ies seeking modification.

This Order is subject to further modification by this Court.

AUDREY J.S. CARRION
Part 23
Judge's Signature appears on the original document

Judge Audrey J.S. Carrión
Case No.: 24-C-94-340058

CC:

TRUE COPY
TEST
Marilyn Bentley
MARILYN BENTLEY, CLERK

Elizabeth A. McCallum, Esq.,
Baker & Holstetler, LLP
1050 Connecticut Avenue NW
Washington, DC 20036
Attorneys for Plaintiffs

Deborah A. Jeon, Esq.,
American Civil Liberties Union Foundation of American
3600 Clipper Mill Road, Suite 350
Baltimore, Maryland 21211
Attorney for Plaintiffs

Ajmel Quereshi, Esq.,
Cara McClellan, Esq.,
Sherrilyn Ifill, Esq.,
NAACP Legal Defense Fund
700 14th Street, NW, 6th Floor
Washington, DC 20005
Attorneys for Plaintiffs

Steven M. Sullivan, Esq.,
Elizabeth M. Kameen, Esq.,
Elliot L. Schoen, Esq.,
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, Maryland 21202
Attorneys for Defendant Maryland State Board of Education

Warren N. Weaver, Esq.,
Ilana Subar, Esq.,
Whiteford, Taylor & Preston, LLP
7 Saint Paul Street, Suite 1500
Baltimore, Maryland 21202
Attorneys for Defendant Baltimore City Board of School Commissioners

Sent via U.S. Mail and Facsimile
Case No.: 24-C-94-340058

EXHIBIT P

KEITH A. BRADFORD, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF EDUCATION,	*	BALTIMORE CITY
Defendant.	*	Case No.: 24-C-94340058

* * * * * * * * * * * *

DEFENDANT MARYLAND STATE BOARD OF EDUCATION'S MOTION TO STAY PROCEEDINGS PENDING APPEAL

Defendant Maryland State Board of Education ("MSBE") respectfully moves to stay proceedings in this Court pending appeal of the Court's March 7, 2022 Order denying defendant's motion to dismiss for lack of subject matter jurisdiction and to dissolve the November 26, 1996 Consent Decree (the "Consent Decree"). A stay of proceedings is necessary to ensure that activity in this Court will not affect the subject matter of the appeal, which will determine whether this Court has authority to proceed with adjudication of the case.

1. On March 24, 2022, MSBE noted a timely appeal of the March 7, 2022 Order pursuant to § 12-303(3)(ii) of the Courts and Judicial Proceedings Article, which authorizes an appeal from an interlocutory order "[r]efusing to dissolve an injunction."

2. The March 7, 2022 Order constitutes an order "refusing to dissolve an injunction" within the meaning of § 12-303(3)(ii) because the Order denied MSBE's request to dissolve the Consent Decree. Though a consent decree '"is a judgment that a court enters at the request of the parties,'" it "is like any other judgment," *Pettiford v. Next Generation Tr. Serv.*, 467 Md. 624, 644 (2020) (quoting *Jones v. Hubbard*, 356 Md. 513, 528 (1999)), and, therefore, it '"is subject to the rules generally applicable to other judgments and decrees,'" *Long v. State*, 371 Md. 72, 82-83

(2002) (citation omitted). "[L]ike any other" injunction, *Pettiford*, 467 Md. at 644, the Consent Decree is "an order mandating or prohibiting a specified act," Md. Rule 15-501(a) (defining "injunction")—or, in this case, multiple specified acts. As with other injunctions, a party "may move for . . . dissolution of" the Consent Decree under Maryland Rule 15-502(f). If, as in this case, that motion is denied, then the order denying dissolution is immediately appealable under § 12-303(3)(ii).

3. The last time this case was before an appellate court, the Court of Appeals recognized that § 12-303 establishes an exception to the general rule that "appellate review of a trial court's ruling ordinarily must await the entry of a final judgment." *Maryland State Bd. of Educ. v. Bradford*, 387 Md. 353, 382 (2005). Specifically, the General Assembly has authorized appeals from "those kinds of orders enumerated in Maryland Code, § 12–303 of the Cts. & Jud. Proc. Article," *id.* at 383, irrespective of whether there has been a final judgment. The Court of Appeals further assured the parties that questions it declined to review in 2005 for lack of an appealable order "can be challenged" on appeal, if and when this Court has issued "an order that is properly appealable on an interlocutory basis." *Id.* at 385.

4. This Court has "inherent power to stay proceedings," *Moser v. Heffington*, 465 Md. 381, 398 (2019), but the Court's ability to refuse a stay of proceedings is subject to constraints when the case is pending appeal. Although "the trial court retains its fundamental jurisdiction over the case" when "an appeal is pending," "its right to exercise such power is limited." *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 65 (2013). That is, "the trial court can 'not exercise its jurisdiction in a manner affecting the subject matter . . . of the appeal,'" and cannot '"continue to act with reference to matters . . . relating to the subject matter of . . . the appellate proceeding.'" *Id.* at 66 (quoting *Kent Island, LLC v. DiNapoli*, 430 Md. 348, 361 (2013), and *State v. Peterson*,

315 Md. 73, 80 (1989)).

5. Here, a stay of proceedings pending appeal is especially appropriate, because "the subject matter . . . of the appeal," *Brethren Mut.*, 212 Md. App. at 66, poses the question whether this Court has authority to continue adjudicating this case. Consequently, continuing to conduct proceedings in this Court while the appeal is pending would inevitably implicate the very "subject matter of . . . the appellate proceeding." *Id.*

6. Moreover, if MSBE prevails on appeal, this 28-year-old case may at long last come to an end. At a minimum, the appellate Court's decision will provide instruction that this Court and the parties will be obligated to follow in future proceedings, if any. In either event, any efforts to litigate in this Court during the pendency of the appeal will have been for naught, and the considerable expenses incurred in those proceedings would constitute an unnecessary waste of public resources, at the taxpayers' expense.

7. MSBE's counsel conferred with counsel for the other parties to request their consent to this motion but they declined to consent.

CONCLUSION

For the reasons stated, MSBE requests that the Court enter an order staying proceedings in this Court pending the outcome of the appeal.

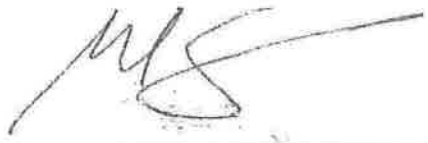
Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

_____

STEVEN M. SULLIVAN
ELLIOTT L. SCHOEN
Assistant Attorneys General
200 Saint Paul Place, 19th Floor
Baltimore, MD 21202

Office: (410) 576-6465
ssullivan@oag.state.md.us
eschoen@oag.state.md.us



Charles O. Monk, II (CPF# 7412010249)
Jason M. St. John (CPF# 0012130303)
Mark A. Simanowith (CPF# 0712120278)
SAUL EWING ARNSTEIN & LEHR LLP
500 E. Pratt Street, Suite 800
Baltimore, MD 21202
Office: (410) 332-8600
charles.monk@saul.com
jason.stjohn@saul.com
mark.simanowith@saul.com

Attorneys for Defendant Maryland State Board of Education

Dated: April 6, 2022