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PRELIMINARY STATEMENT

Private Plaintiffs represent children attending Baltimore City Public School System (“BCPSS”) who are at risk of educational failure because they are subject to economic, social, or other educational circumstances that increase the chances they will not receive an adequate education. They initiated this lawsuit in 1994, seeking to reverse the State’s pattern of underfunding BCPSS and to require Defendant, the Maryland State Board of Education (“MSBE” or the “State”), to comply with its duty under Article VIII of the Maryland Constitution (“Art. VIII”) to provide a thorough and efficient education. Art. VIII obliges the State to fund an adequate education when measured by contemporary educational standards for Baltimore City’s unique population of disadvantaged children. The concept of adequacy necessarily evolves over time, as educational standards change, and requires that schools be sufficiently funded, year over year, to acquire all the resources needed to ensure that every student can meet those standards. This Court has issued multiple declarations specifying minimal amounts needed for constitutionally adequate funding, but the State has not complied. Nearly thirty years after this lawsuit was first filed, the children of BCPSS are still not receiving the education promised them by Art. VIII.

Plaintiffs filed their Petition for Further Relief in 2019 (the “2019 Petition”), to remedy this ongoing violation. Analyses by the State’s Department of Legislative Services (“DLS”) showed annual “adequacy gaps”—the difference between current funding and the amount necessary to provide an adequate education under the then-current State formula—of \$156 million for FY2013, \$290 million for FY2015, and \$342.3 million for FY2017. These conceded annual shortfalls in operational and programmatic funding have not been filled, and result in cumulative deficiencies for BCPSS. Decades of State disinvestment have compounded the school system’s problems since 2004, when this Court found that the State had unlawfully underfunded BCPSS by

at least \$439.35 million, and by as much as \$834.68 million for fiscal years 2001, 2002, 2003, and 2004.

After Plaintiffs filed the 2019 Petition, the General Assembly enacted the “Blueprint for Maryland’s Future” Act (the “Blueprint Act”) in 2020, containing a revised funding formula that, if fully funded, would slowly increase operational and programmatic funding for BCPSS over the coming ten plus years. The projected annual totals will not add up to the \$342.3 million shortfall identified by the State in FY2017 for years to come, let alone address the rising costs of education during the years since the State analyzed the 2017 adequacy gap. Funding under the Blueprint Act, moreover, comes with additional costly requirements and higher contemporary standards that were not part of the State’s 2017 analysis, and there is no certainty that the increases enumerated in the Act will be sufficient or, in fact, be funded. Any improvements will be too little, and come too late, for still another generation of students.

The State has likewise underfunded, and continues to underfund, maintenance and construction of facilities. Chronic underinvestment in BCPSS’s facilities has led thousands of students to miss multiple days of instruction because of failures of boilers and other heating-system components in the winters, and lack of air conditioning in the summers. In addition, BCPSS facilities contend with issues of air quality, water quality, lighting, and noise, all of which have documented negative impacts on learning.

Under the 21st Century School Buildings Program, the State agreed that it would contribute \$20 million in each year through 2055 to leverage approximately \$1.1 billion in bonds to renovate or replace about one-fifth of BCPSS’ facilities, provided BCPSS and Baltimore City each contribute the same amount. As a result, \$20 million a year is being removed from BCPSS’s program budget for 39 years for renovation of a small fraction of its facilities. The subsequent

“Built to Learn” Act of 2020 recognizes that the State must invest more in capital improvements for BCPSS, but the amounts projected do not come close to addressing the problem for all BCPSS students. Notwithstanding these State investments, the majority of BCPSS facilities are still in poor condition according to assessments by the State and BCPSS, pose health and safety risks, and are unsuited to modern educational purposes.

The State’s persistent violations of the Maryland Constitution and this Court’s prior declarations, as well as its adoption of insufficient funding formulas, demonstrate that it will not comply voluntarily—despite a massive budget surplus—and that a direct mandate of this Court is necessary. The Private Plaintiffs therefore respectfully submit this memorandum of law in support of their motion:

(1) For summary judgment granting a declaratory judgment in the terms set forth in the attached Proposed Order, including a declaration that the State is in violation of Art. VIII and has not complied with the Consent Decree or this Court’s prior declarations; and

(2) For further relief under the Consent Decree and this Court’s prior declarations pursuant to the Declaratory Judgments Act, Maryland Courts and Judicial Procedure Code § 3-412(a), as set forth in the attached Proposed Order, including an Order: (a) directing Defendant to pay certain undisputed sums for operations, instruction, facility improvements, and maintenance to BCPSS during FY2023 as immediate relief in respect of Defendant’s unmet constitutional obligations; (b) requiring Defendant to develop and submit to this Court a comprehensive plan for full compliance with Art. VIII and the Court’s prior orders and declarations; (c) permitting Plaintiffs to object and propose amendments to the State’s proposed plan; (d) directing that the Court will, after a hearing if necessary, establish the final approved plan and cause it to be entered as an enforceable judicial decree of the Court; (e) directing that the interim funding amounts fixed

by the Court for FY2023 also be paid, with interest, on July 1 of each year starting in 2023 that the final compliance plan has not yet been approved or that full payment pursuant to the approved compliance plan will not be made on July 1; and, (f) directing that, if Defendant does not comply with any of the Court's orders or with the final approved plan, Defendant may be required to pay compensatory damages, including attorneys' fees, and penalties.

PROCEDURAL HISTORY

The history of this case through the State's first motion to dismiss the 2019 Petition is thoroughly described in this Court's January 16, 2020 Memorandum Opinion denying that motion. Dkt. 105-8 (the "2020 Mem. Op.") at 1-6. The Court highlighted its earlier holding that it:

will continue to retain jurisdiction to ensure compliance with its orders and constitutional mandates [. . .] When the full funding outlined herein is received, the Court will [. . .] determine whether the Consent Decree should then be additionally extended for good cause.

2020 Mem. Op. at 4 (quoting August 20, 2004 Memorandum Opinion (Dkt. 50) at 68 ("2004 Mem. Op.")). The Court held that the Consent Decree is "a binding contract and judgment," under which:

[t]his Court retains continuing jurisdiction [. . .] to monitor and to enforce compliance [. . .] 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.

2020 Mem. Op. at 9 (citing Consent Decree (Dkt. 1-77) at 23, ¶ 69). The Court retained jurisdiction pursuant to the Consent Decree, emphasizing that the Consent Decree refers to "amounts greater than" and "on or after," and that the June 25, 2002 Memorandum Opinion (Dkt. 25) ("2002 Mem. Op.") extended judicial supervision until the State has complied with the Court's June 30, 2000 Memorandum Opinion (Dkt. 3-2) ("2000 Mem. Op.") and Order ("2000 Order"). 2020 Mem. Op. at 4 & 9-10. In November 2021, the State filed a second motion to dismiss, (Dkts. 183, 184, 189), which the Court denied on March 7, 2022. (Dkt. 189-5). The State noticed an appeal and moved

to stay proceedings here, (Dkts. 195, 199); this Court denied that motion, (Dkt. 199-3). The State sought a stay in the Court of Special Appeals, which granted Plaintiffs' motion to dismiss the appeal on May 11, 2022, holding, *inter alia*, that this Court's decision not to dismiss the action is not an appealable order. *See Maryland St. Bd. of Ed. v. Bradford*, Case No. CSA-REG-0201-2022 (Md. Ct. Spec. App. May 11, 2022). The State petitioned the Court of Appeals for a writ of *certiorari*. *Bradford*, Case No. CSA-REG-0201-2022 (Md. Ct. Spec. App. June 9, 2022). The petition was denied on July 8, 2022. *Bradford*, Case No. CSA-REG-0201-2022 (Md. Ct. Spec. App. July 8, 2022).

STATEMENT OF UNDISPUTED FACTS

The State of Maryland started FY2022 with a \$2.5 billion general fund balance from FY2021. It ended FY2022 with an additional surplus of \$5 billion, and therefore began FY2023, on July 1, 2022, with approximately \$7.5 billion in excess revenue. *See* Exhibit ("Ex.") 1, Comptroller of Maryland, *Board of Revenue Estimates Shifts Projections Upward by \$1.6 Billion* (Mar. 10, 2022), <https://content.govdelivery.com/accounts/MDCOMP/bulletins/30e3112#>. Meanwhile, BCPSS's programs, operations, and facilities remain chronically underfunded, and the conditions that supported this Court's findings of unconstitutional underfunding continue today.

A. Constitutionally-Inadequate Funding for BCPSS Operations and Programs.

1. BCPSS's Operations and Programming Have Been Underfunded for Years.

This Court first held in 1996 that students attending BCPSS were not receiving the constitutionally-mandated adequate education. Order, Dkt. 1-66 at 2 (Oct. 18, 1996) ("1996 Order"). Thereafter, the Court entered as a judgment the parties' Consent Decree, under which the State was to provide \$230 million over five years for operations and facilities. Ex. 2, Consent

Decree at 15, ¶¶ 47-48. These funds, however, were concededly “not enough to provide an adequate education to Baltimore City’s unique population of disadvantaged children.” Ex. 3, 2000 Mem. Op. at 3. Accordingly, the Consent Decree required BCPSS and the State to retain an independent consultant to assess the need for further funding to reach constitutional adequacy. Ex. 2, Consent Decree at 12-13 ¶¶ 41-42. That consultant produced the “Metis Report,” which found that an additional \$2,698 per child—approximately \$270 million per year—in operational and programmatic funding was needed for adequacy. Ex. 3, 2000 Mem. Op at 14, 15. This Court adopted the findings of the Metis Report, holding that “[o]verall financial resources available to BCPSS are not adequate,” *id.* at 14, substantial additional funds were necessary for adequacy, *id.* at 15, and the right of Baltimore City school children to a “thorough and efficient” education under Art. VIII was still being denied, *id.* at 25. The Court declared that BCPSS required an additional \$2,000 to \$2600 per pupil for educational operating expenses for FY2001 and FY2002 “to provide an adequate education measured by contemporary educational standards.” *Id.* at 26; Ex. 3, 2000 Order at 1. The State initially appealed, then withdrew its appeal; accordingly, the Court’s 2000 Memorandum Opinion and 2000 Order are “final, binding, and law of this case.” Ex. 4, 2004 Mem. Op. at 57.

Subsequently, the Thornton Commission, the body appointed by the legislature to revise the formula for state education funding, issued its final report in 2001, concluding that the “adequacy gap” for educational funding needs (not including facilities) for BCPSS was the highest in the State at \$2,938 to \$4,250 per pupil. *See* Ex. 5, Comm’n on Educ., Finance, Equity, & Excellence, Final Report (Jan. 18, 2002), available at <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/000000/000013/unrestricted/20030011e.pdf>. The “State’s own Thornton Commission [thus] identified funding needs

substantially greater than those the Court recognized in June, 2000.” Ex. 6, 2002 Mem. Op. at 5.

In partial implementation of the Thornton Commission’s recommendations, the State enacted the “Bridge to Excellence in Public Schools” Act. 2002 Md. Laws Ch. 288 (the “Bridge Act”). The law recognized an “adequacy gap” of \$3,380 per pupil in its funding for BCPSS, meaning the “difference between current funding and the funds necessary to provide an adequate education.” Ex. 4, 2004 Mem. Op. at 12-13, ¶¶ 40, 43. The “adequacy gap” formula included mechanisms for annual adjustments based on changes in “enrollment, local wealth, and other factors,” and payments were to be increased annually for inflation. Ex. 7, DLS, *Education in Maryland*, Legislative Handbook Series, Vol. IX (2014) at 63, 72, (“Handbook”), available at <https://mgaleg.maryland.gov/Pubs/LegisLegal/2014-legislativehandbookseries-vol-9.pdf>. But the Bridge Act provided less funding than needed through FY2007, with “full Thornton funding” of an additional \$258.6 million annually to be provided for the first time only in FY2008. Ex. 4, 2004 Mem. Op. at 13-16, ¶¶ 44, 57. As of FY2005, therefore, the State had not “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.” *Id.* at 21, ¶ 80. Indeed, the State had:

unlawfully underfunded [BCPSS] by \$439.35 million [based on the low-end estimate of \$2,000 per pupil] to \$834.68 million [based on the estimate of \$2,600 per pupil] representing amounts owed under this Court’s final 2000 order for fiscal years 2001, 2002, 2003 and 2004.

Id. at 67 (emphasis added); *see also id.* at 22, ¶¶ 84-88 and 64-65. Funding provided under the Bridge Act from 2003 to 2005, moreover, was substantially less than projected when the statute was enacted, *id.* at 16, ¶ 57, and educational standards were “different[] and higher” than in 2001 and 2002, the years for which the Thornton Commission estimated the necessary amounts, *id.* at 15-16, ¶¶ 52-56.

Despite this judicial declaration of persistent underfunding, during the 2007 Legislative

Session, the General Assembly eliminated the inflation increases from Bridge Act funding for FY2009 and FY2010 and altered the annual inflation adjustment. Def. Mem. in Support of Mot. to Dismiss, June 19, 2019 (Dkt. 105) at 24 (citing 2007 Md. Laws (Special Session) ch.2 (Budget Reconciliation Act)). In subsequent years, the General Assembly continued to eliminate or cap inflation adjustments to the Bridge Act funding formula. *Id.* at 25. Between FY2008 and FY2017, the statewide percentage of adequacy funded—meaning funding “sufficient to acquire the total resources needed to reasonably expect that all students can meet academic performance standards”—decreased by 10.2 percentage points. Ex. 8, DLS, *Follow-up from July 24 Meeting* (Aug.1, 2019) at 6, (“DLS Follow-up (2019)”), available at https://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2019_08_01_FollowupfromJuly24meetingdraft.pdf. For FY2013, DLS calculated that the State’s funding level for BCPSS produced an adequacy gap of \$1,952 per pupil, approximately \$156 million in total. Handbook at 64. For FY2015, DLS found that the adequacy gap for BCPSS had risen to \$290 million. Ex. 9, DLS, *Education in Maryland, Presentation to the Commission on Innovation and Excellence in Education* (2016) at 7, (“DLS Presentation (2016)”), available at http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2016-12-08_DLS_Adequacy_Presentation.pdf. For FY2017, the last year for which DLS analyzed the adequacy of educational funding under the Bridge Act, it calculated an adequacy gap for BCPSS of \$342.3 million, or \$4,384 per pupil, the largest per-pupil deficit in funding adequacy of any school system in the state. Ex. 8, DLS Follow-up (2019) at 4.

DLS’s “adequacy gap” analyses are at the low end. In 2014, in belated response to the Bridge Act’s mandate that the funding formula be revisited in ten years, the State Department of Education retained Augenblick, Palaich, and Associates Consulting (“APA”) to conduct the

required independent analysis of schools and funding adequacy. *See* Bridge Act; Ex. 10, APA, *Final Report of the Study of Adequacy of Funding for Education in Maryland* (Nov. 30, 2016) (“APA Report”) (BSC00038378), available at <https://marylandpublicschools.org/Documents/adequacystudy/AdequacyStudyReportFinal112016.pdf>. APA issued its final report in November 2016, concluding that a “significant increase” in funding was required for BCPSS, as well as a new formula for determining adequacy. Ex. 10, APA Report at 86-87. Using FY2015 data, APA calculated that BCPSS needed an additional \$358 million annually to “ensure all students, schools, and districts have the resources needed to meet [Maryland’s] new standards.” *Id.* at xii-xiii, xxv-xxvi, 111-12.

In 2016, the legislature established the Commission on Innovation and Excellence in Education, known as the “Kirwan Commission,” which it tasked with creating a new set of standards and funding proposals for a 21st-century education for all Maryland public schoolchildren. Ex. 11, DLS, Maryland Comm’n on Innovation & Excellence in Educ., *Blueprint for Maryland’s Future, Final Report* (Dec. 2020) at iii-iv (“Kirwan Report”) (DLS 000003), available at <https://dls.maryland.gov/pubs/prod/NoPbITabMtg/CmsnInnovEduc/2020-Final-Report-of-the-Commission.pdf>. The Kirwan Commission found that Maryland’s funding formula is “regressive,” that is, the State invests less in schools serving high concentrations of poverty than in those in wealthier communities, “depriving the very populations in greatest need [of] the resources required for success.” *Id.* at 1. BCPSS certainly serves a community that requires more resources for success but has less available locally, *see infra* Stmt. Undisputed Facts Section A(2), and that has been deprived of those resources throughout this litigation. The Kirwan Commission recommended that the State provide new funds for Maryland public schools for programs and operations to improve student performance to meet 21st-century standards. *See* Ex. 11, Kirwan

Report at 3-9.

In 2020, the General Assembly (overriding a veto by the Governor) passed the “Blueprint for Maryland’s Future” Act, Md. HB1372 (the “Blueprint Act”), a partial implementation of the Kirwan Commission’s recommendations. The Blueprint Act does not provide funding to address the \$439.35 million to \$834.68 million gap identified by the Court in its prior declarations, nor does it address the “adequacy gaps” in annual funding that DLS found during the second decade of this century. To the contrary, the Blueprint Act’s approach is to assume that Thornton’s adequacy standards have been met: the Blueprint Act purports to “build[] [upon] the adequacy structure created by the Thornton Commission.” *See* Ex. 12, DLS, Office of Policy Analysis, *Overview of the Blueprint for Maryland’s Future: New Policies, Timelines and Funding* (Dec. 14, 2021) at 32 (DLS_002575), available at <https://dls.maryland.gov/pubs/prod/Educ/BlueprintOverview.pdf>. For BCPSS, however, Thornton adequacy standards have not been met, and thus the Blueprint Act promises a structure for which the base is still missing.

The Blueprint Act also recognizes higher contemporary educational standards reflecting the needs of the 21st-century. *See* Md. HB1372; *see also* Ex. 11, Kirwan Report at 8-9 (“reorganization of the whole system” and “whole new approach” to establish “internationally benchmarked curriculum” that enables most students to achieve college and career readiness by end of 10th grade). These new standards raise the cost of providing an adequate education, *see Id.* At 22, widening the funding gap for BCPSS, which was already underfunded by 20th-century standards. Further, it is unclear whether the Blueprint Act’s projected increases, even if fully and immediately funded, will be sufficient additional support for high-need districts like BCPSS. Ex. 13(A), Bruce D. Baker, *Maryland School Finance: Evaluating Equal Educational Opportunity and Educational Adequacy for the Children of Baltimore*, (Oct. 18, 2021) at 10, 118-23 (“Baker Report”) (assessing Kirwan Commission projections).

Full funding under the Blueprint Act, moreover, is not projected to be reached for BCPSS for at least another decade. Ex. 14, DLS, *Blueprint for Md.'s Future – Chs. 36 & 55 of 2021, Updated Fiscal Note Appendices* (Aug. 2021), at App'x C (DLS 00275) available at, https://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/Appendices_A_through_H.pdf.

Thus, BCPSS children who are entering kindergarten in September 2002 would benefit from full implementation of the Blueprint Act's projections when they are juniors in high school. And there is no guarantee they will benefit even then: the Blueprint Act provides that any increases in funding may be abandoned if the State's economy is estimated to grow less than 7.5% over the course of any year. *See* Md. HB1372, Section 19; Ex. 15, Brooks Dep. 220:14-22, May 5, 2021 (acknowledging the legislature could decrease funds or pause increases). Failure to fund the Blueprint Act is not a theoretical risk; as detailed above, the State has failed to fully fund the Bridge Act, its pervious legislative promise of educational funding.

2. It is Undisputed that BCPSS's Student Population Requires Additional Educational Funding and Resources.

In 2004, the Court found that substantial numbers of BCPSS students live in poverty and have other needs that require increased resources for educational adequacy. *See* Ex. 4, 2004 Mem. Op. at ¶¶ 40, 56, 122-125. The same is true today.

a) *Many BCPSS Students Live in Racial Segregation, Poverty, Have Disabilities or Special Needs, or are English Language Learners.*

The State calculates that BCPSS has the highest "at risk student index" in Maryland, *i.e.*, the combined percentage of students who receive free and reduced-price meals, have limited English proficiency, and have special education needs. Ex. 16, DLS, *Overview of State Aid to Local Govt's, Fiscal 2020 Allowance* (Jan. 2019) at 40-42 ("DLS Overview") (BSC00005794),

available at <http://dls.maryland.gov/pubs/prod/InterGovMatters/SteAidLocGov/Overview-of-State-Aid-to-Local-Governments-Fiscal-2020-Allowance.pdf>.

Research shows that schools systems that remain segregated by income and race tend to have extremely unequal educational opportunities compared to better integrated schools. See Ex. 17, U.S. Comm'n on Civil Rights, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (Jan. 2018), at 5, available at <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf>. As discussed further below, BCPSS fits that pattern.

Racial Segregation and Isolation: Maryland estimates its statewide public-school population as 34% white, 33% Black, 20% Hispanic/Latino, and 6% Asian American; BCPSS has a student body that is about 75% African American, 15% Hispanic/Latino, and 7% white. Ex. 18, Md. State Dept. of Ed., *Demographics*, (“2021 MSDE Demographics”), <https://reportcard.msde.maryland.gov/Graphs/#/Demographics/StudentPopulation/1/1/30/XXXX/2021>; Ex. 19, BCPSS, *District Data Profile*, <https://www.baltimorecityschools.org/district-overview> (“2021-22 District Data”).

Low-income Students: Baltimore City residents are, on average, much poorer than those of any other large jurisdiction in Maryland; its “child poverty rate, for public school enrolled children between the ages of 5 and 17, runs about three times the poverty rate of other districts statewide.” Ex. 20(A), Expert Report of Michelle Fine, et. al. *The Legacy of Inadequacy: Cumulative Consequences for the Students, Educators, and Parents/Guardians of BCPSS Expert Report* at 17 (“Fine Report”) (citing Baker, et al., Educ. Law Ctr., *Is school funding fair? A national report card* (7th Ed.) (2018), available at https://edlawcenter.org/assets/files/pdfs/publications/Is_School_Funding_Fair_7th_Edit.pdf).

More than 86% of students in BCPSS—the highest percentage in the State—are eligible for free or reduced-price meals, compared to 42% of students statewide. Ex. 16, DLS Overview at 40; Cf. Ex. 4, 2004 Mem. Op. at ¶122 (“Baltimore City has ‘the largest percentage’ of economically disadvantaged students in the State”).

The APA found that “[s]chools with a high percentage of low-income students, or schools with a high concentration of poverty, require additional services and resources to support student achievement,” Ex. 10, APA Report at 126, and noted that “[r]esearch on the adverse relationship between low-income backgrounds and student and school success is clear and ubiquitous,” *id.* at 131.

Students with Disabilities and Special Education Needs: As of 2020, 17% of BCPSS students had special education needs, four points higher than the State average. Ex. 16, DLS Overview at 42. In 2021, moreover, students with disabilities were 14.1% of BCPSS’s student population, compared to 12.4% of Maryland’s total student population. See Ex. 18, 2021 MSDE Demographics; Ex. 21, MSBE, *Spotlight on Students with Disabilities* (Oct. 26, 2021) at 6, 11, available at <https://www.marylandpublicschools.org/stateboard/Documents/2021/1026/SpotlightOnStudentsWithDisabilitiesPresentation.pdf>.

English Language Learner Students: As of 2021, 9.8% BCPSS students have limited English proficiency, one of highest percentages in the State. Ex. 18, 2021 MSDE Demographics; Ex. 16, DLS Overview at 41. Research shows that schools with more English Language Learners and more children with disabilities tend to have lower proficiency rates. Ex. 13(A), Baker Report at 71.

High Rates of Adverse Childhood Experiences: It is undisputed that BCPSS students face a host of social and environmental stressors. Adverse Childhood Experiences (“ACEs”) include

experiences of extreme poverty, family problems, violence, abuse, and discrimination. Some 56% of children in Baltimore City reported experiencing at least one ACE, and nearly 30% of children in Baltimore, compared to 19% statewide and 22.6% nationally, have experienced more than two ACEs. Ex. 20(A), Fine Report at 72-73 (citing Data Resource Ctr. for Child & Adolescent Health, *Adverse Childhood Experiences Among Baltimore & Maryland's Children* (2014), available at https://www.childhealthdata.org/docs/default-source/local-area-synthetic-estimates/adverse-childhood-experiences-among-baltimore-maryland-s-children.pdf?sfvrsn=b43903fd_4); Ex. 22, 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>.

b) *Students with these Disadvantages Require More Resources and Funding than their Advantaged Peers.*

This Court has declared, and the State has recognized, that students who live with the disadvantages described above need additional and focused resources if they are to have the same chance of succeeding in school as their advantaged counterparts. *See* Ex. 4, 2004 Mem. Op. ¶¶38-40; Ex. 3, 2000 Order at 18-19 (quoting State Admissions); *see also* Dkt. 61, Pls' Mem. in Supp. of Partial Summ. J., Aug. 30, 1996, 49.

The Kirwan Commission recognized that districts that serve more students who live in poverty, have a disability, or are English language learners require more money per pupil than districts with fewer students with these characteristics. *See, e.g.*, Ex. 11, Kirwan Report at 1-2 (noting “unacceptably large achievement gaps based on race and income”), 29-30 (proposing wealth-equalized formulas). The State’s proffered experts in this case similarly agree that economically-disadvantaged students require more resources. *See* Ex. 23, Hanushek Dep. 80:19-

81, 39:19-21, May 2, 2022; Ex. 24, Levenson Dep. 45, 96, Apr. 21, 2022.¹ There is no dispute that BCPSS needs more funding per pupil than districts with more-advantaged populations.

3. It is Undisputed that BCPSS’s Student Performance is Below State Averages.

This Court found in 2004 that “objective indicators” demonstrated that, because of underfunding, BCPSS’s students were performing at levels “far below state standards, and far below state averages.” Ex. 4, 2004 Mem. Op. at ¶¶ 98-125. The following undisputed evidence demonstrates that children in BCPSS continue to perform below State averages and State standards.

a) Lower Proficiency Scores

The State’s official measure of school performance confirms that BCPSS fails to meet State proficiency standards in numerous categories. In 2017, the General Assembly passed the “Protect our Schools” Act, refining the factors and calculations used to assess schools statewide. *See* Md. Laws 2017, ch. 29. Under this assessment, called the “Report Card,” BCPSS’s elementary, middle, and high schools did not meet the 2019 annual targets for academic achievement and progress. Ex. 25, MSDE, *Report Card*, (“2019 Report Card”), <https://reportcard.msde.maryland.gov/Graphs/#/ReportCards/ReportCardSchool/1/E/1/30/XXXX/2019>. The latest Report Card shows that BCPSS has very low proficiency rates in reading and math: 17.9% of elementary students are proficient in Math, and 18.6% are proficient in English Language Arts (ELA); 13.5% of middle school students are proficient in Math, and 22.7% are proficient in ELA; and 21.8% of high school students are proficient in Algebra I, and 32.9% are proficient in ELA 10. *Id.*

¹ Private Plaintiffs have filed a motion to exclude testimony of the State’s proffered expert witnesses, but cite their reports only to the extent they concede points upon which there is no dispute.

Proficiency levels are even lower for students with disabilities. According to BCPSS data, in the 2018-19 school year, only 5% of students with disabilities in grades 3-8 met or exceeded expectations in Math and ELA; and only 5% of high school students with disabilities met or exceeded expectations in Algebra I and English 10. *See* Ex. 19, 2021-22 District Data. These performance levels fall below state targets or state averages. *See* Ex. 25, 2019 Report Card.²

The State's findings are supported by another objective indicator, the National Assessment of Educational Progress ("NAEP"), sometimes called "the Nation's Report Card." NAEP is a national assessment in reading and math administered every year to a sample of students. Ex. 26, Teresa D. Jones & Dr. Sonja Brookins Santelises, Baltimore City Public Schools, *2017 National Assessment of Educational Progress (NAEP) Results* (Apr. 10, 2018) (BSC00044806). BCPSS's NAEP scores dropped between 2009 and 2017. *Id* at 8 (fourth grade declined 5 points in reading, 7 points in math; eighth graders went down 2 points in both reading and math). NAEP results for BCPSS continue to trail those of many large cities (including demographic peer districts), the state, and the nation. *Id*. The latest available NAEP data, from 2019, show below average performance by BCPSS students: only 15% of fourth graders are proficient in math and 13% are proficient in reading; 10% of eighth graders are proficient in math and 15% are proficient in reading. Ex. 27, NAEP, *District Profiles: Baltimore City*, https://www.nationsreportcard.gov/profiles/districtprofile/overview/XM?cti=PgTab_Findings&chort=1&sub=MAT&sj=XM&fs=Grade&st=MN&year=2019R3&sg=Gender%3A%20Male%20vs.%20Female&sgv=Difference&ts=Single%20Year&tss=2019R3&sfj=NL. BCPSS students scored lower in reading and math than students in all but a handful of other large school districts nationwide; compared to other large cities, fourth

² It is worth noting that each time the State calculates a state average or statewide rate, that includes BCPSS's student performance. Therefore, the state average is depressed by the Baltimore City rate, masking the full disparity between BCPSS student performance and that of other districts.

graders in BCPSS score 19 points lower in reading and math, and eighth graders score 14 points lower in reading and 20 points lower in math. *Id.*

b) *Lower Graduation Rates and Higher Dropout Rates*

The State's most recent report shows a statewide 4-year cohort graduation rate of 86.86%, compared to 72.18% for BCPSS. Ex. 25, 2019 Report Card. Meanwhile, BCPSS's 4-year cohort graduation rate for students with disabilities was 47.58% in 2019. Ex. 28, MSBE_000596. In recent years, moreover, BCPSS's dropout rate was double that of the State as a whole. *See, e.g.*, Ex. 29, MSDE, *Summ. of Attendance, Md. Public Sch. 2018-2019* (MSBE_031705), available at <https://marylandpublicschools.org/about/Documents/DCAA/SSP/20182019Student/2019SummaryOfAttendance.pdf> (2.85% statewide; 5.63% for BCPSS); Ex. 30, MSDE, *Summ. of Attendance, Md. Public Sch. 2020-2021*, available at https://marylandpublicschools.org/about/Documents/DCAA/SSP/20202021Student/2021_Summary%20of%20Attendance.pdf (2.79% statewide; 5.07% for BCPSS). The dropout rate for students with disabilities was the worst in the State, at 7.11% in 2019. Ex. 31, MSBE_000607.

c) *Lower Attendance Rates*

The Court considered attendance rates and absenteeism to be “another objective indicator of continuing inadequacy,” Ex. 4, 2004 Mem. Op. at 28 ¶ 116. These issues persist today. Between 2017 and 2021, the statewide attendance rate went from 93.7% to 92.5%. Ex. 32, MSDE, *2021 Md. State Sch. At a Glance*, <https://reportcard.msde.maryland.gov/Graphs/#/AtaGlance/Index/3/17/6/99/XXXX/2021>. During the same period, BCPSS's attendance rate dropped from an already-low 87.7% to 80.6%, and BCPSS's chronic absenteeism rate increased from 37.4% to 49.3%, compared to 18.3% to 22.4% statewide. Ex. 33, MSDE, *Chronic*

Absenteeism Data,³ <https://reportcard.msde.maryland.gov/Graphs/#/Demographics/ChronicAbsenteeism/3/99/1/6/30/XXXX/2021>; Ex. 34, Mohammed Choudhury, MSBE, *Attendance & Enrollment* (Jan. 25, 2022), available at <https://www.marylandpublicschools.org/stateboard/Documents/2022/0125/EnrollmnetAndAttendanceRev1282022.pdf>. Finally, BCPSS has significantly more habitual truancy than the State average. For the 2019-20 school year, BCPSS's rate of habitual truancy was 13.18%,⁴ compared to 2.84% for the State. Ex. 35, MSDE, *Habitual Truants, Md. Public Sch., 2019-2020*, <https://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20192020Student/2020HabitualTruants.pdf>. This pattern has persisted for years. See Ex. 36, *Habitual Truants, Md. Public Sch., 2016-17* (MSBE_005553); Ex. 37, *Habitual Truants, Md. Public Sch., 2015-16* (MSBE_005509).

d) Lower Scores on Advanced Placement and College Entrance Exams

In 2017, the average SAT score for BCPSS students was 884, more than 150 points lower than the State average. See Ex. 38, BCPSS, *College and Career Readiness Update: Presentation to the Baltimore City Board of School Commissioners, Teaching and Learning Committee* (Nov. 5, 2018) at 46 (BSC00007745). BCPSS's eleventh graders taking the PSAT scored more than 183 points lower, and students taking the SAT scored 162 points lower, than State averages. *Id.* at 36,

³ “The chronic absenteeism measure identifies the number of students who are expected to attend school for at least 10 days and who were absent 10% or more of the school days while enrolled at that school. For example, a student who is registered to attend a school for 30 days and who is absent 3 of those 30 days is considered chronically absent. A student can be counted as chronically absent in multiple schools within the state in the same year. This can occur when a student who is enrolled for in a school for at least 10 days and is chronically absent moves and enrolls in another school for at least 10 days and is chronically absent.” Ex. 39, MSDE, *Definitions*, <https://reportcard.msde.maryland.gov/Graphs/#/Demographics/AttendanceRate/3/99/6/1/99/XXXX/2021>.

⁴ “A student is considered a habitual truant if he or she meets ALL of the following criteria: [1] the student was age 5 through 20 during the school year; [2] the student was in membership in a school for 91 or more days; and [3] the student was unlawfully absent for 20% or more of the days in membership.” Ex. 35, MSDE, *Habitual Truants, Md. Public Sch., 2019-2020*, (MSBE_005512), available at <https://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20192020Student/2020HabitualTruants.pdf>.

51. Additionally, only 31% of BCPSS high school students passed AP courses, compared to 63.1% of students statewide. *Id.* at 47-48.

e) ***Lower Rates of Post-Secondary Education***

The percentage of BCPSS students who enrolled in a two- or four-year college in their first year after graduation is substantially less than elsewhere in the State. In 2020, 47.3% of BCPSS enrolled, compared to 58.4% for Anne Arundel County, 59.9% for Baltimore County, and 60.5% of high school graduates statewide. Ex.40, Mohammed Choudhury, MSBE, *Graduation Rate, AP, SAT, Postsecondary Enrollment* (Mar. 22, 2022) at 25, available at <https://www.marylandpublicschools.org/stateboard/Documents/2022/0322/AdjustedCohortGraduationRateAdvancedPlacementSATPostsecondaryEnrollment.pdf>.

4. It is Undisputed that Underfunding of Operational and Instructional Programs Contributes to Lower Student Performance.

This Court has previously detailed how underfunding of BCPSS necessitates reductions in programs that adversely affect student performance. Ex. 4, 2004 Mem. Op. at ¶¶150-232 (describing how “programmatically 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.’”). Some specific reductions in programming that “reduce educational opportunity,” include: teacher reduction and attrition, *id.* ¶¶176-191; limited counselors, support staff and other personnel, *id.* ¶¶223-230; failure to expand arts programs, physical education, early education, and other curricular needs, *id.* ¶¶231-232; enlarged class sizes, *id.* ¶¶160-175; and reduced access to summer school programs, *id.* ¶¶192-222.

Years of underfunding have led to reductions in these areas that persist today. It is undisputed that attracting and retaining qualified teachers and school staff is necessary for student achievement, and that the lack of sufficient teachers and staff is a challenge for BCPSS. *See* Ex.

13(A), Baker Report at 17, 37; Ex. 11, Kirwan Report at 7-8 (policy area 2: high quality and diverse teachers and school leaders). It is further undisputed that there can be significant barriers to recruit and retain high-quality teachers to high-poverty settings. Both sides' experts agree that to attract and retain quality teachers to these environments requires higher wages. *See* Ex. 13(A), Baker Report at 6, 37, 41; Ex. 23, Hanushek Dep. 108:4-22, May 2, 2022; Ex. 13(B), Bruce Baker, *Rebuttal Report of Bruce D. Baker* (May 16, 2022) at 9. The State's own data further show that BCPSS has the one of the highest teacher turnover rates in the State and high rates of teacher absenteeism in comparison to other districts across Maryland. Ex. 20(A), Fine Report at 60; Ex. 41 MSDE, *Teacher Retention and Attrition Dashboard*, https://mldscenter.maryland.gov/webcenter/portal/P12LDS/page133?centerWidth=100%25&leftWidth=0%25&rightWidth=0%25&showFooter=false&showHeader=false&_adf.ctrlstate=d1kjmogyq_14&_afrLoop=820043187465629#%40%3F_afrLoop%3D820043187465629%26centerWidth%3D100%2525%26leftWidth%3D0%2525%26rightWidth%3D0%2525%26showFooter%3Dfalse%26showHeader%3Dfalse%26_adf.ctrlstate%3D4vw8ivovm_4.

It is also undisputed that, despite greater need, BCPSS has far fewer counselors, support staff and other personnel than districts of comparable size with lower poverty rates. *See* Ex. 13(A), Baker Report at 42-43. For example, in the most recent year, BCPSS had 146 guidance counselors; 1,264 support staff; 64 elementary school therapists, 56 librarians and zero library aides. Ex. 42, Md. Public Schs., *Staff Employed at School and Central Office Levels* (Oct. 2021), <https://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20212022Staff/2022StaffEmpty.pdf>. Anne Arundel County—a district of similar size—had 225 guidance counselors; 1,983 support staff; 111 elementary school therapists; 135 librarians and 60 library aides; and 75% more special education therapists. *Id.*

Underfunding produces understaffing and “fuels high rates of over-work, frustration, ‘dumping’ of excess responsibilities on many staff, for some a sense of disrespect and for many, eventual turn-over.” Fine Report at 16-17. There is undisputed evidence that teachers in BCPSS had “many more non-teaching duties/obligations, such as doing lunch and yard supervision, janitorial tasks, clerical tasks, and covering classes for absent colleagues.” *Id.* These circumstances contribute to Baltimore City’s challenges attracting and retaining teachers, particularly high-quality teachers. *See* Ex. 43, MSDE, *Professional Staff by Type of Degree and Years of Experience, Md. Public Schs. Oct. 2021* (Jan. 2022), available at <https://marylandpublicschools.org/about/Documents/DCAA/SSP/20212022Staff/2022ProfStaffbyDegree.pdf>; Ex. 13(A), Baker Report at 50 (BCPSS has lower average experience levels than their lower poverty surroundings); Fine Report at 36 (“[BCPSS] Administrators report that they often have to make impossible choices between, for instance, hiring a social worker or a librarian or paying the going rate for a plumber or purchasing art supplies.”).

B. Constitutionally-Inadequate Funding for BCPSS Facilities.

It is undisputed that BCPSS has not received needed funds to maintain its buildings, nor to update them to meet contemporary educational standards. *See, e.g.*, Ex. 4, 2004 Mem. Op. at ¶ 24, 71. BCPSS has some of the oldest facilities in Maryland, and these superannuated buildings generate a host of problems for student health and academic achievement. *See* Ex. 44, Gorrell Dep. 86, May 14, 2021; Ex. 45, Donahue Dep. 63, May 21, 2021; *see also* Ex. 65, (Ex. 5 to Gorrell Dep., May 14, 2021, at 49 (“Adequacy Standards & Facilities Assessments for IAC”)).

Dilapidated facilities also send a “tacit message” that Marylanders have chosen to exclude BCPSS students from the learning environments they need to be successful. Ex. 46, Nobody Asked Me Campaign, *Bearing Strange Fruit* (Apr. 2020), at 33-34, (“Nobody Asked Me”), available at

<https://securereservercdn.net/192.169.220.85/egk.2d6.myftpupload.com/wp-content/uploads/2022/05/NAM-Lookbook-Bearing-Strange-Fruit-2.pdf>. Researchers found that young people “made a connection between how society valued them and how they navigate their place in the world by the way their school buildings are run and maintained.” *Id.* At 29. BCPSS students often felt “that because they attended a predominantly Black school district, their quarantining to a school building equivalent to the slums was inevitable.” *Id.* at 33; *see also* Ex. 20(A), Fine Report at 96.

1. BCPSS Facilities Suffer from Decades-Long Underinvestment.

The Court first found that BCPSS facilities were underfunded over twenty years ago. In 2000, this Court expressly adopted the findings of the independent facilities evaluation required by the Consent Decree, known as the Metis Report. Ex. 3, 2000 Mem. Op. at 15; Ex. 2, Consent Decree at ¶¶40-42, 47, 53. The Metis Report’s specific findings and recommendations included the conclusions that BCPSS physical facilities were in very poor shape and substantial additional funding should be provided for school facilities improvements. *Id.* at 15-16.

The State has likewise recognized its responsibility to address facilities issues in districts with outsized needs like BCPSS. In 2004, a state commission to study school facilities was established by the General Assembly on recommendation of the Thornton Commission. The commission, known as the Kopp Commission, examined the “minimal adequacy” of buildings and concluded that most of BCPSS facilities did not meet those standards. Ex. 47, Task Force to Study Public School Facilities Final Report (Feb. 2004) at 90, 125 (“Kopp Commission Report”), available at <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/000000/000471/unrestricted/20050044e.pdf>. And in recent years, another commission has reiterated that it “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* Ex. 48,

21st Century School Facilities Comm'n, Final Report (Jan. 2018), at 7, available at <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/024000/024009/20190389e.pdf>.

Despite these acknowledgments, over the past decade, the Maryland Interagency Commission on School Construction (the “IAC”)⁵ and three comprehensive school facility assessments have documented glaring inadequacies throughout BCPSS facilities and found them to be significantly underfunded. In their respective Facilities Condition Assessments (“FCAs”), the three assessments each calculated a Facility Condition Index (“FCI”), a widely-used indicator for the overall condition of a facility or system of buildings in which, on a scale of zero to 100 (the higher the number, the worse the condition). The descriptions used to characterize FCI ranges differ among the three FCAs, all agree that FCIs from 50 to 60 correspond to “poor” condition, and that FCIs greater than 60 corresponds to “very poor” condition. *See* Ex. 49(B), Jerry Roseman, *Rebuttal to Matt Munter’s Disclosure* (May 16, 2022) at 5.

Jacobs SFA: Between 2011 and 2012, Jacobs evaluated all 183 then-operational BCPSS buildings for physical condition (code-compliance, fire and life safety, adequacy of roofing, HVAC, plumbing and electrical systems), and for educational adequacy (quality of classrooms, cafeteria, library, and auditorium, provision of spaces for music, art, science and technology, and whether the spaces are odor-free and well lit). Ex. 50, Jacobs, *State of School Facilities: Baltimore City Public Schools* (June 2012), available at <https://baltimore21stcenturyschools.org/sites/default/files/2012june-jacobsreport.pdf>, at 15-21 (“Jacobs Report”). The Jacobs Report calculated an overall FCI for BCPSS of 60, indicating “districtwide facilities in very poor condition.” *Id.* at 25. Sixty-nine percent of BCPSS buildings were rated in “very poor” condition;

⁵ The IAC is composed of State cabinet members including the State Superintendent of Schools and the Secretaries for the Departments of General Services and Planning.

an additional 16% were in “poor” condition. Fifty of the buildings in “very poor” condition required such extensive repairs based on their FCIs that they were considered “candidates for replacement.” *Id.* at 26. For educational adequacy, BCPSS facilities scored 55 out of 100—a “failing grade.” *Id.* at 9. The Jacobs Report cited numerous areas in need of funding, including roofing, building structure, exterior and interior systems, HVAC, electrical, fire and safety and plumbing, and estimated it would cost \$2.45 billion over a 10-year period to bring all facilities up to minimally acceptable to standards of building performance and educational adequacy. *Id.* at 10. The Jacobs Report also estimated that It would cost \$4 billion to complete a full portfolio replacement to meet educational standards at that time. *Id.* at 25.

In 2013, the IAC reviewed the findings of the Jacobs report and agreed 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* Ex. 51, IAC, *Baltimore City: Public School Construction Program Block Grant Funding* (Jan. 8, 2013) at 4, (“IAC Public School Construction (2013)”) (BSC00007569), available at https://iac.mdschoolconstruction.org/wp-content/uploads/2020/10/2012_p196_PSCP_Report-on-Baltimore-City-Block-Grant.pdf (emphasis added). The IAC also agreed with Jacobs’ conclusion that \$2.45 billion would be required to correct BCPSS’s facilities deficiencies. *Id.*

EMG Facilities Assessment: From 2016 to 2020, EMG visited and assessed every facility in the BCPSS portfolio, providing a 10-year FCI value for the physical condition of each school. *See* Ex. 52, EMG, Facility Condition Assessments, <https://drive.google.com/file/d/1qzjL9EI96E3kAcp5rc2Lhyf9pSGZjqKZ/view> (“EMG Reports”); Ex. 49(A), Jerry Roseman, *Bradford v. MSBE: Expert Report of Jerry Roseman* (Nov. 22, 2021) at 21-23 (“Roseman Report”); *see also* Ex. 53, Munter Dep. 81, Apr. 22, 2022. Although Plaintiffs do not

entirely adopt the qualitative descriptions used by EMG because it provided “fair” and “good” ratings for components in significant disrepair, EMG’s findings still certainly show a school system in disrepair. *See* Ex. 49(A), Roseman Report at 23.

Bureau Veritas SFA: In 2020, the State, through the IAC, engaged Bureau Veritas (“BV”) to conduct an assessment of the physical condition and educational sufficiency of Pre-Kindergarten through Grade 12 public school buildings across Maryland. *See* Ex. 54, Def’s Expert Witness Disclosure of Matt Munter, PE of Bureau Veritas, at 3 (“Munter Disclosure”). While Plaintiffs dispute BV’s methodology,⁶ but there is no dispute that the SFA conducted by BV reveals significant inadequacies in BCPSS facilities. The BV SFA gives 33% of BCPSS schools an FCI of 60 or higher (“very poor”), while another 29% receive an FCI between 50 and 60 (“poor”). *See* Ex. 54, Munter Disclosure at 4; Ex. 55, MSBE_063708. The fact that more than 60% of all schools in Baltimore City exceeded an FCI of 50 “is very alarming.” Ex. 49(A), Roseman Report at 37. The BV SFA also found that BCPSS has the greatest number of schools in Maryland with an HVAC and Roof FCI score of over 80, and the greatest number of K-12 school facilities with an FCI score of 60 or higher. Ex. 56(A), Pls’ Rebuttal Expert Witness Disclosure of Joshua M. Sharfstein, MD at 7-8 (“Sharfstein Disclosure”). As former IAC Executive Director Robert Gorrell testified, a school rated 60 FCI or higher is unreliable and needs to be replaced “because we might fix one or two systems but we have others that are going to fail.” Ex. 44, Gorrell Dep. 200, May 14, 2021.

⁶ According to Plaintiffs’ experts Roseman and Sharfstein, BV’s FCI values are overly generous and do not reflect the true depreciation of the facilities. *See* Ex. 49(A), Roseman Report at 24 (BV “rolled up” individual FCI components into the calculation of the overall FCI, thereby failing to take into account that a severely deficient key component, such as a roof drain, can render an entire system in very poor condition); Ex. 56(A), Sharfstein Disclosure at 6-7 (by averaging the FCI scores, BV fails to identify the highest-needs facilities).

The BV SFA also reports that BCPSS schools have more components that are 20 to 30 years beyond their expected useful life (“EUL”) than any other Maryland school system. Ex. 56(A), Sharfstein Disclosure at 8.

Using an indicator called the Maryland Condition Index (“MDCI”), the BV SFA also assessed whether the facilities met the State’s Educational Facilities Standards, which describe the bare minimum space and attributes needed to deliver State-required education. *See* Ex. 54, Munter Disclosure at 4; Ex. 45, Donahue Dep. 102-103, May 21, 2021. By MDCI score, BCPSS had the largest number of schools among the top 50 worst school facilities in Maryland. Ex. 56(A), Sharfstein Disclosure at 9.

In partial response to the Jacobs Report and to advocacy by ACLU of Maryland, Baltimore Education Coalition, and BCPSS, the General Assembly established the 21st Century School Buildings Program in 2013 to renovate selected BCPSS schools to meet 21st century educational standards. *See* Ex. 57, 21st Century Schools Baltimore, Current Status, <https://baltimore21stcenturyschools.org/roadmap/>. The program has renovated 24 school facilities and will renovate five more. These renovations concern just small fraction of BCPSS school facilities, leaving most buildings untouched and in poor condition. *Id.* The legislation authorizes up to \$1.1 billion in funding, less than half the \$2.45 billion Jacobs and the IAC concluded in 2012-2013 would be needed to raise all BCPSS facilities to acceptable standards. Ex. 50, Jacobs Report at 27; Ex. 51, IAC Public School Construction (2013). Moreover, the funding structure for the 21st Century School Buildings Program presents additional challenges for BCPSS. BCPSS was required to commit operating dollars for over 30 years to leverage the bonds that finance the program, taking already limited dollars out of classrooms. *See* Ex. 58, Financing the Plan, <https://baltimore21stcenturyschools.org/about/financing-plan>.

Building upon the existing 2^{1st} Century School Buildings Program, the Built to Learn Act of 2020 is expected to provide BCPSS with approximately an additional \$420 million. Ex. 59, DLS, *Fiscal & Policy Note: Built to Learn Act of 2020* (MSBE_060382). Yet, these funds would provide systemic upgrades to just two high school facilities, far short of what is necessary to provide educationally adequate facilities for other high schools in BCPSS, Ex. 60, Affirmation of Alison Perkins-Cohen at 7 (“Perkins-Cohen Aff”). and still leave BCPSS approximately \$1 billion short of the \$2.45 billion that the Jacobs Report estimated in 2012 was necessary to bring all City Schools buildings up to *minimally acceptable standards* through repairs and building replacements. And this \$1 billion figure does not account for inflation over the past 10 years.

Even if full 2^{1st} Century School Buildings Program and Built to Learn funding is received, more than 80 schools will remain in need of complete overhaul, and tens of thousands of students will continue to be deprived of constitutionally adequate school facilities. Ex. 20(A), Fine Report at 13, 39; Ex. 60, Perkins-Cohen Aff. at 3-11. Based on the IAC’s own data on school square footage and construction costs, as well as the Jacobs, EMG, and BV SFA reports, and accounting for inflation and rising construction costs,⁷ BCPSS estimates that it would cost more than \$3.8 billion in systemic renovations to replace aging facilities and address the maintenance backlog for the schools that have not been and will not be addressed by the 2^{1st} Century School Buildings Program and Built to Learn Act and even more to complete a full portfolio replacement to meet modern educational standards. *Id.*

⁷ It is undisputed that the State’s insufficient funding of BCPSS’s facilities is amplified by rising construction costs. Ex. 44, Gorrell Dep. at 34, 273-74, May 14, 2021; *see also* Ex. 61, 21st Century School Fund, Inc., U.S. Green Building Council, Inc., and the National Council on School Facilities, *State of Our Schools: America’s K-12 Facilities* (2016) at 25 (“State of Our Schools Report”) (BSC00083377), available at <https://files.eric.ed.gov/fulltext/ED581630.pdf> (In a nationwide study, Maryland was projected to have the 8th-highest future cost for new construction from FY 2012-24); Ex. 62, IAC, Report to the Capital Debt Affordability Commission, at 10-11 (BSC00085180) (building construction costs in Maryland have increased by 45.6% in the last 8 years, and cost escalation is expected to continue).

2. It is Undisputed that BCPSS Does Not Receive the Minimum Maintenance and Capital Improvement Funding Required by State and National Standards.

It is well-established that school facilities require sufficient funding not only for the type of systemic renovation projects described above, but also for ongoing facilities maintenance and operations (“FM&O”) (e.g., routine and preventive facilities maintenance, minor repairs, custodial services, grounds keeping, utilities, and security) and capital improvements (“CIP”) (e.g., projects to regularly upgrade existing facilities’ systems). The IAC calls for school systems to spend at least 4% of the current replacement value (“CRV”) of their facilities each year, divided between 2% for FM&O and 2% for CIP, and advises that lower rates would be harmful. *See* Ex. 63, IAC, *Maintenance of Maryland’s Public School Buildings*, FY2021 Annual Report (Oct. 1, 2021) at 7 (“IAC Maintenance Report FY2021”), available at <https://iac.mdschoolconstruction.org/wp-content/uploads/2021/09/FY21-Annual-Maintenance-Report.pdf>. National industry standards are even higher than the IAC’s recommendations: they call for school systems to spend **at least 7%** of CRV, divided between 3% for FM&O and 4% for CIP. Ex. 61, *State of Our Schools Report* at 23-24.

BCPSS, however, must make do with far less than 4%. Based on BCPSS’s 149 active school facilities as of FY2021, totaling 16.8 million square feet, the IAC calculated the CRV of BCPSS’s portfolio to be \$7.2 billion. Ex. 63, IAC Maintenance Report FY2021 at 185. Accordingly, BCPSS should spend at least \$288 million (4% of CRV) per year on FM&O and CIP. *Id.* For FY2022, its expenditure was \$92.3 million, less than 2% of CRV. Ex. 64, BCPSS, *Comprehensive Maintenance Plan* (Aug. 2021) at 35 (“CMP”) (BSC00094914). Given the lack of adequate State funding to meet industry standards for maintenance, City Schools would be forced to take scarce funds from its operating budget needed to provide for in-classroom learning. Ex. 60, *Perkins-Cohen Aff.* at 5-6.

BCPSS's annual spending for FM&O and CIP have averaged 80% below industry standards for the last four decades, resulting in "cascading damage" to roof structures, plumbing, piping, heating, ventilation, and air quality. Ex. 49(A), Roseman Report at 6-12. Gorrell agrees that the conditions, functional value, and purpose of a facility are "degraded and possibly lost from use" if yearly expenditures are not made. Ex. 44, Gorrell Dep. at 267-68, May 14, 2021. BCPSS is now entrenched in a "vicious cycle" in which it must implement costly emergency repairs because of starved maintenance, further depleting its already anemic budget. Ex. 49(A), Roseman Report at 11. IAC Deputy Director and Acting Director Alex Donahue concedes that lack of funding may be a reason that BCPSS has a notably higher percentage of inadequate or poor facilities, and therefore is less effective at maintenance than other school districts. Ex. 45, Donahue Dep. at 118-120, May 21, 2021; *see also* Ex. 53, Munter Dep. at 152-153, Apr. 22, 2022 ("Certainly there's no debate that underfunding preventive maintenance results in early failure of buildings").

Emergency repairs and this sort of reactive maintenance can be three times more expensive than preventive maintenance, Ex. 44, Gorrell Dep. at 219-220, May 14, 2021, and it diminishes the operational budget that BCPSS could otherwise be using for the classroom, office supplies or technology. *See* Ex. 64, CMP at 13. Patch-work maintenance, moreover, is not best practice. *See e.g.* Ex. 53, Munter Dep. at 234-35, Apr. 22, 2022 (inappropriate to place a new system on an aged roof without replacing the roof); Ex. 20(A), Fine Report at 51 (quoting administrators: "even when we try to fix the problems, our solutions interfere with learning because we try to supplement, say, with electric heaters or air but old buildings can't handle these electrical excesses"); Ex. 49(A), Roseman Report at 10-11 (describing issues with reactive maintenance).

Researchers advise that “[w]hen a backlog of deferred maintenance has been allowed to accumulate, spending must exceed the minimum level until the backlog has been eliminated.” Ex. 49(A), Roseman Report at 154 (citing National Research Council of the National Academies of Science (1990), *Committing to the Cost of Ownership, Maintenance, and Repair of Public Buildings*). Gorrell testified to the same effect: insufficient maintenance funds in prior years will require increased emergency funds and an increase in the percent of CRV needed in future years. Ex. 44, Gorrell Dep. at 225-56, May 14, 2021.

The State admits it has not achieved its own maintenance funding goals for BCPSS. It has not fully implemented its plan for a maintenance management system to provide data to State and local stakeholders that would ensure sufficient funding. Ex. 44, Gorrell Dep. At 241-42, May 14, 2021. Nor has it acted on its own recommendation to “[c]onsider legislation that requires a certain percentage of formula funding or a new funding source be dedicated to and spent on routine facilities maintenance and operations.” *Id.* at 243.

3. It is Undisputed that BCPSS Students’ Health, Safety, and Academic Achievement are Harmed by Inadequate Facilities.

The State has a duty “[t]o provide healthy and safe physical environments that support the effective delivery of education programs that meet Maryland’s educational standards.” Ex. 65, Adequacy Standards & Facilities Assessments for IAC at 53. It is undisputed that without adequate funding for facilities, BCPSS cannot provide students with the healthy and safe environment they need to meet contemporary educational standards.

As a result of inadequate State funding, BCPSS facilities have defects in windows, HVACs and piping, amongst other issues, that create noisy, poorly-lit environments with inhospitable temperatures. It is undisputed that these conditions “contribut[e] to the low academic achievement, low graduation rates, high absenteeism, and high drop-out rates among BCPSS students.” Ex.

66(A), Lorraine Maxwell, *Report Regarding Impact of School Facility Condition Deficiencies on Student Performance for Bradford v. MSBE*, at 21-25 (“Maxwell Report”). A recent comprehensive review of studies by the Harvard School of Public Health identified ventilation and indoor air quality, water quality, thermal health, lighting and views, acoustics and noise, dust, pests, mold and moisture, and safety and security as particularly important to student learning. Ex. 13(A), Baker Report at 133-34.

Ventilation and Indoor Air Quality: It is undisputed that BCPSS has widespread HVAC failures and therefore compromised ventilation and filtration systems. Ex. 50, Jacobs Report at 25. Studies link recirculating air and low ventilation rates in classrooms to lower average daily attendance and slower speeds in student completion of tasks. Ex. 66(A), Maxwell Report at 8.⁸

Water Quality: As noted above, BCPSS has some of the oldest buildings in the State, with an average of 37 years old. *See* Ex. 44, Gorrell Dep. At 86, May 14, 2021; Ex. 45, Donahue Dep. at 63, May 21, 2021; Ex. 65, Adequacy Standards & Facilities Assessments for IAC at 50. Lead pipes are more likely to be found in buildings that were built more than 36 years ago. Ex. 63, IAC 2021 Maintenance Report at 185. The majority of BCPSS schools—about 75%—have elevated lead levels in their drinking water. Ex. 49(A), Roseman Report at 26. As a result, most use bottled water for drinking and cooking. *See id.* at 165.

Thermal Health: The State recognizes that HVAC systems are building components that have the greatest “potential impact on teaching and learning,” Ex. 63, IAC FY2021 Maintenance Report at 11. Researchers have found that “[c]umulative heat exposure over the course of a school year is associated with a lower level of student learning, and the presence of classroom air

⁸ During the COVID pandemic, City Schools has used COVID relief funds to invest in MERV 13 filters or HEPA air purifiers that achieve MERV 13 or better levels of performance to mitigate infectious aerosol transmission, but these upgrades do not address the underlying HVAC failures the system faces. Ex. 68 BCPSS, *In-Person Air Quality Plan*, <https://www.baltimorecityschools.org/in-person-air-plan>.

conditioning systems nearly wipes out that negative effect.” *See* Ex. 67, Nat’l Bureau of Econ. Research, *Hotter School Days, Less Learning—Unless There’s AC*, August 2018, <https://www.nber.org/digest/aug18/hotter-school-days-less-learning-unless-theres-ac> (“[e]ach additional school day with a temperature in the 90s, rather than the 60s, reduced achievement by one-sixth of a percent of a typical year’s gain”). Similarly, “[w]ithout air conditioning, a 1°F hotter school year reduces that year’s learning by one percent.” Ex. 69, Goodman, J., Hurwitz, M., Park, R.J., & Smith, J., *Heat and Learning* (2019), available at <http://edworkingpapers.com/ai19-30>. Notably, “[h]ot school days disproportionately impact minority students, accounting for roughly five percent of the racial achievement gap.” *Id.*

It is undisputed that heating and cooling failures have significant impacts on students in BCPSS. From 2014 to 2019, students in BCPSS lost 1.5 million hours—221,000 full days of school—to closures caused by building system failures. Ex. 56(A), Sharfstein Disclosure at 11. And less than three months before this motion was filed, BCPSS’s website advised that 30 schools would close or have early dismissal on extremely hot days and on days “that feel warmer due to a combination of heat and humidity.” *See* Ex. 70, BCPSS, Schools without air-conditioning (June 14, 2022), <https://www.baltimorecityschools.org/ac>. Schools that have AC may also “dismiss early, if their systems require repair that cannot be completed within one day.” *Id.* The BCPSS website also warns of school closures during cold weather if moving children from room to room to seek a warmer area does not suffice. *See* Ex. 71, BCPSS, Inclement Weather, <https://www.baltimorecityschools.org/inclement-weather>. Degraded heating systems also suffer burst pipes and produce water damage, adding to the litany of reasons for lost learning. *See* Ex. 72, BCPSS, Heating and Cooling, <https://www.baltimorecityschools.org/heating-and-cooling>. BCPSS students report that lack of cooling “makes learning a lot more difficult,” and teachers

report that in hot temperatures children lose concentration, misbehave, or fall asleep. Ex. 20(A), Fine Report at 52-56. Students have “highlighted how they missed many important, meaningful moments in school because of time lost to inhospitable classroom temperatures.” Ex. 46, Nobody Asked Me at 34.

The IAC found that 75% of the classrooms in Maryland that lack air conditioning are in BCPSS. Ex. 73, IAC, *Report on the Status of Air Conditioning in Maryland’s School Facilities* (Oct. 8, 2021) at 4-6, available at <https://iac.mdschoolconstruction.org/wp-content/uploads/2021/10/Report-on-the-Status-of-Air-Conditioning-in-Marylands-School-Facilities.pdf>; *see also* Ex. 63, IAC Maintenance Report FY 2021 at 189 (35% percent of BCPSS schools have HVAC ratings of Not Adequate or Poor). As of September 2021, the State found that 21 schools in BCPSS are entirely without AC, which is a “preponderance” of the school buildings in Maryland without functioning AC. Ex. 73, IAC, *Report on the Status of Air Conditioning* at 6; Ex. 45, Donahue Dep at 42, May 21, 2021.

Lacking sufficient State funding, BCPSS was forced to forgo installation of central HVAC systems in many schools without AC, and instead installed window air conditioning units called vertical package units (“VPUs”). *See* Ex. 74, Baltimore City Public Schools’ Air Conditioning Plan: Update, <https://www.baltimorecityschools.org/sites/default/files/2022-05/ac-plan-may-2022-v2.pdf>. VPUs are less expensive in the short term, but they, take up substantial classroom space and do not provide heat, cooling, or ventilation to shared spaces such as hallways, cafeterias, gyms, auditoriums, and libraries. *See* Ex. 49(A), Roseman Report at 68; Ex. 53, Munter Dep. at 145-147, Apr. 22, 2022. VPUs also require significant resources to operate and maintain, given the older electrical systems in BCPSS that must be upgraded before they can be installed. VPUs are “not a permanent solution for school facilities with HVAC systems well beyond their life cycle

and that require replacement,” Ex. 49(A), Roseman Report at 68, and do not absolve the State of its responsibility to ensure livable temperatures in BCPSS schools.

Acoustics and Noise: BCPSS’s defective HVAC systems and lack of classroom insulation also create noisy environments. *See* Ex. 49(A), Roseman Report at 68, 87; Ex. 13(A), Baker Report at 134; Ex. 20(A), Fine Report at 37. Chronic exposure to noise in schools impairs students’ cardiovascular health, increasing blood pressure and stress hormones; it is also associated with lower reading and math scores, and decreased motivation. Ex. 66(A), Maxwell Report at 11-12.

Lighting: Adequate lighting, both natural daylight and electric, is associated with improved concentration, memory and learning, and with higher math and reading skills. Ex. 66(A), Maxwell Report at 9-10. In BCPSS, however, 97 schools have inadequate electrical systems, and in some cases window failures do not allow for natural light. *Id.*; *see also* Ex. 61, IAC Maintenance Report FY 2021 at 188 (half of assessed schools had failing grades in interior lighting); Ex. 49(A), Roseman Report (53 assessed schools had inadequate windows); Ex. 53, Munter Dep. at 222, Apr. 22, 2022. Poor lighting conditions interfere with student learning and performance. Ex. 13(A), Baker Report at 134.

ARGUMENT

A. THE UNDISPUTED FACTS DEMONSTRATE THAT PLAINTIFFS ARE ENTITLED TO A DECLARATORY JUDGMENT CONCERNING THE STATE’S UNCONSTITUTIONAL CONDUCT.

A. Summary Judgment Standard.

It is “wholly appropriate for a trial court to grant a declaratory judgment at the summary judgment stage.” *Piney Orchard Community Ass’n, Inc. v. Piney Pad A, LLC*, 221 Md. App. 196, 206, 108 A.3d 536, 542 (2015). Summary judgment is appropriate when “there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law.” *Piscatelli*

v. *Smith*, 197 Md. App. 23, 36 (2011); *see* Md. Rule 2-501.

B. Plaintiffs are Entitled to a Declaration of the Ongoing Constitutional Inadequacy of BCPSS's Programs and Facilities.

1. The State is not providing an education that is “adequate when measured by contemporary educational standards” to students attending BCPSS.

This Court's holding that every schoolchild in Maryland has the constitutional right to an education that is adequate when measured by contemporary educational standards, Ex. 3, 2000 Mem. Op. at 24-5, is “final, binding and the law of this case.” Ex. 4, 2004 Mem. Op. at 57. The State has not, and could not, controvert Plaintiffs' showing, much of it from the State's own statistics, that by the “objective indicators” considered by the Court in 2004, *see id.* at 24-29 & 57, BCPSS students are “still being denied their right to a ‘thorough and efficient’ education under Article VIII,” *id.* at 67. The State also cannot controvert its own data concerning the inadequacy of BCPSS's facilities. *See supra* Stmt. Undisputed Facts, Section B.

2. The State has been in continuous violation of Art. VIII and has never complied with the Court's declarations of its constitutional obligations, including that, at a minimum, “full Thornton funding” is constitutionally required.

This Court has repeatedly held the State in violation of its duty to fund an adequate education for the children of Baltimore City. Ex. 75, 1996 Order; Ex. 3, 2000 Mem. Op. at 14, 15, 25 & 26; Ex. 6, 2002 Mem. Op. at 4 & 5; Ex. 4, 2004 Mem. Op. *passim*. In 2000, this Court held that “[o]verall financial resources available to BCPSS are not adequate,” Ex. 3, 2000 Mem. Op. at 14, substantial additional funds were necessary for adequacy, *id.* at 15, and additional funding of approximately \$2,000 to \$2600 per pupil for educational operating expenses for FY2001 and FY2002 was required to enable BCPSS “to provide an adequate education measured by contemporary educational standards.” *Id.* at 26; 2000 Order at 1. The State did not provide this additional funding, and, in 2002, the Court held that the State's failure to comply constituted “good

cause” for extending judicial supervision of the Consent Decree. *See* Ex. 6, 2002 Mem. Op. at 4. The Court noted that “the State’s own Thornton Commission identified funding needs substantially greater than those the Court recognized in June, 2000.” *Id.* at 5. The Court retained jurisdiction under Consent Decree ¶ 68, and it held that it would “continue judicial supervision of this matter until such time as the State has complied with” the 2000 Memorandum Opinion and Order. *Id.*

In 2004, the Court held that the State had “**unlawfully underfunded** [BCPSS] 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.” Ex. 4, 2004 Mem. Op. at 67 (emphasis added). The State, moreover, recognized in the Bridge Act that there was an adequacy gap of \$3,380 per pupil in its funding for BCPSS. *Id.* at 12-13, ¶ 43. Nonetheless, funding increases between 2003 and 2005 were substantially lower than projected when the Bridge Act was enacted, even though State standards were higher than in 2001 to 2002, increasing the amount of additional funding necessary for adequacy. *Id.* at 15-16, ¶ 52-57.

The Court held that increased funding is properly measured as the “increase per pupil over pre-existing funding streams,” *id.* at 22-23, ¶ 88, and emphasized that it “intended the increased funding required” by the 2000 Memorandum Opinion and 2000 Order “to be provided on top of pre-existing mandated increases,” *id.* at 24, ¶ 89, and that such funding increases be adjusted to reflect subsequent increases in education costs, *id.* at 23-24, ¶¶ 92-94. In clear violation of these judicial declarations, the legislature reduced funding starting with legislation passed in FY2007, and as a result created annual adequacy gaps (as calculated by DLS) for BCPSS of \$156 million for FY2013, \$290 million for FY2015, and \$342.3 million for FY2017. *See supra* Stmt. Undisputed Facts Section A(1). These are the amounts that, according to DLS, the State should have paid, in each of the years in question, for BCPSS to achieve an adequate education. It should

be noted that DLS’s “adequacy gap” calculations are probably too low: APA found, based on data from FY2015, that BCPSS needed an additional \$358 million annually to meet the State’s standards and requirements and “ensure all students, schools, and districts have the resources needed.” *See supra* Stmt. Undisputed Facts, Section (A)(1).

3. The State’s violations will persist until it provides constitutionally-adequate funding for educational services in BCPSS and remedies the effects of its prior constitutional violations.

The State never provided all the funding for BCPSS that was called for by the Thornton Commission. The Blueprint Act, however, assumes that the educational standards to which Thornton aspired are already being met. It further remains a matter of conjecture whether the programs the Blueprint Act describes will even be fully funded. *See supra* Stmt. Undisputed Facts, Section (A)(1). The State’s failure to meet the obligations imposed by this Court, and its failures to finance all the recommendations of its own Thornton and Kirwan Commissions, must be considered in light of the State’s declared budget surplus of \$7.5 billion at the start of FY2023. *See* Ex. 3, 2000 Mem. Op. at 23-4 *and* 2000 Order at 2. The State is more than able to meet its constitutional obligations.

The State’s violations of this Court’s Orders, and its persistent failure to provide adequate funding to BCPSS—even when the State has billions of dollars in surplus funds—demonstrate that it will not cure its constitutional violation until it is required to do so.

4. The State is further violating Art. VIII by failing to provide sufficient resources to ensure the adequacy of BCPSS facilities, and these constitutional violations will persist until the State acts to remedy the physical condition of BCPSS facilities.

Art. VIII plainly applies to environments for educational instruction just as much as it applies to the quality of that instruction. The Consent Decree included additional funding for facilities improvement, Ex. 2, Consent Decree ¶¶ 29-34, ¶¶ 40-54, and this Court has recognized

and incorporated evidence of inadequate facilities into its findings of continuing constitutional violations. Ex. 75, 1996 Order at 2, ¶ 2; Ex. 3, 2000 Mem. Op at 15; Ex. 4, 2004 Mem. Op. ¶¶ 24, 71.

Under constitutional provisions that are the same or similar to Art. VIII, courts of other states have required the funding of safe facilities suitable for educational services. *See, e.g., DeRolph v. State*, 754 N.E.2d 1184, 1195 (Ohio 2001) (to “pass constitutional muster” under a “thorough and efficient” standard, “the state must have in place legislation that will be likely to bring school facilities into compliance within a reasonable time”); *State v. Campbell Cty. Sch. Dist.*, 32 P.3d 325, 337 (Wyo. 2001) (it is a “fundamental precept,” that “the State is responsible for funding capital construction of facilities to the level deemed adequate by state standards”); *Idaho Schs. for Equal Educ. Opp. v. State*, 976 P.2d 913, 919-20 (Idaho 1998) (“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”); *Abbott by Abbott v. Burke*, 693 A.2d 417, 437 (N.J. 1997) (“adequate physical facilities are an essential component of [the] constitutional mandate” of a “thorough and efficient” education).

Maryland officials have repeatedly recognized that the State has the constitutional obligation to fund adequate school buildings suitable for learning. Gorrell affirmed that facilities are covered by “the mandate” of Art. VIII and that a “thorough and efficient system” of public schools includes both programs and facilities. *See* Ex. 65, Adequacy Standards & Facilities Assessments for IAC at 48. “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 53; *see also* Ex. 76, IAC, *Educational Sufficiency Standards* (MSBE_034308), available at <https://iac.mdschoolconstruction.org/wp->

content/uploads/2020/12/Md.-Educ.-Sufficiency-Standards_Adopted_180531-1.pdf.

The State's school construction program, however, allocates state funds to BCPSS schools on par with state funds to Montgomery County schools, despite the huge difference in availability of local funds. Ex. 51, IAC Public School Construction (2013) at viii-2, 4. The Kirwan Commission observed that this funding formula is "regressive," that is, the State invests less in schools serving high concentrations of poverty, like BCPSS, than in those in wealthier communities, like Montgomery County schools. Ex. 11, Kirwan Report at 1. The State has offered no plan to provide the more than \$3.8 billion in systemic renovations that BCPSS estimates to be necessary to renovate aging facilities up to *minimally acceptable standards* through repairs and building replacements that the 21st Century School Buildings Program and the Built to Learn Act, as well as annual State Capital Improvement Program funding in recent years, has left untouched. Perkins-Cohen Aff. at 3-11. Moreover, "the IAC has imposed a series of obstacles that have made it more difficult for BCPSS to obtain new appropriations for its capital improvement projects outside of the 21st Century School Buildings Program and the Built to Learn Act, thereby effectively decreasing available capital funding for the remainder of BCPSS's portfolio." *Id.* at 8.

This Court first declared that BCPSS's school children were receiving an unconstitutionally deficient education in 1996. It made the same declarations in 2000, 2002, and again in 2004. The State's own Kopp Commission established the gravity of the constitutional violations with respect to school facilities some eighteen years ago. *See supra* Stmt. Undisputed Facts Section B(1). Despite the Court's Orders and the findings of the Kopp Commission, the State has never achieved compliance. *See id.* Further relief from the Court is desperately needed.

This Court should declare that the State is violating Art. VIII by failing to provide sufficient resources to ensure the adequacy of BCPSS facilities, and that the constitutional violation

presented by the physical condition of BCPSS facilities will persist until the State provides the funding necessary to make those facilities adequate when measured by contemporary educational standards.

II. PLAINTIFFS ARE ENTITLED TO ADDITIONAL ORDERS PURSUANT TO THE DECLARATORY JUDGMENTS ACT GIVING THEM FURTHER RELIEF UNDER THE CONSENT DECREE AND THE COURT’S PRIOR DECLARATIONS.

A. Standard of Review Under the Declaratory Judgments Act.

Under the Declaratory Judgments Act, “[f]urther relief based on a declaratory judgment or decree may be granted if necessary or proper.” Md. Courts & Judicial Proc. Code, § 3-412(a). The Act permits parties to return to court to seek enforcement of rights previously determined by declaratory judgment when declared rights have been violated. *See DeWolfe v. Richmond*, 434 Md. 403, 419-20 (2012) (applying statute and quoting the position of the State defendants in that case that § 3-412(a) provides plaintiffs “the option to seek further relief, if necessary, under § 3-412 at a later time if defendants were to fail to comply with the declarations . . .”), *on reconsideration*, 434 Md. 444, 472 (2013) (affirming 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 . . .”). Here, Plaintiffs have shown that their declared rights have been violated. By definition, the existence of an adequacy gap—the “difference between current funding and the funds necessary to provide an adequate education,” Ex. 4, 2004 Mem. Op. at 12, ¶40—means that additional funds are necessary. The State’s pattern of allowing its constitutional violations to persist in violation of the Court’s declarations makes it necessary, as well as entirely proper, for the Court to direct the State to take measures to remediate its violations.

B. The State Should be Required to Make Immediate Payment of Amounts it Clearly Owes.

This Court determined in 2000 that BCPSS needed “additional funding of approximately \$2,000 to 2,600 per pupil for educational operating expenses for [FY] 2001 and 2002.” Ex. 3, 2000 Mem. Op. at 26; Ex. 78, 2000 Order at 1. At the end of FY2002, the State had not complied with the Court’s directive, “even though the State’s own Thornton Commission identified funding needs substantially greater than those the Court recognized in June 2000.” Ex. 6, 2002 Mem. Op. at 5. At the end of FY2004, the State had still “not complied with its constitutional obligations to the children of Baltimore City,” and for “[FY]2001, 2002, 2003 and 2004 alone, [had] “unlawfully underfunded BCPSS by \$439.35 million [based on the low-end estimate of \$2,000 per pupil] to \$834.68 million [based on the estimate of \$2,600 per pupil] in contravention of a final order of this court.” Ex. 4, 2004 Mem. Op. at 64-65. The Court further held that it “would not tolerate any delays in full Thornton funding for the BCPSS beyond FY2008.” *Id.* at 67-68.

Under the Bridge Act, “adequacy” is defined as: “an empirical estimate of the amount of funding that [. . .] school systems require in order to obtain the resources they need to reasonably expect that students can meet the State’s academic performance standards.” Ex. 4, 2004 Mem. Op. at 14 ¶50 (citing Affidavit of John Rohrer, Director of DLS). DLS analyzed the “adequacy gap” in school funding in Maryland starting with FY2002, the first year the Bridge Act was in effect. For that year, the State admitted to an adequacy gap of \$270.4 million, thus admitting that it had violated this Court’s June 30, 2000 declaration that additional funding for BCPSS was necessary. Ex. 4, 2004 Mem. Op. at 12-13, ¶43; Ex. 78, 2000 Order; *see also* Ex. 8, DLS Follow-up (2019) at 3.

The Bridge Act included mechanisms for annual adjustments based on changes in “enrollment, local wealth, and other factors,” *see* Ex. 7, Handbook at 63, and payments were to be

increased annually for inflation, *id.* at 72. Notwithstanding this Court’s rulings, however, the Legislature took steps, starting with the 2007 legislative summer session, to eliminate the mandated increases, and reduced funding commencing with FY2009. *Id.* at 76-77; *accord* Ex. 10, APA Report at 3.

DLS calculated that the State’s funding for BCPSS left an adequacy gap of \$156 million for FY2013. Ex. 7, Handbook at 64 (Ex. 3.4). That gap was \$290 million for FY2015. *See* Ex. 9, DLS Presentation (2016) at 7. In FY2017, the last year for which DLS conducted an educational adequacy analysis, the adequacy gap for BCPSS was \$342.3 million. Ex. 8, DLS Follow-up (2019) at 9.

DLS “adequacy gap” analyses are clearly at the low end. APA concluded that a “significant increase” in funding was required for BCPSS, as well as a new formula for determining adequacy. Ex. 10, APA Report at 86-87. APA concluded from FY2015 data that BCPSS needed an additional \$358 million annually to satisfy Maryland’s standards and “ensure all students, schools, and districts have the resources needed to meet the new standards.” *Id.* at xii-xiii, xxv-xxvi, 111-12.

This Court is not limited to issuing another declaration that the State is in violation of its constitution: it has the power to compel compliance. As this Court has held, and as the Court of Appeals affirmed in *Montgomery County v. Bradford*, 345 Md. 175,181,691 A.2d 1281, 1284 (1997) (*Bradford I*), Art. VIII establishes the right of all children in Maryland to an adequate education by contemporary educational standards and obligates the General Assembly to raise sufficient revenue through taxation or other means, and to appropriate sufficient funds, to ensure that each child in this state receives a thorough and efficient education. Art. III, § 52 of the constitution, moreover, requires the State to budget the necessary amount.

A constitutional right that requires State funding for compliance is fully enforceable before

the Maryland courts. In *Ehrlich v. Perez*, 394 Md. 691 (2006), the Court of Appeals considered whether the State could be compelled, under Art. 24 of the Declaration of Rights' guarantee of equal protection, to fund medical benefits to Maryland residents who immigrated after August 22, 1996, as it provided such funding for similar individuals who immigrated before that date. The Court affirmed the Circuit Court's grant of a preliminary injunction requiring payment of prospective and retrospective benefits, and it rejected the State's assertion that the Court lacked constitutional power to order the State to expend unappropriated funds. *Id.* at 737. The Court of Appeals emphasized that the Circuit Court was tasked with remedying a constitutional violation, and therefore acted within its authority even if its Order resulted in expenditures by the State:

the order prospectively reinstating . . . benefits to the [plaintiffs] . . . does not operate as an order directing the appropriation of specific funds [but rather] serves as a judicial determination that [the State's] action warranted the issuance of a preliminary injunction because there is a likelihood that [its] action was unconstitutional.

Id. at 735-36. 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)). As the Court of Appeals explained,

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.

Ehrlich, 394 Md. at 736. Thus, an order compelling State officials to comply with the constitution by providing constitutionally required services or benefits does not offend the separation of powers, and this Court has plenary authority to order the State to provide sufficient funding to meet the threshold for the constitutionally required education guaranteed by Art. VIII.

Courts in other states have compelled compliance with similar constitutional provisions, especially when those states had ample opportunity to comply but failed to do so, as Maryland has here. *See, e.g., Gannon v. State*, 368 P.3d 1024, 1058 (Kan. 2016) (“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.”) (citations omitted); *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) (“a thorough and efficient system of education is a fundamental right guaranteed by the Constitution [and] 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).

In 2002, this Court declared that it trusted the State “to bring itself into compliance with its constitutional and contractual obligations.” Ex. 6, 2002 Mem. Op. at 5. The State never required that trust, and it never honored its constitutional commitment to thousands of children in Baltimore City whose entire school careers have been shadowed by the risk, and blighted by the reality, of educational failure.

In 2004, this Court declared that it “will not . . . tolerate any delays in full Thornton funding for the BCPSS beyond FY2008.” Ex. 4, 2004 Mem. Op. at 68. The Court should not tolerate any

further delays. It should order immediate relief for the current school year by directing the State to provide immediate funding for:

(1) **FY2023 Adequacy Gap for Programs and Operations:** Plaintiffs respectfully propose the following alternative calculations of the minimum additional funding the State should be required to provide for BCPSS programs and operations in FY2023. This payment is intended to be a one-year stopgap until the comprehensive plan for ongoing constitutional compliance described below is in place. *See infra*.

First, the Court could direct payment of the \$2,000 to \$2,600 per pupil that the Court declared necessary in its final and binding 2000 Order but the State never paid. Multiplying \$2,000 by the 2021-22 BCPSS pupil census of 77,807 equals \$155,614,000, and multiplying \$2,600 x 77,807 = \$202,298,200. An Order directing the State to fund an additional amount, over and above all other planned funding, for BCPSS for FY2023 in the range of \$155,614,000 to \$202,298,200 would not account for inflation since 2000, nor for the increased costs subsequently recognized as necessary by the Thornton and Kirwan Commissions, but it would, require the State to comply for a year with the terms of the Court's 2000 Order.

Alternatively, the Court could adjust the payment called for in the 2000 Order for inflation. The cumulative rate of inflation for the years 2000-2021 is 72.1%, *see* <https://www.usinflationcalculator.com/>, yielding a present value of \$3,441 for \$2,000 in 2000, and a present value of \$4,474 for \$2,600 in 2000. Multiplying each by the 2021-22 BCPSS pupil census of 77,807 yields an inflation-adjusted range for an annual additional payment for the current school year pursuant to the Court's final and binding 2000 Order of \$267,733,887 to \$348,108,518. An Order directing the State to fund an additional amount, over and above all other planned funding, for BCPSS for FY2023 in the range of \$267,733,887 to \$348,108,518 would again not take account

the increased costs recognized as necessary by the Thornton and Kirwan Commissions, but it would require the State to comply for a year with the terms of the Court's 2000 Order as adjusted for inflation.

As a third alternative, the FY2017 "adequacy gap" for BCPSS established by DLS was \$4,384 per pupil which, multiplied by the 2021-22 BCPSS pupil census of 77,807, equals \$341,105,888. This calculation, it may be noted, does not include any adjustment for inflation since 2016 (FY2017 began on July 1, 2016), but the result is within range directed by the Court in its 2000 Order, as adjusted for inflation immediately above. An Order directing the State to fund an additional \$341,105,888, over and above all other funding, for BCPSS for FY2023 would not, as noted, account for inflation since 2016, nor for the additional funding recognized as necessary by the Thornton and Kirwan Commissions, but it would require the State to fill one year's adequacy gap as established by the State itself.

As a fourth alternative, the Court could adjust the \$4,384 per pupil FY2017 "adequacy gap" calculated by DLS by the cumulative rate of inflation for the years 2016 to 2022, *i.e.*, 23.5%, *see* <https://www.usinflationcalculator.com/>, yielding an inflation-adjusted "DLS adequacy gap" for 2022 of \$5,411.22 per pupil. Multiplying this amount by the 2021-22 BCPSS pupil census of 77,807 equals \$417,134,716. An Order directing the State to fund an additional \$417,134,716, over and above all other funding, for BCPSS for FY2023 would not account for the additional funding recognized as necessary by the Thornton and Kirwan Commissions, but it would require the State-established FY2017 adequacy gap as adjusted for inflation.

(2) **Facilities Maintenance and Operations:** Plaintiffs respectfully ask the Court to require the State to fund for BCPSS for FY2023 the full amount of the minimum annual expenditure set by the State for facilities maintenance and operations, *i.e.*, 2% of the \$7.2 billion

that is the most recent statement of the replacement value of BCPSS's building portfolio. *See* IAC Maintenance Report FY2021. 2% of \$7.2 billion = \$144 million.⁹ Accordingly, Plaintiffs respectfully urge the Court to order funding for BCPSS's FM&O of the full 2% set by IAC, without subtracting any part of BCPSS's current maintenance budget.

(3) **Capital Improvements:** Plaintiffs further respectfully ask the Court to require the State to fund for BCPSS for FY2023 the full amount of the minimum annual expenditure set by the State for annual capital improvements to upgrade existing facility systems, *i.e.*, another 2% of the \$7.2 billion that is the most recent statement of the replacement value of BCPSS's building portfolio, or an additional \$144 million. Accordingly, Plaintiffs respectfully urge the Court to order funding for capital improvements for BCPSS of the full 2% set by IAC, without subtracting any part of BCPSS's current budget, including but not limited to capital improvement program funding allocated by the IAC, Built to Learn Act, and the 21st Century School Buildings Program.

* * *

In sum, Plaintiffs respectfully urge the Court to direct Defendant to make immediate payment to BCPSS for FY2023 of an amount in the range of \$155,614,000 to \$417,134,716 for programs, *plus* \$144,000,000 for FM&O *plus* \$144,000,000 for CIP, *i.e.*, \$442,614,000 to \$705,134,716. The payment ordered should be in addition to "pre-existing funding streams," 2004 Mem. Op. at 22-23, ¶ 88, and "provided on top of pre-existing mandated increases." *Id.* at 24, ¶ 89. Thus, it should not reduce or replace any other funds destined by the State for BCPSS.

⁹ It bears emphasis here that national industry standards call for school systems to spend at least 7% of replacement value each year, of which 3% should be dedicated to FM&O and 4% should be dedicated to capital improvements, and that, for FY2022, BCPSS's combined expenditure on FM&O and capital improvements was just 1% of replacement value. *See* State of Our Schools Report at 23-24; IAC Maintenance Report FY2021 at 185; CMP.

C. The State Should be Required to Prepare and Submit to the Court a Comprehensive Plan to Bring Itself into Compliance with the Constitution and the Court's Declarations.

It bears emphasis that no version of the Order sought above could alone result in constitutional adequacy. The constitutional requirement of a “thorough and efficient” education for all children cannot be achieved in a year. Many years of adequate funding will be needed to undo the work of decades of disinvestment and rebuild faculties, staffs, and facilities. The Court should order the State to submit a comprehensive plan to bring itself into compliance with Constitution and the Court’s declarations, and to *maintain* that compliance.

The amounts sought in the prior section are based on the minimum amounts fixed by the Court and acknowledged by the State. As this Court held in 2004, the amounts Thornton called for are “likely” insufficient, Ex. 4, 2004 Mem. Op. at 15, ¶¶ 52-55, and the constitutional standard requires that funding be adjusted to reflect the substantial subsequent increases in education costs, such as average teacher salaries and the costs occasioned by ever-increasing contemporary education standards, *id.* at 15, ¶¶ 51-54; 23-24, ¶¶ 92-93 & 94.

The Blueprint Act substantially raised the bar for an adequate education and added new compliance requirements and obligations, necessitating expenditures well in excess of the funding contemplated in calculations of the “adequacy gaps” under the Bridge Act. “Thornton adequacy” was intended to bring BCPSS to the level of a thorough and efficient 20th century education. Once achieved, “Thornton adequacy” would provide the foundation necessary for BCPSS to create the 21st century education to which the Kirwan Commission aspired. It must further be emphasized that the Blueprint Act does not constitute a plan for timely remediation of the State’s constitutional violation and its failure to comply with the Court’s orders. The Blueprint Act is phased in slowly

and lacks guarantees; it is, moreover, prescriptive, requiring expensive actions by BCPSS as a condition of funding.

Similarly, the State agrees that 4% of replacement value (2% for facilities maintenance and operations and 2% for capital improvements) is the minimum that a school district should spend each year on facilities. The State also agrees in principle that more is needed when facilities have suffered years of inadequate funding. *See supra* Stmt. of Undisputed Facts, Section B(2). The 21st Century School Buildings Program and the Built to Learn Act likewise do not constitute a comprehensive plan for remediation because they fund systemic upgrades to a minority of the buildings that need to be fixed and do not provide sufficient ongoing facilities maintenance funds.

Thus, the Order requested above, requiring the State to provide additional funding for one year in partial remediation of the State's inadequate funding of BCPSS programs plus the acknowledged minimum annual amounts for facilities maintenance and capital improvements, is only a "down payment" against the full amounts needed over the years to come to achieve constitutional adequacy for BCPSS. The calculation of the full amounts should be set forth in the comprehensive plan for full compliance with Art. VIII obligations to BCPSS that the State should be required to prepare and submit for the Court's approval. Plaintiffs suggest that such a plan could start with a proposal to implement the combined recommendations of the Thornton and Kirwan Commissions, starting immediately, and to accelerate the projected funding under the Blueprint Act. Such a plan should also address the unmet need of more than \$3.8 billion in facilities renovations to meet minimally adequate standards. In any event, the State, as the party with the obligation to provide a constitutionally adequate education to the children of Baltimore City, and as the party that has shirked that obligation for decades despite this Court's clear declarations, should now be required to show the Court how it will comply with the Maryland Constitution.

CONCLUSION

For the foregoing reasons, the Private Plaintiffs respectfully request this Court to grant an Order in the terms set forth in their Proposed Order, filed herewith.

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