

# Gambling on a Settlement: the Baltimore City Schools Adequacy Litigations

BY DIANE W. CIPOLLONE

## INTRODUCTION

In 1983, Maryland's highest court rejected a constitutional challenge to the state's education finance system, holding that the State Constitution did not mandate equality in spending among the state's school districts. Eleven years later, the American Civil Liberties Union and Baltimore City initiated new suits against the state based on claims that the city's students were being denied an adequate education. These new "adequacy" claims, however, never went to trial. Instead, they were preempted by an eve-of-trial settlement that provided a moderate increase in school funding in return for changes in the city's school governance structure.

In the past 25 years, legal challenges to state education finance systems have been lodged in over 40 states. Few of these litigations have been settled prior to trial. An analysis of developments in Maryland, therefore, provides insights into ways to avoid confrontational and costly trials. Such settlements, however, may leave a core issue—how to provide an adequate education for disadvantaged inner-city students—unresolved. In Maryland, it remains to be seen how far the settlement will go toward addressing the acknowledged inadequacy of public education in Baltimore City.

## HISTORICAL BACKGROUND

### EDUCATIONAL REFORM

In 1987, Governor William Donald Schaefer appointed a commission to examine ways to measure the performance of the Maryland public schools and to develop strategies for improve-

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ment. The 1989 Final Report of the Governor's Commission on School Performance provided the impetus for educational standards reform in Maryland. In its report, the Commission (also known as the Sondheim Commission) examined student achievement, but also recognized the need for real accountability and assurances that appropriations were being used effectively, especially in light of appeals for increases in state aid to education.<sup>1</sup> The commission recommended the establishment of a comprehensive accountability system in which each school, each school system and the state would all be held responsible for student performance.

In accordance with the recommendations of the Sondheim Commission, the Maryland State Board of Education instituted its "Schools for Success" reform plan, which established statewide standards to be met by the year 2000. The Maryland School Performance Program (MSPP) was developed as the "accountability" system by which the state would assess the yearly progress made by individual schools and school systems toward meeting the new standards.<sup>2</sup> The MSPP measures the educational performance of schools according to four different criteria: (1) student scores on the Maryland School Performance Assessment Program Tests (MSPAP), which cover a wide range of subjects and are administered annually to children in grades three, five and eight; (2) student scores on Functional Tests designed to measure the extent to which high school students have attained "basic competencies" in reading, mathematics, writing and citizenship; (3) student attendance rates; and (4) student dropout rates. The ability of schools to meet the new standards in each of these categories is annually rated as "excellent," "satisfactory" or "not met."<sup>3</sup>

Regulations adopted in 1993 gave the State Board the power to intervene in or "reconstitute" schools that fail to meet the MSPP standards. Reconstitution involves changing one or more of the following: a school's administration, staff, organization, or instructional program. A school may be eligible for reconstitution by the

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1. Governor's Commission on School Performance, Final Report (Baltimore, MD: Governor's Commission, 1989), 2.

2. Governor's Commission on School Funding, Final Report (Baltimore: Maryland State Department of Education, 1994), 1-2 [hereinafter "Hutchinson Report"]. The performance of schools and school systems are judged against their own progress from year to year, not against progress in other schools or other school districts. Maryland School Performance Report, 1996: State and School Systems (Baltimore: Maryland State Department of Education, 1996), 1 [hereinafter "1996 MSP Report"].

3. 1996 MSP Report, 5.

State Board if its MSPP results are “below satisfactory and declining” or if the school is not making “substantial and sustained” improvement.<sup>4</sup> If a school is identified as eligible for reconstitution, the local school system is first afforded an opportunity to submit a school improvement plan to the State Board. If this plan is accepted, the school remains under the management authority of the local board of education while the State Board monitors implementation of the plan. If the State Superintendent rejects the local system’s proposal as insufficient, or if local reconstitution efforts fail, the State Board may take action to reconstitute the school.<sup>5</sup>

The annual MSPP Reports issued by the State Board since 1990 demonstrate the inability of the Baltimore City Public Schools (BCPS) to meet the new state standards. The BCPS has repeatedly failed to reach a satisfactory level of performance on the MSPAP “to a greater degree than any of the other twenty-three jurisdictions in Maryland.”<sup>6</sup> Of the forty-two schools in Maryland that have been identified as “reconstitution-eligible,” forty are in the BCPS; this number represents approximately one quarter of the city’s schools.<sup>7</sup> This data, provided by the State Board, would prove crucial to plaintiffs in the Baltimore City Schools lawsuits as indisputable evidence of the inadequate education provided by schools in Baltimore City.

#### EDUCATION FINANCE SYSTEM

Maryland’s public elementary and secondary educational system is composed of local boards of education in each of the state’s twenty-three counties and the city of Baltimore. These local boards rely primarily on a combination of state and local funds to finance their school systems. The state funds the public schools through over 30 different programs. Legislatively-mandated funding in five grant categories—current expenses, compensatory aid, teachers’ retirement costs, school bus transportation and special education

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4. Code of Maryland Regulations § 13A.01.04.07 [hereinafter “COMAR”].

5. COMAR § 13A.01.04.07E.

6. Affidavit of Nancy S. Grasmick, State Superintendent of Schools, paras. 4, 6 (Aug. 23, 1996), *infra*, n.8. See also 1990-1996 MSP Reports.

7. Deposition of Christopher T. Cross, President, Maryland State Board of Education, 22 July 1996, Tr., 96 in *Bradford, et al. v. Maryland State Board of Education, et al.*, Case No. 94340058/CE (Cir. Ct. Balt. City, 1994) and *Board of School Commissioners of Baltimore City, et al. v. Maryland State Board of Education, et al.*, Case No. 95258055/CL 2021151 (Cir. Ct. Balt. City, 1995).

programs—account for 94 percent of state aid to education.<sup>8</sup>

In 1922, Maryland became one of the first states to enact an “equalization formula” to reduce the impact of wealth disparities among the school districts. The statutes established a minimum foundation program to support basic educational needs but also permitted local subdivisions to supplement the state share with local tax revenues.<sup>9</sup> The financing formula in effect since 1974 is known as the Lee-Maurer current expense formula. This formula employs a two-step process to determine the proportion in which the state and local school systems will share the cost of a per-pupil minimum foundation amount for each fiscal year. The minimum foundation amount is based on actual statewide educational expenditures in specific categories during the third and fourth prior fiscal years.<sup>10</sup> After the minimum foundation amount is determined, the wealth of each jurisdiction determines the state’s share of the minimum foundation amount. The local board is responsible for funding the difference between the minimum per-pupil amount and the state share. However, all counties, including Baltimore City, currently provide funding higher than the local match required by the Lee-Maurer formula.<sup>11</sup>

While the Lee-Maurer formula is the largest state aid program, it accounts for only 62 percent of state education aid. The equaliz-

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8. Department of Legislative Services, Maryland General Assembly, *Structure of School Finance in Maryland*, July 1997, 6-7 [hereinafter “1997 Structure of School Finance”]. Compensatory aid grants are based on student counts used for the distribution of federal Title I aid. The primary factor is the number of children ages 5-17 living in poverty. The program provides more aid per pupil to less wealthy counties. Department of Fiscal Services, Maryland General Assembly, *Overview of Education Aid*, 10 Feb. 1997, 5 [hereinafter “Overview of Educ. Aid”]. Compensatory aid grants have averaged 3.5 percent of state aid to education in FYs 1995-1998. Department of Fiscal Services, Maryland General Assembly, *Structure of School Finance in Maryland*, Jan. 1995, 4 [hereinafter “1995 Structure of School Finance”]; 1997 Structure of School Finance, 7.

9. Chapter 382 of the Acts of 1922. For a history of major changes in the foundation amount since 1974, see Maryland General Assembly, *Maryland Local Government: Revenues and State Aid*, 1994, 84-86 [hereinafter “Revenues & State Aid”]. Maryland law imposes no cap on local education spending. In some counties, however, voters have approved property tax cap referendums.

10. The following expenditures are included in the calculation of the minimum foundation amount: administration, instruction, special education (public schools), student personnel services, health services, and operation and maintenance of plant. Federal and certain state aid funds are deducted from the total. The costs are converted to a per-pupil amount and averaged over two years. The minimum foundation amount is 75 percent of the average per-pupil costs. The foundation amount increases each year based on prior years’ actual spending. *Revenues & State Aid*, 81-82. If the annual increases in the foundation amount exceed 31.5 percent of general fund revenues, the basic current expense figure will be frozen at the prior FY’s amount, pending a General Assembly resolution affirming the affordability of the increase. *Ibid.*, 85. MD. CODE ANN. EDUC. § 5-202(b)(2)(ii)(1992).

11. *Overview of Education Aid*, 2.

ing provisions of the formula, therefore, do not compensate for other unequalized aid programs and disparities in local wealth.<sup>12</sup> For example, Baltimore City is the third largest school system in the state, serving approximately 12.5 percent of Maryland's public school students. Seventy percent of these students are eligible for free or reduced-price meals, compared to a statewide average of 31 percent; no other Maryland school district has a comparable concentration of students in poverty.<sup>13</sup> Nevertheless, Baltimore City's per-pupil expenditure in fiscal year (FY) 1995 was \$5,842, more than \$500 below the statewide average of \$6,400.<sup>14</sup> In that same year, the minimum foundation amount was only \$3,323.<sup>15</sup> Three years later, this amount is still only \$3,720, significantly less than the overall per-pupil spending of even the poorest districts in prior years.<sup>16</sup> Thus, even though Baltimore City receives among the highest per-pupil state share of the minimum foundation amount<sup>17</sup> and makes a local tax effort above the state average,<sup>18</sup> it remains mired below the state average in per-pupil expenditures. At the time that the city school suits were filed, Baltimore City also had the fourth lowest per-pupil expenditures in the nation among urban school districts.<sup>19</sup>

In 1993, the Governor's Commission on School Funding (known as the Hutchinson Commission) was charged with recommending changes in the state education finance system that would ensure adequate resources for all schools and provide incentives for

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12. The teachers' retirement program is the next largest state aid program at 19 percent. Through this grant, the state pays 100 percent of the school systems' share of retirement contributions for employees enrolled in the pension system maintained by the state. Overview of Educ. Aid, 5; 1995 Structure of School Finance, 7; 1997 Structure of School Finance, 7.

13. Department of Fiscal Services, Maryland General Assembly, *Selected Primary & Secondary Education Data*, Feb. 1997, 3 [hereinafter "Selected Data"]. In Prince George's County, the largest school system in the state, 41.2 percent of students were eligible for free and reduced price meals in 1995-96.

14. Selected Data, 9.

15. Revenues & State Aid, 83.

16. Overview of Educ. Aid, 3.

17. In FY 1998, Baltimore City, the poorest subdivision, received a state contribution of \$2,759 per pupil, while the wealthiest county received \$205 per pupil. Overview of Educ. Aid, 2-3. The city had the lowest per capita assessable base wealth at 48 percent of the statewide average, compared to 237 percent of the statewide average for the most wealthy jurisdiction. Selected Data, 25-27.

18. Hutchinson Report, 7.

19. Selected Data, 29.

academic improvement. In its 1994 Final Report to the Governor, the Hutchinson Commission proposed a new model for school funding that would reflect the following principles: To ensure educational adequacy, schools must have resources and competent staff.<sup>20</sup> To ensure educational opportunity, the state must devote additional resources to children with special needs, particularly those living in poverty. The Commission found that the single best predictor of school results is the percentage of the school population approved for free or reduced-priced lunch:

Analyses of 1992 [MSPP] test results indicate a strong direct relationship between the performance of schools and the percentage of school populations approved for free or reduced price lunch . . . . Schools with high proportions of students living in or near poverty have poor performance regardless of the school system in which they are located . . . . The most critical priority is to provide better learning opportunities for poor children.<sup>21</sup>

The Hutchinson Commission further argued that each school and school system must be accountable to the state and provide for the integration of education and other services for children and families.<sup>22</sup> The Commission's recommendations included a call for an increase in foundation funding "adequate for school systems to provide for a rigorous, fundamental education" and an alternative method for calculating the per-pupil foundation amount. Other funding recommendations included a state grant of \$500 for every child living in poverty, \$1,500 for every child in poverty to schools that develop comprehensive plans to reduce or eliminate obstacles to the success of poor children in school, a requirement that local jurisdictions provide funds necessary for quality education, and additional state funding for special education services.<sup>23</sup>

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20. The Hutchinson Commission was guided by the holding in *Hornbeck v. Somerset County Board of Education*, discussed in the following section, that the Maryland Constitution does not require equal per pupil funding but does embody a right to an "adequate education."

21. Hutchinson Report, 4, 16.

22. *Ibid.*, 8-9.

23. *Ibid.*, 10-15. The Commission recommended that the foundation amount be derived from the average spending of three counties which had educationally adequate performance on the MSPP and a relatively low percentage of children living in poverty. It further recommended folding the costs of several existing categorical funding programs into the higher foundation amount, thereby providing local systems with greater flexibility in deciding how the money is spent.

Implementing these recommendations would have required an additional \$571 million increase in state aid to education, bringing the total increase to \$1.2 billion by FY 1999.<sup>24</sup> In light of these enormous costs, the Commission offered a modified implementation plan whereby foundation funding would increase at a slower rate. This modified plan would have raised state aid \$332 million above current law by FY 1999.<sup>25</sup> The legislature, however, adopted only a small part of the Hutchinson Commission's recommendations. Although laws providing for targeted poverty grants were enacted, the current expense formula, which accounts for the majority of state aid, was not changed.<sup>26</sup>

#### EARLY COURT RULINGS

In 1979, Baltimore City and three rural counties initiated the first challenge to Maryland's educational finance laws. In *Hornbeck v. Somerset County Board of Education*, these four school districts, characterized by plaintiffs as "fiscally distressed," claimed that the state's public school financing system violates the Equal Protection Clause of the Fourteenth Amendment, the equal protection guarantees of the Maryland Declaration of Rights, and Article VIII (the Education Article) of the Maryland Constitution.<sup>27</sup> The Court of Appeals' lengthy opinion reviewed the legislative history of both Article VIII and attempts to reduce disparities based on local wealth. The Court first addressed plaintiffs' claim based on the Constitution's Education Article,<sup>28</sup> noting that while a number of gubernatorial and legislative commissions had studied the financing formula, none made recommendations for equal per-pupil funding or expenditures, "recognizing instead, the principle of shared

24. Because of enrollment growth, state aid to public schools would already have increased \$634 million between 1994 and 1999.

25. *Ibid.*, 15-16.

26. Md. Code Ann. Educ. § 5-207. Overview of Educ. Aid, 8. Schools that serve high concentrations of students living in poverty (defined as students who qualify for free or reduced-price meals) are eligible to receive targeted poverty grants upon the State Board's approval of a plan to improve the educational achievement of students in poverty. The grants are targeted to specific schools and may not exceed \$1,500 per student living in poverty. Since its inception in FY 1995, the targeted poverty grant program has been allocated between 0.3 percent and 0.4 percent of state aid for education. 1995 Structure of School Finance at 7; 1997 Structure of School Finance at 7. In actual dollars, \$8 million was allocated for each FY 1996-1998, an increase of \$3 million from the first year of the program.

27. 295 Md. 597, 458 A.2d 758 (1983).

28. Article VIII, § 1 of the Maryland Constitution provides in pertinent part, "The General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide, by taxation, or otherwise, for their maintenance."

responsibility between the State and local governments for public school education and emphasizing the need for a measure of local control and initiative.”<sup>29</sup> In keeping with its tone of unfettered deference to the work of the state legislature, the Court referred to the Lee-Maurer basic current expense formula as “another major effort at improved equalization” and described as “Herculean efforts” the steps taken by the state to extend greater educational opportunities to children.<sup>30</sup> The *Hornbeck* Court held, therefore, that the “thorough and efficient” clause of the Maryland Constitution does not mandate exact equality of per-pupil funding and expenditures among the state’s school districts and does not prohibit local subdivisions from spending locally-generated tax revenues for public school purposes in addition to funds received by the state. The Court also denied plaintiffs’ federal and state equal protection claims.<sup>31</sup>

Despite the Court’s rejection of all challenges to Maryland’s school financing scheme, the evidence *not* presented by the *Hornbeck* plaintiffs laid the legal groundwork for the subsequent Baltimore City Schools adequacy-based lawsuits. The Court noted that while Maryland had established statewide qualitative standards, plaintiffs never alleged that these standards were not being met in any school district, nor did they assert that the state funding system did not provide all districts with sufficient resources to provide a basic education:

The trial court did not find that the schools in any district failed to provide an adequate education measured by contemporary educational standards. Simply to show that the educational resources available in the poorer school districts are inferior to those in the rich districts does not mean that there is insufficient funding provided by the State’s financing system for all students to obtain an adequate education.<sup>32</sup>

Based on the evidence presented, the Court could only rule that the current finance system was not “depriving, interfering with, or

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29. 458 A.2d, 775-76.

30. *Ibid.*, 776, 787.

31. *Ibid.*, 770, 776, 782-86.

32. *Ibid.*, 780.

impinging upon, much less absolutely eliminating, any child's right to an adequate education."<sup>33</sup>

Thus, the *Hornbeck* Court's holding that Article VIII embodies a right to "an adequate education measured by contemporary educational standards," provided future plaintiffs with a court-defined criterion for alleging that Baltimore City school children were not receiving the "thorough and efficient" education required by the Maryland Constitution.

## ADEQUACY LITIGATION

### LIABILITY STAGE

In December 1994, the ACLU of Maryland filed a class action lawsuit in the Circuit Court for Baltimore City on behalf of "present and future students in the BCPS who are 'at-risk' of educational failure."<sup>34</sup> In *Bradford v. Maryland State Board of Education*, plaintiffs claimed that the State was failing to provide BCPS schoolchildren with an adequate education by not providing "resources sufficient and appropriate to enable BCPS to meet or make meaningful progress toward meeting contemporary education [sic] standards, especially with respect to at-risk students."<sup>35</sup> Plaintiffs expressly distinguished their claims from those previously adjudicated in *Hornbeck*, asserting that they did not "seek to reduce or reallocate educational resources currently provided to any other school district in Maryland."<sup>36</sup>

The complaint set forth statistics regarding the abysmal perfor-

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33. *Ibid.*, 787.

34. *Supra*, n. 8.

35. *Bradford* Complaint at para. 41. Defendants were the Maryland State Board of Education, the State Superintendent of Schools and the Governor.

36. *Ibid.*, at para. 1. Montgomery County, one of Maryland's wealthiest jurisdictions and the second largest school system in the state, filed a Motion to Intervene in the *Bradford* and *City* lawsuits. Md. Ct. of Appeals, Nos. 31 & 56, September, 1996 Term. The county asserted that if a violation of the right to an adequate education were found, state resources would be diverted from the county to BCPS. In affirming the lower court's denial of the county's Motion to Intervene, the Court of Appeals agreed with plaintiffs' view that "a judgment in their favor will not automatically or necessarily result in any of Maryland's current public school resources being diverted from their current uses to provide additional funding for the City's public schools." Slip op., 29, 4 Apr. 1997. The dissenting opinion in this 4/3 decision vehemently disagreed that the Baltimore City lawsuits could be viewed in isolation: "The majority's view, that this litigation simply represents a local dispute between Baltimore City and the State, with an impact largely confined to Baltimore City, is wholly devoid of reality." J. Eldridge, dissenting, 2-3. The dissent also criticized the scope of the consent decree, arguing that it represented "an unprecedented excursion beyond the outer limits of judicial authority," *Ibid.*, 5.

mance of BCPS students on measures of student outcomes including the MSPAP and the Maryland Functional Tests, as well as figures on student attendance, dropout rates and preparation for higher education. Noting that the State Board had also set standards for resources that school districts should provide as part of an adequate education, the complaint further alleged that the inadequate resources available to BCPS contributed to poor student outcomes.<sup>37</sup> The *Bradford* plaintiffs sought a court order requiring State defendants to work with the plaintiffs and Baltimore City to develop and implement a plan to improve Baltimore's public schools in accordance with state standards.<sup>38</sup>

Nine months later, the Board of School Commissioners of Baltimore City filed suit against the State Board of Education and the State Superintendent of Schools.<sup>39</sup> The City sought declarations that the State had failed to provide sufficient resources to allow children in Baltimore City to obtain a "basic public school education consistent with contemporary qualitative educational standards." City plaintiffs also sought a declaration that the state's failure to "properly assess" the needs of minority and disabled students in BCPS violated the Equal Protection Clause of Article 24 of the Maryland Declaration of Rights. The City sought injunctive relief prohibiting the State from implementing and funding a system that failed to provide a basic public school education; they asked the Court to order the State to redesign its school finance system to fully fund state mandates and to provide BCPS with additional funding and other resources.<sup>40</sup> Both parties relied on the Hutchinson Commission's recommendations as a measure of the funding and resources necessary to provide an adequate education to children in poverty.

#### THE STATE'S DEFENSE: MISMANAGEMENT OF BCPS

One month after Baltimore City filed its lawsuit against the State, the State filed a Third Party Complaint in the *Bradford* case against the City seeking the total restructuring of BCPS manage-

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37. *Bradford* Complaint, paras. 42-111.

38. *Ibid.*, 42.

39. Board of School Commissioners, *supra* n. 8. The City plaintiffs similarly distinguished their case from *Hornbeck*, stating that they did not seek exact equality in per-pupil funding and expenditures among all school districts. Board of School Commissioners, Amended Complaint at para. 3.

40. *Ibid.*, 31-32.

ment.<sup>41</sup> The State contended that due to the gross mismanagement of BCPS, the City, not the State, was liable for any inadequacies in the education provided to Baltimore City students. The State claimed that BCPS was unwilling and/or unable to implement school reform recommendations that had been identified in 1992 as ways to improve the academic achievement of the City's schoolchildren. Three years later, BCPS still lacked both a master plan for implementing the recommendations and an accountability system for school employees. The State further alleged that "the total failure of effective management . . . is also evidenced by BCPS' failure to access and properly utilize resources available to it, and failure to establish systematic instructional and operational strategies . . . ."<sup>42</sup> The lawsuits were consolidated and extensive discovery began.<sup>43</sup>

The State's argument that mismanagement was to blame for the underachievement of students in Baltimore City—as well as attempts by the State Board and the legislature to facilitate, and ultimately mandate, management changes in BCPS over a period of six years—provided a background for positions taken by the State Board and the legislature in response to attempts to settle the lawsuits. In 1991, the Association of Black Charities (in consultation with the Board of School Commissioners, the BCPS Superintendent and the Mayor), sponsored a management study of the BCPS (the "CRESAP" study). The study's objective was to develop recommendations to improve the educational achievement of the city's schoolchildren. The final report from the study contained more than 100 recommendations that would restructure the management system of BCPS into a network of enterprise schools.<sup>44</sup> "Accountability" was to form the cornerstone of an

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41. State's Third Party Complaint at para. 1. Defendants were the Mayor and City Council of Baltimore, the Board of School Commissioners of Baltimore City and the Superintendent of Schools.

42. *Ibid.*, at paras. 1-4.

43. Since 1988, BCPS has been under a U.S. District Court order to comply with laws regarding the education of students with disabilities in *Vaughn G., et al. v. Mayor and City Council, et al.*, Civ. Act. No. MJG 84-1911 (D. Md. 1988). The Superintendent of Schools has been held in contempt on numerous occasions for failure to adhere to court orders in the case. *Vaughn G.* plaintiffs' Motion for Additional Remedial Measures, filed in Sept., 1995, was pending during this time and sought, *inter alia*, an order placing BCPS in receivership, or in the alternative, appointment of a partial receiver, with full authority for all matters regarding the education of students with disabilities in BCPS. In an unprecedented procedure, the federal district court case in *Vaughn G.* was consolidated with the state court *Bradford* and *Board of School Commissioners* cases for discovery.

44. Maryland State Department of Education, *CRESAP - A Report of the Management Study of the BCPS*, (Baltimore: Maryland State Department of Education, June 1992).

improvement plan whereby the system must "fundamentally change the way it does business." The BCPS administration agreed to implement the majority of these recommendations.

The inability and/or unwillingness of BCPS to actually implement the CRESAP recommendations became a focus of inquiry and oversight by the State Board and the Maryland Legislature. Over the next 3 years, the State Board and MGT of America, Inc., an independent educational consulting firm, repeatedly informed legislative committees that BCPS had not made substantial progress in implementing the CRESAP recommendations. Lawmakers were told of the major barriers to implementation, including the lack of a master plan, confusion among school officials about the report, inadequate training efforts, and a lack of commitment by the Superintendent to implement key recommendations.

It was amidst this scrutiny that BCPS filed its lawsuit against the State. Five months later, the legislature included a provision in the budget bill to withhold \$5.9 million in state aid from BCPS unless the City agreed to a 5 percent reduction in salaries for those administrators named in the MGT report as responsible for failure to fully implement CRESAP recommendations.<sup>45</sup> If BCPS agreed and funds were released, those monies would be mandated for use in the schools, not for administrative salaries. The legislature passed the bill but Governor Parris Glendening vetoed it.<sup>46</sup> On the same day, the Governor informed Mayor Kurt Schmoke of Baltimore that \$5.9 million would be withheld from fiscal 1997 aid to education unless the City and the State agreed to full oversight of the BCPS by the State Board and all litigants agreed to incorporate this settlement in consent decrees.<sup>47</sup> Within this context, the Governor imposed a deadline for settlement with the Mayor while

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45. The legislature's action to withhold the funds would have been "consistent with provisions included in recent state budget bills to withhold up to 25 percent of the salary of state administrators deemed to be responsible for poor compliance with state laws, rules, and regulations governing fiscal administration practices." See Maryland State Department of Education, *A Report on Monitoring Implementation of Management Study Recommendations in Baltimore City Public Schools*, Phase II, 26 Jan. 1996, Ex. 1 [hereinafter "Committee Narrative of the 1995 General Assembly"].

46. The legislature also included provisions in the budget bill to withhold \$24 million from BCPS contingent on progress toward implementing a City-State Partnership to manage BCPS on a temporary basis, as well as the creation of a merit-based, system-wide teacher evaluation system. The Governor did not veto these bills.

47. House Appropriations Committee Internal Report, *Implementation of Management Reform in the Baltimore City Public Schools-Chronology* (Baltimore: State of Maryland, 29 January 1997), (on file with author).

discovery in the litigation continued.

#### SETTLEMENT ATTEMPTS

In June 1996, Governor Glendening offered the City of Baltimore \$140 million in additional state aid over four years in exchange for an agreement to restructure BCPS management and drop the City complaint. This offer fell below the \$100 million per year sought by Mayor Schموke, and thus he rejected it. As to the management reforms, the Mayor called the Governor's suggestion "insulting and paternalistic."<sup>48</sup> Many state legislators were also critical of Glendening's offer, although they argued that the Governor's proposed changes in the management of BCPS were not drastic enough. Others in the legislature expressed such bitterness about the lawsuit that the prospect of any settlement gaining approval seemed in doubt.<sup>49</sup>

A month later, however, after a one-on-one, closed-door meeting, Governor Glendening and Mayor Schموke agreed to a "conceptual framework" to end the litigations. The Mayor and Governor would jointly select a new school board; in return, the State would provide \$182 million in additional funding to BCPS over five years. Mayor Schموke also agreed to a "collaboration" involving an independent arbiter who would review existing policies and make recommendations on how the additional money should be spent. While the Mayor did not agree to drop the lawsuit, he did agree to a one-year delay of the trial.<sup>50</sup> Both the State Board and certain legislators expressed reservations about this framework, especially as the agreement was not accompanied by consent decrees settling all the lawsuits. Delegate Howard P. Rawlings of Baltimore City, the influential Chairman of the House Appropriations Committee, sought and received State Board endorsement of proposed legislation that would address concerns regarding governance, accountability, personnel and procurement.

The following week, Mayor Schموke reported to the press that Governor Glendening had agreed to endorse legalizing slot machines at Maryland racetracks; proceeds from the machines

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48. Jean Thompson, "Schموke Says School Aid Offer Falls Short," *Baltimore Sun*, 21 June 1996, sec. 1A.

49. Jean Thompson and Thomas W. Waldron, "Proposal for City School Aid Detailed," *Baltimore Sun*, 20 June 1996, sec. 1A.

50. Jean Thompson and Thomas W. Waldron, "Deal Would Grant \$200 Million in School Aid," *Baltimore Sun*, 28 July 1996, sec. 1A.

would give Baltimore City another \$25 million per year for its schools.<sup>51</sup> Negative public reaction regarding the suggestion that slots pay for the settlement caused the deal to unravel. The Governor disputed the Mayor's recollection of their agreement and announced that he would veto any legislation introducing slots at Maryland racetracks.<sup>52</sup> Delegate Rawlings made public his proposed legislation, but Mayor Schموke continued to resist changes in the City Charter that would permanently alter his sole authority to appoint the school board, calling any such legislation a "takeover of [City] schools."<sup>53</sup> In October 1996, a public hearing was held for select House and Senate committees on Delegate Rawlings' proposed legislation restructuring the school system.<sup>54</sup> The litigation continued without settlement and *Bradford* plaintiffs' Motion for Partial Summary Judgment was heard.

#### REMEDIAL DECREE

After months of discovery, both the City and State Board admitted that students in Baltimore City were not receiving an "adequate education."<sup>55</sup> In response to the *Bradford* plaintiffs' Motion for Partial Summary Judgment, the Court found that, under the criteria established in the *Hornbeck* ruling, the students in the BCPS were not being provided with "an education that is adequate when measured by contemporary educational standards."<sup>56</sup> The cause of this inadequacy, however, remained in dispute. As the November 6 trial date approached, Judge Kaplan, the City Court trial judge, postponed the trial for six days and held a private meeting with the litigants in a final attempt to reach a settlement.

On November 12, the parties announced a settlement that resulted in a consent decree. The City agreed to a total restructuring of the BCPS in exchange for an additional \$230 million in state

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51. Thomas W. Waldron and William F. Zorzi, Jr., "On Slot Machines, a Tale of Levers and Leverage," *Baltimore Sun*, 4 Aug. 1996, sec. 1A.

52. Thomas W. Waldron, "Glendening Says No Slots as Long as He's Governor," *Baltimore Sun*, 13 Aug. 1997, sec. 1A.

53. Thomas W. Waldron, "Deal to Aid City Schools Unravels," *Baltimore Sun*, 7 Aug. 1996, sec. 1A.

54. H. R. 312. Senator Barbara A. Hoffman, Democrat, representing Baltimore City, sponsored S. B. 795.

55. See Memorandum in Support of [*Bradford*] Plaintiffs' Motion for Summary Judgment, 2-3, referring to numerous admissions in the record.

56. Order dated 16 Oct. 1996, 2.

education aid over the next five years.<sup>57</sup> The terms of the consent decree would be embodied in the so-called "City-State Partnership Legislation" to be signed by the Governor no later than May 1, 1997. If the proposed legislation was not passed by that date, the consent decree would be null and void and the trial would begin in mid-May.<sup>58</sup>

Under the terms of the consent decree, the General Assembly must appropriate \$30 million in fiscal year 1998 and \$50 million in each fiscal year 1999-2002. The state funding provided in the settlement is separate from and in addition to the established state aid pursuant to the current expense formula and other grants currently allocated to BCPS.<sup>59</sup> The agreement also provides for school construction funds of at least \$10 million annually for the next five years. If the additional funds are not appropriated in any of these subsequent years, the consent decree will terminate at the end of the last fiscal year in which additional funds were appropriated.<sup>60</sup>

In exchange, the City agreed to major changes in the structure of the Baltimore City school system. Prior to the litigation and settlement, the BCPS system was a department of the City's executive branch. The Mayor appointed the school board and the superintendent; non-certificated school personnel were considered employees under the city's civil service system, and procurement policies for the schools were, like those of any other city agency, subject to procedures imposed by the Mayor, City Council and Board of Estimates.<sup>61</sup>

The decree abolishes the City's Board of School

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57. *Bradford* Consent Decree para. 47. A similar consent decree was entered in *Vaughn G.*

58. *Bradford* Consent Decree paras. 4, 5. In the event the *Bradford* and *City* cases went to trial, the trial would commence jointly with Plaintiffs' Motion for Additional Remedial Measures in *Vaughn G.* It was expected that trial proceedings would be alternately held in the Baltimore City Circuit Court and the federal district court. Interview with Malissa Ruffner, Attorney for *Bradford* plaintiffs, 5 May 1997; Interview with Leslie Seid Margolis, Attorney for *Vaughn G.* plaintiffs, 28 Apr. 1997.

59. *Ibid.*, paras. 43-48. If any new source of state revenue generally dedicated to education becomes available during the term of the decree, BCPS must receive its designated share of such revenue without any reduction of the funds from the settlement. Baltimore City may not use the additional funding provided by the settlement to meet its maintenance of effort requirement.

60. The decree further provides for the release of FY 1997 funds as provided in that year's budget bill (\$12 million in additional state discretionary funds for reconstitution-eligible schools and teacher salary parity). Upon implementation and approval of the performance-based evaluation system, the Board may request payment of \$2 million withheld in FY 1997.

61. Balt. City Charter, Art. VII, § 62, Art. VI, VII, §§ 61-66. In Maryland's 23 other counties, the Governor appoints members of 11 county boards of education; 12 boards are elected by the respective county voters. Md.Code Ann.Educ. §§ 3-108, 3-114.

Commissioners. A new Board, established as a "City-State Partnership," will be held directly accountable for "improving the academic achievement of the Baltimore City school children as measured by the MSPP.<sup>62</sup> The nine voting members of the new Board will be appointed jointly by the Mayor and Governor from a list of candidates submitted to them by the State Board. These Board members are expected to meet specific qualifications, including expertise in one of a number of fields (such as education or business administration) and Baltimore City residency.<sup>63</sup>

The consent decree also outlines a new management structure for the school system. The position of superintendent is abolished, and the new Board, rather than the Mayor, will hire a Chief Executive Officer responsible for the overall administration of the BCPS. The CEO's continued employment is contingent upon improved academic performance by BCPS students and the "sound management" of the school system. The CEO, with Board approval, will select a Chief Academic Officer and a Chief Financial Officer. To ensure parental involvement, the decree establishes a Parent and Community Advisory Board.<sup>64</sup> The decree remains in effect through June 30, 2002, and the court retains continuing jurisdiction during the term of the decree to monitor and enforce compliance.<sup>65</sup>

A consultant must make an interim report on the progress of the reforms by April 30, 2000. The new Board and the State Board will jointly select the consultant and determine the scope of the review and evaluation. At a minimum, the report must include an assessment of the following: educational and management reforms, performance of students, compliance with the terms of the consent decree, utilization of additional funding and an assessment of the sufficiency of the additional funding provided by the State.<sup>66</sup>

Proposed City-State Partnership legislation incorporating the terms of the consent decree was drafted as part of the settlement

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62. *Bradford Consent Decree*, para. 8.

63. *Ibid.*, paras. 11-15.

64. *Ibid.*, paras. 21-25. The CEO will be a member of the Mayor's cabinet but will report directly to the new Board. Non-certificated employees, who were formerly city civil service employees, will become enrolled in the BCPS personnel system. Purchases for BCPS, which were previously made by the city's Department of Finance, will now be made directly by BCPS. *Id.*, paras. 35-38.

65. *Ibid.*, paras. 68-69.

66. *Ibid.*, paras. 40-42. The interim report must also include an assessment of compliance with orders in *Vaughn G.* A final comprehensive review and evaluation is due by 1 Dec. 2001.

negotiations and underwent various revisions. The final version, Senate Bill 795, appropriated the additional funding as agreed upon in the settlement and mandated the school board and management reorganization. One of the most significant changes to appear in the final bill concerned the sunset provision.<sup>67</sup> State legislators refused to agree to additional funding for the next five years if, after the fifth year, the City school system could revert to the status quo.<sup>68</sup> A provision was added which stated that after the final comprehensive review of the reforms was conducted, the new Board and the State Board of Education would propose to the General Assembly "any changes appropriate in the management structure and levels of funding of the BCPS." If no further action is taken by the General Assembly during the 2002 regular legislative session, then only the provision establishing the new Board, would remain in effect.<sup>69</sup>

#### REACTION TO THE SETTLEMENT

Preferring an imperfect remedy to the uncertainty of a trial, all parties to the lawsuits urged public acceptance of the settlement.<sup>70</sup> The Mayor suggested that the agreement provided an opportunity "to work together for the benefit of the children of Baltimore." The Governor noted his pleasure that "the needs of Baltimore's children were the priority as we worked together toward this partnership." According to the ACLU, relief for the children of Baltimore would begin immediately.<sup>71</sup>

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67. Paragraph 6 of the consent decree provides that if the legislation is enacted with any variance from the agreed upon terms, the parties may waive the variance in writing. If not waived in writing, any party may file a motion seeking a determination whether the variance affects substantive rights under the decree. After the legislation was signed by the Governor, all parties to the consolidated lawsuits entered into a Stipulation and Order agreeing that, for purposes of para. 6 above, no party contends that the legislation contains variances that affect the parties' substantive rights. Since the consent decree provides for funding to be appropriated each year for the next four fiscal years, the consent decree also allows parties to reserve their rights to challenge any future variances if the legislature revises or modifies the legislation in subsequent years. *Bradford Consent Decree*, para. 7.

68. William F. Zorzi, Jr., "House Committees OK Management Changes for Baltimore Schools," *Baltimore Sun*, 22 Mar. 1997, sec. 2B; Thomas W. Waldron and William F. Zorzi, Jr., "Votes Line Up for City School Aid," *Baltimore Sun*, 27 Mar. 1997, sec. 1A; William F. Zorzi, Jr., "Assembly Faces Jam of Issues on Last Day," *Baltimore Sun*, 7 April 1997, sec. 1A.

69. Chapter 105 of the Acts of 1977. The nine voting members of the new Board would continue to be jointly appointed by the Mayor and the Governor; however, the requirement that the list of candidates be submitted by the State Board would be deleted.

70. At the time of the settlement, the special education lawsuit against the City had been pending for 13 years. See n. 44, *supra*. If the settlement failed, the City risked an adverse ruling in federal court on *Vaughn G.* plaintiffs' request that BCPS be placed in receivership, due to its repeated violations of court orders.

71. Office of the Governor of the State of Maryland et al., News Release, "Framework Reached to Resolve Three Baltimore City Schools Suits," 12 Nov. 1996.

Reaction to the settlement in Baltimore City, however, was less enthusiastic. Many felt that the Mayor had given up control of the city's school system in exchange for an inadequate level of additional funding, a per-pupil increase estimated at only \$500 each year.<sup>72</sup> Some BCPS parents criticized the Mayor for reversing his position, as he had previously assured city school groups that he would not give the state control of the school system for any amount of money.<sup>73</sup> Mayor Schموke's political opponents mounted an eleventh-hour effort to convince the legislature to reject the proposed legislation.<sup>74</sup>

When the settlement was made public, the Baltimore Teachers' Union (BTU), feeling that their collective bargaining rights had been adversely affected, filed a Motion to Intervene in the lawsuits. Unions representing other school employees joined in the motion. The BTU had sought to be included in the settlement negotiations, but was assured by the City and State that the discussions would not involve union issues. Although the BTU believed that the financial settlement was insufficient, they made no attempt to overturn the consent decree. All parties agreed to negotiate with the unions; in return, the unions stayed the Motion to Intervene. The parties came to agreement on the majority of issues.<sup>75</sup> As to unresolved matters, all parties testified before the legislature, which ultimately made the final decision on the remaining union-related issues.

Many legislators also expressed dissatisfaction with the settlement. In fact, the 1997 session of the Maryland General Assembly was regarded by seasoned legislators as one of the most divisive in recent memory. Political opposition to the settlement fell along geographic rather than purely political lines. Many legislators argued that there was no money in the state budget to fund the settlement, especially since Governor Glendening had pledged to reduce income taxes. Democratic and Republican legislators alike

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72. Jackie Powder, "Coalition Calls for a Boycott of Md. Lottery," *Baltimore Sun*, 17 Nov. 1996, sec. 1B.

73. Telephone interview with Clarice Herbert, Co-Chair, Save Our Children Coalition, 8 Aug. 1997.

74. African-American political, business and religious leaders denounced the proposed legislation in a highly charged letter delivered to the legislature just days before the final vote. Thomas W. Waldron and William F. Zorzi, Jr., "Blacks Denounce Schools Package," *Baltimore Sun*, 4 Apr. 1997, sec. 1A. Political insiders simply regarded it as a political maneuver led by a future mayoral hopeful. William F. Zorzi, Jr., "Power and the City Schools Bill," *Baltimore Sun*, 8 Apr. 1997, sec. 2B.

75. Telephone interviews with Christine Neff, Attorney for BTU, 5 Aug. 1997; Sharon Blake, Director of Educational Issues for BTU, 5 Aug. 1997.

further argued that aid increases should not be limited to Baltimore City. Suburban legislators held out for aid to poor schoolchildren in their counties and refused to pass legislation allocating additional funds to BCPS unless they also received greater funding.<sup>76</sup>

The Governor deemed the counties' demands excessive and rejected them.<sup>77</sup> In order to achieve passage of the city school reform legislation, however, a compromise had to be reached.<sup>78</sup> Senate Bill 795, which was approved on the last day of the legislative session, included funds for all 23 counties totaling more than \$32 million in additional school aid for each year funds are appropriated to Baltimore City.<sup>79</sup> Legislators also approved a 10 percent income tax reduction, which will be phased in over the next five years.<sup>80</sup>

#### PUBLIC ENGAGEMENT

The Report of the Hutchinson Commission, which specifically identified the need for additional resources to educate children in poverty, as well as the inability of many jurisdictions to provide such resources under the present state funding formula, was completed less than one year prior to the filing of the *Bradford* complaint. Despite this relatively recent public analysis of school funding needs, there was no mechanism in place during the litigation and settlement negotiations to facilitate a statewide dialogue about

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76. Telephone interviews with Senator Paul Pinsky, Democrat, Prince George's County, 25 July 1997; and Senator Jean Rosser, Republican, Montgomery County, 28 July 1997; William F. Zorzi, Jr., "House Committees OK Management Changes for Baltimore Schools," *Baltimore Sun*, 22 Mar. 1997, sec. 2B; William F. Zorzi, Jr. and C. Fraser Smith, "School Reform Goes Down to Wire," *Baltimore Sun*, 5 Apr. 1997, sec. 1A.

77. William F. Zorzi, Jr., "House Committees OK Management Changes for Baltimore Schools," *Baltimore Sun*, 22 Mar. 1997, sec. 2B.

78. Although enough votes were cast to pass the legislation, many of the suburban legislators who led the fight for funding to all counties still did not vote in favor of the legislation. They argued that the additional aid provided by the Governor's budget was still insufficient and vowed to keep pushing for more state money in the next legislative session. Thomas W. Waldron, "Lawmakers Say the Quest for State Funds Isn't Over," *Baltimore Sun*, 9 Apr. 9, 1997, sec. 1A.

Three months after the close of the legislative session, the Governor and House Speaker jointly announced the appointment of a Task Force on "Education, Equity, Accountability, and Partnerships" to determine if inequities or 'gaps' exist in funding programs earmarked for Maryland students believed to be at-risk. The Task Force will also be asked to develop "greater accountability systems" for school systems and school leaders in meeting appropriate educational and fiscal standards. The 28-member Task Force will make a preliminary report by 15 December 1997.

79. Chapter 105 of the Acts of 1997.

80. Chapter 4 of the Acts of 1997.

the resources necessary to provide an "adequate education" to Baltimore City school children. Both the *Bradford* and City plaintiffs relied on the findings and recommendations of the Hutchinson Commission in their respective lawsuits, but neither party brought the issues forth for public engagement to garner support for a proposed remedy.<sup>81</sup> A group called the Maryland Education Coalition ("MEC") had taken steps over the years to advocate on behalf of all schoolchildren, particularly those living in poverty.<sup>82</sup> As a statewide organization, however, MEC's membership included representatives of suburban counties who opposed the City-State Partnership legislation. MEC, therefore, was not in a position to advocate directly on behalf of Baltimore City.

After the settlement was announced, the Governor obtained the support of the Maryland Business Roundtable for Education. In testimony before the House of Delegates, the organization urged passage of the proposed legislation. In hindsight, attorneys for *Bradford* plaintiffs and school advocacy organizations agree that much more could have been done to establish widespread support for the infusion of additional funds into BCPS. The reform legislation was repeatedly characterized as the "aid for accountability" school deal. There was no support for additional funds for BCPS absent the quid pro quo of management reform and joint City-State Partnership status.

#### CONCLUSION

The central issue in *Bradford*—the need for additional funding for a school system with such high concentrations of children living in poverty—was blurred by accusations from the legislature and elsewhere of fiscal and educational mismanagement within the City school system. The Baltimore City schools educational adequacy suits did not bring about any changes to the state's education finance system, found to be constitutional in *Hornbeck*, nor was any remedy or liability for a finding of an inadequate education determined. The amount of increased funding provided by the decree falls far short of the recommendations of the Hutchinson

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81. The ACLU attempted to keep the Baltimore community informed of the progress of the lawsuits by distributing periodic newsletters. Interview with Malissa Ruffner, Attorney for *Bradford* plaintiffs, 12 May 1997.

82. In discussions prior to the filing of the *Bradford* complaint, MEC urged the ACLU to include poor rural school districts as plaintiffs. Telephone interview with Tru Ginsburg, Board Member, MEC, 13 Aug. 1997.

Commission. Moreover, the amount represents only a slightly more equitable share of state funding for BCPS. Under the settlement, Baltimore City will receive approximately 20.3 percent of state aid to education in FY98, compared to 20 percent in FY97.<sup>83</sup>

In the end, the parties avoided a potentially costly and divisive trial and forged a settlement in which each side may claim some small victory. The implementation of management reforms has begun: the new school board has recently been appointed and the transition plan is being drafted with public comment from teachers, parents and advocacy groups. The extent to which the new school governance plan will create real accountability within BCPS and ensure better educational opportunities for Baltimore City's children, however, remains to be seen. The larger question of whether a negotiated settlement will prove superior to a court-ordered remedy also remains unanswered.

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83. Telephone conversation with John W. Rohrer, Principal Analyst, Department of Fiscal Services, Maryland General Assembly, 24 July 1997.