

IN THE COURT OF APPEALS OF MARYLAND

Nos. 31 & 56

September Term, 1996

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MONTGOMERY COUNTY, MARYLAND

v.

KEITH A. BRADFORD et al.

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MONTGOMERY COUNTY, MARYLAND

v.

BOARD OF SCHOOL COMMISSIONERS  
OF BALTIMORE CITY et al.

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Bell, C.J.,  
Eldridge  
Rodowsky  
Chasanow  
Karwacki  
Raker  
Murphy, Robert C.  
(retired, specially assigned),

JJ.

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Dissenting Opinion by Eldridge, J.,  
in which Raker, J., joins.

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Filed: April 4, 1997

Eldridge, J., dissenting.

I disagree with the majority's opinion and decision in two major respects.

First, the majority clearly errs in refusing to consider the consent decree entered in the underlying cases on November 26, 1996, and in taking the position that the decree is not before us. The majority opinion overlooks entirely the respondents' motion to dismiss Montgomery County's appeal on the ground that the consent decree has rendered the appeal moot. In order for a decree to render moot an earlier appeal from a denial of intervention, however, the decree must be within the trial court's jurisdiction. For the reasons discussed in Part I below, the consent decree in these cases is undoubtedly beyond the jurisdiction of the circuit court. It represents a foray into areas which, under Article 8 of the Maryland Declaration of Rights, are the province of other branches of government.<sup>1</sup>

Second, the denial of Montgomery County's motion to intervene is, under the circumstances here, contrary to reason and authority. The majority's view, that this litigation simply represents a local dispute between Baltimore City and the State,

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<sup>1</sup> Article 8 of the Declaration of Rights provides as follows:

**"Article 8. Separation of powers.**

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

with an impact largely confined to Baltimore City, is wholly devoid of reality. Considering the allegations in the complaints, the scope and effect of the declaratory judgment sought and obtained by the plaintiffs, the important public policy questions involved, the collusive aspects of the litigation, and the public interest and need for the constitutionality of the General Assembly's enactments to be defended, the motion to intervene by the largest political subdivision of the State should have been granted.

I.

As indicated above, all of the respondents have filed in this Court a motion to dismiss the consolidated appeals on the ground of mootness. The respondents argue that the "Consent Decree" signed by Judge Kaplan and entered on November 26, 1996, has rendered moot Montgomery County's appeal from the order denying intervention. A copy of the consent decree, along with an affidavit by an Assistant Attorney General attesting that the copy is true and accurate, were filed in this Court with the motion to dismiss.

Although not cited by the respondents, there are decisions by this Court holding that a pending appeal from an order denying intervention becomes moot when a decree is entered in the underlying litigation. *Weinberg v. Fanning*, 208 Md. 567, 572, 119 A.2d 383, 386-387 (1956); *Bowles v. Moller, Inc.*, 163 Md. 670, 684-685, 164 A. 665, 670 (1933). Nevertheless, as indicated in *Weinberg v.*

*Fanning, supra*, 208 Md. at 570, 119 A.2d at 385, in order to render moot the appeal from the denial of intervention, the trial court must have had "jurisdiction to pass the decree."

Consequently, the respondents' motion to dismiss has brought before this Court the consent decree entered on November 26, 1996. While we do not have before us all of the issues that might be raised in a direct appeal from the decree, we do have before us the question of the decree's fundamental validity. If the decree is invalid, it cannot render moot Montgomery County's appeal from the denial of intervention, and the respondents' motion to dismiss should be denied.

This Court has pointed out that, "[i]n light of the separation of powers provision of the Maryland Constitution, set forth in Article 8 of the Declaration of Rights, a court has no jurisdiction to perform a nonjudicial function," *Duffy v. Conaway*, 295 Md. 242, 254, 455 A.2d 955, 960-961 (1983). The decree entered in the underlying litigation on November 26, 1996, is replete with provisions that go far beyond the functions of the judiciary.

Thus, paragraph 8 of the November 26th decree provides as follows:

"8. The new Board of School Commissioners for Baltimore City ('Board') shall be established as a City-State partnership and shall be held directly accountable for improving the academic achievement of Baltimore City school children as measured by the Maryland School Performance Program ('MSPP'). The Board shall

not be deemed an agency of the State."

Paragraph 9 of the decree vests in the new Board "full control of all functions relating to" the Baltimore City Public Schools. Paragraphs 10 through 16 provide for the number of members of the new Board, the matter of compensation of members, the residency of members, the requirement that members "shall reflect the demographic composition of Baltimore City," and the qualifications of different groups of members. Paragraphs 17 through 20 of the decree authorize the appointment of the Board's members by the Mayor of Baltimore City and the Governor, set forth a method by which the appointments are to be made, delineate the terms of the members and the grounds for removal, provide for a chairperson, and define a quorum. Paragraphs 21 through 26 of the decree mandate that the Board "shall hire a Chief Executive Officer . . . who shall be a member of the Mayor's Cabinet," set forth requirements for the chief executive officer's "employment contract," create the position of "Chief Financial Officer," establish a "Parent and Community Advisory Board," and contain other detailed requirements concerning the management structure of the new Board of School Commissioners created by the decree. Paragraphs 27 and 28 require the new Board to adopt a "Transition Plan," and paragraphs 29 through 34 relate to a "Master Plan to increase student achievement" which must be adopted and implemented. Paragraphs 35 through 38 concern procurement and personnel, require that "all current

collective bargaining agreements shall expire on June 30, 1997," and provide for new collective bargaining agreements. Paragraphs 39 through 42 impose various duties upon the new Board.

The financial resources and funding for the new Board are provided for in paragraphs 43 through 54 of the decree. The circuit court ordered that "the State of Maryland shall provide" the Baltimore City Public Schools "with additional funds," which "shall be separate from established State funding . . . and other current State funds provided to" the Baltimore City Public Schools. The court also decreed that the "additional funds provided by the State as described in this Decree shall not be provided by reducing any other State funds provided to Baltimore City." These additional state funds "appropriated" by the circuit court amount to approximately \$250 million over five years, with procedures delineated in the decree for requesting more additional funds. These procedures include a provision in paragraph 53 for the appeal of certain circuit court rulings directly to the Court of Appeals.

The remaining paragraphs of the November 26th decree contain transition provisions and requirements concerning special education. The decree states that it shall be "in effect through June 30, 2002, unless the Court extends the term," and that "[t]he Court retains continuing jurisdiction during the term of this Decree to monitor and to enforce compliance with the terms of this Decree." Finally, the decree provides that it shall not be "fully effective" until the enactment of certain proposed legislation,

which is attached as an exhibit to the decree, and the appropriation of the additional funds by the State budget bill.

The above-summarized decree signed by Judge Kaplan represents an unprecedented excursion beyond the outer limits of judicial authority. The decree resembles a major executive branch reorganization statute. *Compare, e.g.,* Ch. 77 of the Acts 1969.

Unless the law creating the government agency is itself unconstitutional, a Maryland circuit court has utterly no power to abolish an existing government agency such as a local school board. A circuit court has no jurisdiction to create a new government agency, to determine whether it shall be a state or local agency, to provide for the appointments of its members by a mayor and the Governor, to mandate the qualifications of the members and the agency's structure, to delineate the agency's powers, duties and functions, or to do any of the other things set forth in the numbered paragraphs of the circuit court's November 26th decree.<sup>2</sup> To the best of my knowledge, none of the most sweeping court decrees involving local school systems, based on the Fourteenth Amendment and the principles set forth in *Brown v. Board of*

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<sup>2</sup> Maryland Code (1978, 1997 Repl. Vol.), §§ 2-205 and 2-206 of the Education Article, grants to the State Board of Education broad supervisory authority over public schools, including the authority to accredit schools and to order that a particular school cease operations (§ 2-206(h)), and the State Board may institute legal proceedings to enforce its authority (§ 2-205(d)). Nothing in these sections, however, authorizes the abolition of a local school board or the creation of a new school board with specified organization, powers and duties.

*Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), has ever gone so far as to abolish a local school board and create a new school board in its place, with a specified membership and structure.

Furthermore, I am unable to find in the budget and appropriations provisions of the Maryland Constitution, Article III, § 52, any role for the Circuit Court for Baltimore City. As this Court has admonished, "it must be remembered that public resources are not unlimited and there are many competing demands upon public funds." *State v. Frazier*, 298 Md. 422, 457, 470 A.2d 1269, 1287 (1984). The weighing of those competing demands is for the political branches of government.

This Court has taken the position that the separation of powers requirement in Article 8 of the Maryland Declaration of Rights prohibits conferring upon the judiciary jurisdiction to appoint the members of the Board of Visitors responsible for supervising a county jail (*Beasley v. Ridout*, 94 Md. 641, 657-660, 52 A. 61, 65-66 (1902)), to appoint school commissioners (*Beasley v. Ridout, supra*, 94 Md. at 659-660, 52 A. at 66), to review the accounts of certain county officials (*Robey v. Prince George's County*, 92 Md. 150, 159-165, 48 A. 48, 49-52 (1900)), to issue liquor or racetrack licenses (*Cromwell v. Jackson*, 188 Md. 8, 27-28, 52 A.2d 79, 86-89 (1947), *Close v. Southern Md. Agr. Asso.*, 134 Md. 629, 108 A. 209, 214-215 (1919)), to determine *de novo* whether

applicants should have permits to fill wetlands (*Dep't of Nat. Res. v. Linchester*, 274 Md. 211, 229, 334 A.2d 514, 525-526 (1975)), or to perform other functions appropriately within the province of the legislative or executive branches of government. See, e.g., *Reyes v. Prince George's County*, 281 Md. 279, 295-296, 380 A.2d 12, 21-22 (1977); *Planning Commissioner v. Randall*, 209 Md. 18, 25-27, 120 A.2d 195, 198-199 (1956); *Board of Supervisors v. Todd*, 97 Md. 247, 263-265, 54 A. 963, 965-966 (1903); *Baltimore City v. Bonaparte*, 93 Md. 156, 161-163, 48 A. 735, 736-737 (1901). As stated in *Planning Commission v. Randall*, *supra*, 209 Md. at 25, 120 A.2d at 199, "[t]he judicial department ha[s] no jurisdiction or right to interfere with the legislative process which was committed by the constitution . . . to the Legislature itself."

Under the principles set forth in the above-cited cases, there can be no doubt that the circuit court's November 26th decree was far in excess of the court's jurisdiction. Judge Kaplan, in signing and entering the decree, has purported to perform a multitude of nonjudicial functions. The circuit court has assumed a role which belongs exclusively to the legislative and executive branches of government.

Moreover, the fact that the parties to the underlying litigation consented to the decree cannot bring it within the jurisdiction of the circuit court. It is firmly settled that parties cannot confer jurisdiction upon a court by consent. See,

*e.g.*, *Sisk v. Friendship Packers*, 326 Md. 151, 158, 604 A.2d 69, 72 (1992); *Kawamura v. State*, 299 Md. 276, 282 n.4, 473 A.2d 438, 441 n. 4 (1984); *Anthony Plumbing of Md. v. Atty. Gen.*, 298 Md. 11, 16, 467 A.2d 504, 506 (1983); *Highfield Water Co. v. Wash. Co. San.*, 295 Md. 410, 414, 456 A.2d 371, 373 (1983).

If anything, a consent judgment involving a matter of public policy is more vulnerable than other judgments to a collateral challenge based upon the lack of authority underlying the judgment. *See, e.g.*, *Montgomery County v. Revere*, 341 Md. 366, 379-382, 671 A.2d 1, 7-9 (1996); *Green v. Sollenberger*, 338 Md. 118, 131, 656 A.2d 773, 779 (1995) (a consent adoption decree, not authorized by the adoption statutes, "is voidable and subject to collateral attack at any time").

Similarly, the conditional provisions in the November 26th decree do not cure the lack of jurisdiction. If a decree contains orders and directives beyond the subject matter jurisdiction of a court, the insertion of a clause making the decree contingent upon the passage of particular legislation or budget bill provisions does not change the fact that the orders and directives are beyond the court's jurisdiction. Otherwise, a judge could order anything he or she desired as long as the order was made conditional. For example, it is a common practice for the General Assembly to enact legislation contingent upon the enactment of other legislation or budget bill provisions. Nevertheless, the enactment of such

contingent legislation remains a legislative and not a judicial function. A court does not have co-equal authority to enact legislation contingent upon the passage of other legislation.

Furthermore, the conditional nature of the decree may disappear. If the conditions are met, or if the parties waive the need for particular conditions to be met (and such waiver is provided for in this decree), then the decree will purportedly be fully enforceable as any other type of equitable judgment. Parties could be held in contempt for violating parts of the decree.

Finally, like the factor of consent, the conditional nature of the decree makes it more vulnerable to a collateral challenge and not less vulnerable. The Court of Special Appeals recently held in *Southern Four v. Parker*, 81 Md. App. 85, 93, 566 A.2d 808, 812 (1989), with regard to conditional judgments:

"`It is a general rule that [a] judgment must not be conditioned on any contingency, and it has been held that a conditional judgment is wholly void.'"

Later, the appellate court reiterated that a "`conditional decree, one that does not operate in praesenti, but is to become operative on the occurrence of some condition, is void.'" *Southern Four v. Parker, supra*, 81 Md. App. at 94, 566 A.2d at 812, quoting with approval *Burger v. Burger*, 481 S.W.2d 632, 634 (Mo. App. 1972). The Court of Special Appeals explained this principle as follows (81 Md. App. at 94, 566 A.2d at 812, quoting with approval *Wallace*

v. *Hankins*, 541 S.W.2d 82, 84 (Mo. App. 1976)):

"`A conditional judgment or decree is one whose enforcement is dependent on the performance of future acts by a litigant and is to be annulled if default occurs. An alternative judgment or decree is for one thing or another but does not declare in a definitive manner which alternative will ultimately prevail. Conditional and alternative judgments and decrees are wholly void as they do not perform in praesenti and leave to speculation and conjecture what their final effect may be. In other words, under conditional or alternative judgments and decrees, the final resolution of the cause is consigned to the accomplishment vel non of future acts whose actual performance or nonperformance are matters dehors the record.'"`

This Court in *Duffy v. Conaway*, *supra*, 295 Md. at 261, 455 A.2d at 964, quoting from *Tanner v. McKeldin*, 202 Md. 569, 576-577, 97 A.2d 449, 452 (1953), stated "that a controversy, to be justiciable, must be `capable of final adjudication by the judgment or decree to be rendered.'" We went on to hold in *Duffy*, 295 Md. at 261-262, 455 A.2d at 965, that a Maryland court has no jurisdiction to render a "judgment" which is "`purely tentative'" and subject to implementing action by the General Assembly. Under the principles set forth in *Duffy*, the November 26th decree in the instant case would be invalid even if the circuit court had jurisdiction to abolish school boards, create new government agencies, etc.

For all of the foregoing reasons, most of the circuit

court's November 26th decree, including all of the numbered paragraphs, is beyond the subject matter jurisdiction of the circuit court and is void. The respondents have brought the issue of the decree's validity before this Court by their motion to dismiss. In addition, a judgment beyond the trial court's jurisdiction is subject to a collateral challenge at any time. Furthermore, this Court will sua sponte strike down a judgment beyond the trial court's jurisdiction. *Duffy v. Conaway, supra*, 295 Md. at 254, 455 A.2d at 961.

It should be emphasized that the parties' agreement to recommend to the General Assembly particular legislation and appropriations relating to the public school system is not my concern. From a public policy standpoint, the recommendations may well be desirable. That is a matter for the political branches of government and not the judiciary. Moreover, the parties are fully entitled to settle pending litigation. The present litigation could have been dismissed after the parties entered a settlement agreement. What is objectionable in this case, from a jurisprudential standpoint, is the role of the circuit court, the insertion into the court's decree of orders which are beyond the court's jurisdiction, and the court's usurpation of the Legislature's function. The various numbered paragraphs of the November 26, 1996, decree are void, and the people of Maryland are entitled to be so informed.

II.

A.

In upholding the denial of Montgomery County's motions to intervene in these two cases, the majority largely accepts many of the respondents' self-serving characterizations of this litigation, as well as some of the Court of Special Appeals' characterizations of the *Bradford* case, and the majority ignores the actual allegations and theories set forth in the plaintiffs' complaints. For purposes of intervention, the majority views this case as if it were ordinary litigation with its impact limited to Baltimore City.

Thus, the majority opinion states that the *Bradford* plaintiffs alleged that the State was constitutionally responsible for "educational deficiencies in the Baltimore public school system due to various economic, social, and educational factors *peculiar to Baltimore City*" (slip opinion at 1-2, emphasis added), that the *Bradford* complaint "focuses solely on the children in the Baltimore City public school system" (*id.* at 13), and that both lawsuits are "directed . . . *solely* to the constitutional adequacy of the education provided to children in the Baltimore City public schools" (*id.* at 30, emphasis in original).<sup>3</sup>

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<sup>3</sup> The state constitutional provision, which the plaintiffs in both cases contend has been violated, is Article VIII, § 1, of the Maryland Constitution, which states as follows:

**"Section 1. General Assembly to establish  
system of free public schools.**

(continued...)

In actuality, however, the *Bradford* complaint was brought on behalf of an alleged class of "at risk" students which the complaint defined as follows:

"`At-risk' students are those who experience circumstances of economic, social and/or educational disadvantage that substantially increase the likelihood that they will fail to obtain an adequate education in public school.

"8. Students who are `at risk' include those who:

- (a) live in poverty (usually defined for educational purposes by their eligibility for free or reduced price school meals);
- (b) attend schools with a high proportion of students living in poverty (more than thirty percent eligible for free or reduced price meals);
- (c) live with fewer than two parents;
- (d) have parents who did not themselves graduate from high school;
- (e) live with parents who are unemployed;
- (f) are homeless;
- (g) are parents or pregnant;
- (h) live under the threat of violence at home or at school;

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<sup>3</sup>(...continued)

"The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance."

- (i) have been retained in grade on at least one occasion;
- (j) score more than one year below grade level on standardized testing measures; or
- (k) have otherwise been determined to be in need of remedial education."

Although the *Bradford* plaintiffs limited their action to the "at risk" students in Baltimore City, they acknowledged that there were "at risk" students, under the above-quoted definition, throughout the State. The *Bradford* complaint went on to allege that the "State's constitutional duty to provide for an adequate education runs to every school-aged child throughout Maryland," and that this duty applies to "at risk schoolchildren in Baltimore City . . . [and] in other communities and school districts in Maryland." In contending that the constitutional inadequacy of the present public school system is shown by the failure of students to meet state prescribed performance standards, the *Bradford* complaint acknowledged that the students in "many" Maryland school districts fail to meet these standards.

The amended complaint in the *Baltimore City* case, which asserted that the adequacy of education should be measured by performance under standards adopted and applied by the State Board of Education, alleged that in 1990 "none of the Maryland school districts met satisfactory standards," and that, four years later, "only three school districts demonstrated educational adequacy."

Montgomery County was not one of those three districts. The amended complaint in the *Baltimore City* case contained more allegations detailing the inadequate performances of children throughout the State measured by various tests, concluding that "[c]ontemporary qualitative educational standards established by . . . the State Board still are not being met in *many districts*, including Baltimore City" (emphasis added), and that these failures "present concrete evidence that Defendants have failed to fulfill their duty under Article VIII to provide for the maintenance of a basic public school education." Later the *Baltimore City* amended complaint asserted that "[t]he qualitative standards of the MSPP are not being met in any school district in the State."<sup>4</sup> The basic theme of the *Baltimore City* case, set forth in paragraph 53 of the amended complaint, was as follows (emphasis added):

"Defendants, in violation of the education clause [Article VIII, § 1], have failed to appropriate increases in State education funding necessary *for all school districts*, particularly Baltimore City, to provide *all students* with a basic public school education."

The majority opinion also indicates that this litigation is not primarily about money. The majority opinion states that the *Bradford* plaintiffs "sought a court order requiring the State to work with the plaintiffs and Baltimore City to improve the City's

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<sup>4</sup> "MSPP" stands for "Maryland School Performance Program."

public schools so that they provide an adequate education" (slip opinion at 3), but the majority mentions nothing about the *Bradford* plaintiffs' request for funds. The majority also says that the *Bradford* complaint "did not directly attack the constitutionality of the system of public school funding which we upheld in *Hornbeck v. Somerset Co. Bd. of Educ.*, 295 Md. 597, 458 A.2d 758 (1983)." (Slip opinion at 4). The majority opinion points to the state defendants' contention that "`money' . . . is not the primary subject of the litigation." (*Id.* at 8). In describing the allegations of the amended complaint in the *Baltimore City* case, the majority merely says that the plaintiffs "sought by way of relief that the State provide a constitutionally adequate education." (*Id.* at 10).

Contrary to the view of the majority, an examination of the two complaints demonstrates that these cases are chiefly about money from the State.<sup>5</sup> The crux of the *Bradford* plaintiffs' case was set forth in paragraphs 41, 136, and 137 of their complaint as follows (emphasis added):

"41. The State of Maryland and the defendants have failed to provide schoolchildren in Baltimore City with an adequate education. In particular, the defendants have failed to provide resources sufficient and appropriate to enable BCPS [Baltimore City

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<sup>5</sup> Any reader of the newspapers circulated in Maryland over the past several months would also know that these cases are all about money.

Public Schools] to meet or make meaningful progress toward meeting contemporary education standards, especially with respect to at-risk students . . . .

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"136. Pursuant to its obligations under the Education Clause of the Maryland Constitution, the General Assembly has established a mechanism for funding elementary and secondary education from a combination of State and local appropriations.

"137. The principal cause of the inadequate education available to plaintiff schoolchildren, which results in the constitutional violation set forth above, is the lack of adequate resources. Under the constitution, *the State is legally responsible for ensuring that the combination of state and local funding is adequate to meet the needs of BCPS's school population, and the State's failure to assure such funding adequacy violates [its] constitutional duty.*"

The *Bradford* plaintiffs in the first paragraph of their complaint disclaimed any intent to relitigate the issues dealt with in *Hornbeck v. Somerset Co. Bd. of Educ.*, *supra*, 295 Md. 597, 458 A.2d 758, which concerned, *inter alia*, the differences in total per pupil funding among the various Maryland subdivisions (295 Md. at 613-615, 458 A.2d at 766-768), and in which this Court held that the Maryland Constitution "does not mandate uniformity in per pupil funding and expenditures among the State's school districts" (295 Md. at 631, 458 A.2d at 776). Nonetheless, the later paragraphs of the *Bradford* complaint specifically challenged the differences in per pupil funding between Baltimore City and other school dis-

tricts, complaining that Baltimore City

"cannot devote as great a share of its resources to regular instruction as do other school districts.

"134. In 1992-93, BCPS spent only \$2,437 per student on current instructional expenses (less adult education), the lowest of any school district in Maryland. The statewide average for current instructional expenses was \$2,926, nearly 20% higher than that in BCPS. As a result of BCPS's below-average spending, a classroom of 30 students in BCPS received approximately \$17,000 less to spend on current instructional needs than a similar size classroom in an average-spending school district in Maryland."

It is obvious from a reading of the entire *Bradford* complaint that the plaintiffs' request for a court order requiring the State to take steps to "provide an adequate education" meant that the State should provide more funds. As paragraph 137 of the complaint, quoted previously, makes clear, the requested "adequacy" in public education means "funding adequacy."

The amended complaint in the *Baltimore City* case made little effort to disguise that the plaintiffs' constitutional challenge was to the present system of public school funding, and that what the plaintiffs sought was more state money. In their amended complaint's "Preliminary Statement," the *Baltimore City* plaintiffs stated that they wanted

"injunctive relief . . . directing that Defendants provide `by taxation or otherwise' suf-

ficient assistance and resources to Baltimore City Public Schools ('BCPS') so that BCPS can make available to all school-aged children residing in Baltimore City the opportunity for a basic public school education."

Echoing the complaint in the *Hornbeck* case, the amended complaint in the *Baltimore City* case alleged in paragraph 34 that "Baltimore City students perform worse on the MSPP than those school districts that are able to spend more funds for education" and "that in school districts where more money is available, students perform better." Paragraph 34 continued:

"The performance of Baltimore City, particularly as compared to suburban districts which have greater fiscal capacities, shows that the financing scheme dependent upon local wealth and ad hoc categorical State aid does not provide school districts that have limited fiscal capacities with the means essential to provide a basic public school education."

The *Baltimore City* amended complaint repeatedly attacked the Maryland system of shared State and local fiscal responsibility for the public schools.<sup>6</sup>

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<sup>6</sup> For examples, see paragraphs 39, 40, 45, 53, 54 and 55 of the amended complaint, alleging as follows:

"39. In 1990, when Maryland was the eighth richest state in the United States, it fell to 42nd in the nation in its monetary contribution to public education. Overall, in fiscal year 1992, local government provided fifty-five (55%) percent of the funding for public

(continued...)

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<sup>6</sup>(...continued)

schools.

40. Insufficient State expenditures for public education require that local Boards of Education be fiscally dependent on financing from the local government through income and property tax revenues. . . .

\* \* \*

45. Under Maryland's public school financing plan, a school-aged child's opportunity to obtain adequate education, undeniably, is dependent upon the ability of the local political jurisdiction, in which he or she happens to live, to raise local taxes. To even be eligible to receive the State's `share' of basic current expenses, local jurisdictions must be able to levy taxes sufficient to provide their local share as determined by the foundation formula. § 5-202(b)(3). Local appropriations also must keep pace with enrollment and match or exceed spending in the prior year.

\* \* \*

53. Defendants, in violation of the education clause, have failed to appropriate increases in State education funding necessary for all school districts, particularly Baltimore City, to provide all students with a basic public school education.

54. Despite increasing evidence that the State's public school financing plan is insufficient to provide for the maintenance of adequate education that is effective in all districts, the Defendants consistently have resisted local efforts to obtain sufficient State

(continued...)

The specific constitutional actions or inactions by state officials and entities which were complained about in the *Baltimore City* case appeared to be the failures of Governors to include sufficient state funds for public schools in the annual budgets submitted to the General Assembly (paragraph 51 of the amended complaint) and the General Assembly's breach of its "duty to enact a 'Supplementary Appropriations Bill' or other legislation to ensure that a thorough and efficient public school system is provided for, even if the Governor's annual budget does not meet that constitutional mandate." (Paragraph 52).

In their "Prayer For Relief," the *Baltimore City* plaintiffs asked the court, *inter alia*, to "[o]rder Defendants to design an enhanced system of public school finance for implementation by the General Assembly which assures that all mandates for education as established by Defendants are properly funded" and to "[o]rder

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<sup>6</sup>(...continued)

funds for the maintenance of a basic public school education. The full funding estimated as needed at the local level for public education in the State Budget for fiscal years 1994, 1995, and 1996 was not appropriated.

55. Defendants have had ample time to provide for the maintenance of adequate education. Without sufficient State funds or assistance to provide its children with a basic public school education, Baltimore City is impeded in carrying out its statutory duty to establish and maintain a system of free public schools for its students."

Defendants to provide BCPS with . . . funding to the fullest extent necessary for BCPS to provide a basic public school education to school-aged children in BCPS as defined by contemporary qualitative educational standards." Consequently, the plaintiffs sought a new and "enhanced" system of public school funding in place of the existing system.

Article VIII, § 1, of the Maryland Constitution makes no reference to localities or subdivisions. The section imposes a duty upon the statewide legislative body to establish a thorough and efficient public school system "throughout the State . . . ." The plaintiffs in these cases requested a declaratory judgment that the General Assembly has violated Article VIII, § 1. The *Bradford* complaint described a group of "at risk" students, based on a list of social, personal, and economic factors, which has members in every Maryland subdivision. As reviewed above, the complaints in both cases alleged that the education being received by public school students throughout the State, and particularly "at risk" students, was constitutionally inadequate. The plaintiffs in each case contended that the existing state public school financing system and formulae, based on shared State and local fiscal responsibility, were constitutionally deficient. They wanted a new financing system.

These allegations of unconstitutionality, and the type of declaratory judgment which might have resulted, equally concern all

Maryland counties as well as Baltimore City. If, as alleged, the "at risk" students throughout the State are receiving a constitutionally inadequate education, this applies to Montgomery County as well as Baltimore City. If the failure to meet the standards of state performance programs demonstrates a constitutionally inadequate education, then, under the complaints' allegations, the education provided in all school districts is unconstitutional. If the State has failed to provide the "funding necessary for all school districts," as alleged, this failure relates to counties as well as to Baltimore City. The plaintiffs' challenge to the financing system and formulae applies throughout the State. When the parties' self-serving characterizations of the cases are overlooked, and when the actual allegations of the complaints are examined, it is obvious that these cases are not very different from *Hornbeck v. Somerset Co. Bd. of Educ.*, *supra*, in which Montgomery county was allowed to intervene.

Montgomery County clearly has "an interest relating to the property or transaction that is the subject of the action" within the meaning of Maryland Rule 2-214(a) relating to intervention of right. The two lawsuits are attacking the statewide public school system, provided under Article VIII, § 1, of the Maryland Constitution, with its principal feature being shared State and local government responsibility. Montgomery County is as much a part of that system as is Baltimore City. If a declaratory judgment

invalidating the present system and formulae for public school financing were rendered, Montgomery County obviously "might be disadvantaged by the disposition of the action," *Board of Trustees v. City of Baltimore*, 317 Md. 72, 89 n.19, 562 A.2d 720, 728 n.19 (1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1167, 107 L.Ed.2d 1069 (1990); *Citizens Coordinating Comm. v. TKU*, 276 Md. 705, 711, 351 A.2d 133, 137 (1976).<sup>7</sup>

The majority opinion holds that Montgomery County does not have a sufficient "interest" for intervention as of right because "[t]he `transaction' in these cases, i.e. the two lawsuits, is limited in scope to the plaintiffs' claim that the State has failed to provide the requisite resources and services to the Baltimore City public schoolchildren necessary to fulfill its constitutional obligation . . . ." (Slip opinion at 28). As previously demonstrated, however, this is simply not accurate. The allegations of unconstitutionality are not limited in scope to Baltimore City

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<sup>7</sup> The majority opinion may seem to intimate that the "might be disadvantaged" standard set forth in *Citizens Coordinating Comm. v. TKU*, is no longer applicable since that case was decided under a former rule, and that the Court of Special Appeals' opinion in *Hartford Ins. Co. v. Birdsong*, 69 Md. App. 615, 519 A.2d 219 (1987), decided under present Rule 2-214(a), disapproved of *TKU* and set forth a more stringent test for the interest of the applicant to be sufficient for intervention. I find nothing in the *Birdsong* opinion disapproving of this Court's earlier *TKU* opinion, or stating that the "might be disadvantaged" standard is no longer applicable. Moreover, the *Board of Trustees* case was an opinion of this Court, decided under the present rule, and decided subsequent to *Birdsong*. In *Board of Trustees*, we reaffirmed the "might be disadvantaged" standard.

public school students.<sup>8</sup>

It is true that the plaintiffs, while attacking the constitutionality of the public school system throughout the State, attempt to limit the relief sought to Baltimore City. Of course, a declaratory judgment need not be in the form requested by the plaintiffs. See *Harford Mutual v. Woodfin*, 344 Md. 399, 414-415, 687 A.2d 652, 659 (1997), and cases there cited. More importantly, I do not believe that plaintiffs, simply by limiting the scope of the relief requested, can prevent intervention by an applicant with a clear interest in the subject matter of the litigation. For example, could owners of wetlands in Anne Arundel County bring an action to declare the statewide wetlands statutes<sup>9</sup> unconstitutional, on grounds that would be applicable throughout the State, but, by merely asking that the phrase "as applied in Anne Arundel County" be appended to the declaratory judgment, succeed in keeping out of the lawsuit owners of wetlands in other counties with a different point of view? I do not believe that the principles of

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<sup>8</sup> The majority also indicates that, if the plaintiffs obtain the millions of dollars in additional state funds which they seek, any financial impact upon Montgomery County would be "speculative." I wonder where the majority believes that over 250 million dollars of additional state funds will come from. There is not, to the best of my knowledge, a money tree in Annapolis supplying the state treasury. A large amount of additional State money for one subdivision comes from the taxpayers in all subdivisions, and the taxpayers in Montgomery County supply more of that money than do the taxpayers in any other single subdivision.

<sup>9</sup> Maryland Code (1974, 1990 Repl. Vol.), §§ 9-101 through 9-310 of the Natural Resources Article.

intervention under Maryland law can be so easily manipulated.

Montgomery County had an "interest relating to the . . . transaction that is the subject of the action" within the meaning of Rule 2-214(a) and, therefore, was entitled to intervene as of right.<sup>10</sup>

B.

There is another factor in these cases, which the majority refuses to consider, but which clearly justifies intervention by an interested person or entity willing to defend the General Assembly's enactments relating to Maryland's public school system. The cases have, to a degree, become collusive, with no existing party defending the constitutionality of the public school system.

(1)

As the majority opinion points out, there was a "lack of opposition to the entry of the partial summary judgment" declaring that Article VIII, § 1, of the Maryland Constitution was violated with regard to Baltimore City public school children. Furthermore, the "Consent Decree" of November 26, 1996, incorporated by reference the "partial summary judgment holding," in the words of

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<sup>10</sup> Montgomery County alternatively sought permissive intervention under Rule 2-214(b), and this was also denied by the circuit court. "Denial of intervention, sought either as a matter of claimed right or by permission, is an appealable final order." *Maryland Life & Health Ins. v. Perrott*, 301 Md. 78, 87, 482 A.2d 9, 13 (1984), and cases there cited. Even if it be assumed, *arguendo*, that Montgomery County was not entitled to intervene as of right, I would hold that the circuit court abused its discretion in denying permissive intervention.

the decree,

"that Article VIII, Section 1, of the Maryland Constitution requires that the General Assembly provide all students in Maryland's public schools with an education that is adequate when measured by contemporary educational standards and that the public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards."

While the decree goes on to recite that there is some dispute concerning the causes of this constitutional violation, the partial summary judgment and the decree do constitute a declaratory judgment that the State has failed to provide some public school children with the minimum education constitutionally required. Since Article VIII, § 1, of the Maryland Constitution makes the General Assembly responsible for providing whatever may be required under that section, and since, under Article III, §§ 27-52, of the Constitution, the General Assembly fulfills its responsibilities by enacting statutes and budget bill provisions, the declaratory judgment in these cases necessarily means that at least some of the General Assembly's enactments concerning public education are constitutionally infirm.

The Maryland State Superintendent of Schools and the President of the Maryland State Board of Education, represented by the Attorney General of Maryland, expressly consented to the entire decree. Thus, the State defendants and the Attorney General have agreed with the plaintiffs' contention and the circuit court's

declaration that the public education system provided for by the General Assembly, and the General Assembly's enactments regarding public education, are to some extent unconstitutional. There is no longer any party in these cases totally defending the constitutionality of these legislative enactments. The litigation has, therefore, become collusive.

When a case involving the public interest is or may become collusive, with no party defending the validity of statutes or other governmental actions, and where those statutes or actions are not clearly invalid, it is important to allow intervention in order that the statutes or governmental actions receive a defense and that both sides of the constitutional dispute be presented to the judiciary. Intervention has been allowed in such cases even after the trial court's judgment, where the collusive aspect of the litigation simply took the form of the losing governmental parties declining to pursue appellate remedies. See *Coalition v. Annapolis Lodge*, 333 Md. 359, 368-371, 635 A.2d 412, 416-417 (1994). See also *Board of Trustees v. City of Baltimore*, *supra*, 317 Md. at 91-92, 562 A.2d at 729.

Judge J. Dudley Digges for this Court in *Reyes v. Prince George's County*, *supra*, 281 Md. at 283, 380 A.2d at 14, emphasized

"that the American system of adjudication from its inception has been grounded on the principle that adversary presentation of issues. . . plays a vital and essential role in attaining justice."

Moreover, an adversary presentation is "a safeguard essential to the integrity of the judicial process," *ibid.*, quoting *United States v. Johnson*, 319 U.S. 302, 305, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943). Later in its *Reyes* opinion, 281 Md. at 299, 380 A.2d at 23, the Court reiterated

"that it is essential to the effective functioning of the adjudicatory process that judgments, particularly those involving constitutional issues, be rendered only after the court has had the benefit of full presentation of opposing positions on the questions upon which it is to express an opinion."

The *Reyes* case involved a situation where statutes were challenged by a party whose costs and counsel fees were being paid by the government entity defending the statutes, and the Court was concerned that this degree of collusion might lead to an insufficient adversarial presentation of the issues. Consequently, the Court held that, when such situations arise in the future, the trial court should (281 Md. at 300, 380 A.2d at 24)

"name counsel, without recommendation or suggestion by any party to the action, to present in the same manner and to the same extent as though representing a truly adverse party, a position in opposition to that taken by the party who initiated and for whose benefit the action was instituted."

The instant cases involve a much greater degree of collusion

than was involved in *Reyes*. Unlike *Reyes*, in the present cases, from and after the partial summary judgment, there was no adversarial presentation of the constitutional issues. More importantly, the possible insufficiency of the adversarial presentation in *Reyes* related to the *attack* upon the statutes and governmental action. In the cases at bar, however, after a certain stage in the proceedings, there was no party *defending* the enactments of the Maryland General Assembly concerning the public schools. If, as held in *Reyes*, it is necessary to import counsel in order to challenge the validity of statutes, it would seem even more necessary to allow intervention by an interested and willing governmental party to defend the enactments of the General Assembly.

As Judge Marvin Smith emphasized for the Court in *State v. Burning Tree Club*, 301 Md. 9, 36, 481 A.2d 785, 799 (1984),

"[o]ne accused of crime, presumed under our system to be innocent, is entitled to an advocate of his position. A statute, with its presumption of constitutionality, has just as much right to an advocate of its validity."

In that case, this Court disallowed a declaratory judgment action by the Attorney General of Maryland challenging the validity of a state statute, even though there was another party in the case willing to defend the statute. In language which is directly applicable to the Attorney General's conduct in the present cases,

we explained (*State v. Burning Tree Club, supra*, 301 Md. at 36, 481 A.2d at 798-799):

"Who has the duty of conducting the defense of a challenged statute if this duty does not rest upon the Attorney General of Maryland? It is no answer to say, as the Attorney General claimed at oral argument, that in this instance Burning Tree is prepared to spiritedly defend the statute. If we were to permit the Attorney General to maintain the present action for this reason, an anomalous result would be reached in a future proceeding, again brought to declare a statute unconstitutional, where the defendant may elect not to defend either for economic or other reasons. In that situation, the matter would go by default and the statute might well be declared unconstitutional, even though if properly defended a contrary result might have been reached.

"The fact that the Attorney General believes this or any statute to be unconstitutional does not make it such."

The "future proceeding" envisioned by the Court in the above-quoted passage came about in these cases when the Attorney General's Office acquiesced in the declaration of unconstitutionality, and there was no remaining party to defend the General Assembly's enactments. Not only did the Attorney General's Office abandon its "duty of appearing in the courts as the defender of the validity of enactments of the General Assembly" (*Burning Tree Club*, 301 Md. at 37, 481 A.2d at 799), but the Attorney General has vigorously opposed the efforts by the largest political subdivision of the State to intervene and defend the enactments of the General

Assembly.

The language of a three-judge federal court in *Nash v. Blunt*, 140 F.R.D. 400, 403 (W.D. Mo. 1992), *aff'd*, 507 U.S. 1015, 113 S.Ct. 1809, 123 L.Ed.2d 441 (1993), in allowing intervention on the same side as state defendants in a case with political overtones, is pertinent here:

"In addition to being necessary as a check on the possible intrusion of partisan interests into these legal matters, the grants of intervention were necessary to insure this court's jurisdiction. In arriving at the proposed settlement, the parties necessarily agreed on a wide variety of factual and legal issues; for instance, the parties agreed that the proposed settlement does not violate the Constitution or the Voting Rights Act and that the court's adoption of the settlement was the best solution to this entire lawsuit. This court was (and, to some extent, is still) concerned that the parties might actually agree on many of the central issues involved in this case, thereby depriving the court of 'opposing parties representing adverse interests' as required by Article III. *Financial Guar. Ins. v. City of Fayetteville*, 943 F.2d 925, 929 (8th Cir. 1991). By allowing the intervenors to participate in this case, we have insured that opposing viewpoints will continue to be presented to the court.<sup>3</sup>

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<sup>3</sup> Even if the parties' agreement on certain issues did not implicate Article III concerns, we would still grant the motions to intervene because the intervenors' presence will aid the court in resolving the issues presented in this case."

Another federal court, after reviewing numerous cases, made a similar point (*Herdman v. Town of Angelica*, 163 F.R.D. 180, 190

(W.D.N.Y. 1995)):

"The cases cited above indicate that in considering a motion to intervene as of right on the side of a government entity in an action in which the government entity is not suing as *parens patriae*, but rather is defending the legality of its actions or the validity of its laws or regulations, courts should examine both (1) whether the government entity has demonstrated the motivation to litigate vigorously and to present all colorable contentions, and (2) the capacity of that entity to defend its own interests and those of the prospective intervenor."

*See also Hopwood v. State of Texas*, 21 F.3d 603, 606 (5th Cir. 1994), *cert. denied*, \_\_\_ U.S. \_\_\_, 116 S.Ct. 2580, 135 L.Ed.2d 1094 (1996) ("The proposed intervenors have not demonstrated that the State will not strongly defend its affirmative action program").

I do not mean to suggest that, in ordinary litigation, whenever a party acquiesces in a partial summary judgment in favor of his opponent, or enters into a consent judgment, the case has become collusive and intervention by a third party is warranted. Obviously this is not so. Parties should be encouraged to resolve their differences by reaching agreements. Nevertheless, when an action is brought to declare unconstitutional the enactments of the General Assembly, when those statutes are not obviously invalid, and when at some point during the litigation there is no party defending the legislative enactments, then, under the principles set forth in the above-cited cases, the litigation has become

collusive and intervention is clearly in order.

(2)

The Attorney General's position in this litigation, and the refusal by the circuit court and this Court to allow intervention for the purpose of defending the Legislature's enactments, are particularly puzzling when one considers the nature of the plaintiffs' constitutional challenge and the prior decisions of this Court. The existing "System of Free Public Schools"<sup>11</sup> which has been provided by the General Assembly, involving shared State and local responsibility, involving comprehensive statutory provisions relating to all aspects of education, and involving large appropriations of taxpayers' dollars, is not, as applied to "at risk" students, obviously invalid or clearly in violation of public policy embodied in constitutional provisions. If it were, perhaps a plausible argument could be made to justify the position of the circuit court and the role of the Attorney General. *Cf. Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959, 962 (4th Cir. 1963), *cert. denied*, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964) (federal government attorneys, "unusually enough," refused to defend the validity of a racial "separate-but-equal" provision in a federal statute, although another party in the case defended the constitutionality of the provision).

Instead of the legislative enactments under Article VIII,

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<sup>11</sup> Article VIII, § 1, of the Maryland Constitution.

§ 1, being clearly invalid, it is the plaintiffs' constitutional theory which seems questionable in light of *Hornbeck v. Somerset Co. Bd. of Educ.*, *supra*, 295 Md. 597, 458 A.2d 758. As discussed earlier, the plaintiffs in both cases below alleged that the "at risk" Baltimore City public school students were receiving a constitutionally inadequate education, and that this inadequacy was primarily shown by the students' scores on so-called "MSPP" and "MSPAP" tests.<sup>12</sup> According to the *Bradford* plaintiffs, this inadequacy primarily results from a lack of sufficient funding, "and the State's failure to assure such funding adequacy violates [its] constitutional duty." Similarly, the amended complaint in the *Baltimore City* case alleged that the "[d]efendants, in violation of the education clause [Article VIII, § 1], have failed to appropriate increases in State education funding necessary for all school districts, particularly Baltimore City, to provide all students with a basic public school education." In fact, as poin-

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<sup>12</sup> As previously noted, "MSPP" stands for "Maryland School Performance Program." "MSPAP" stands for "Maryland School Performance Assessment Program."

The complaint in the *Bradford* case also alleged that the inadequacy was shown by the students' high rate of being "unlawfully absent from school," the number who do not complete high school, the number who are not qualified "for admission to the University of Maryland system," the difficulty in "attract[ing] and retain[ing] qualified teachers and professional staff," alleged insufficient "quantities of 'good quality' instructional materials and supplies," the alleged inadequate condition of the school buildings, and the alleged high "rate at which students enter, withdraw from, or transfer between schools."

ted out in Part II A of this opinion, the amended complaint in the *Baltimore City* case, read as a whole, appeared to be an attack upon the basic system of shared State and local fiscal responsibility for the schools.

Consequently, the complaints in both cases proceeded upon the primary theory that low test scores and other alleged deficiencies in students' performance and conduct, together with the State's system of public school funding, constituted a sufficient basis for the circuit court to determine that the education provided was constitutionally inadequate in violation of Article VIII, § 1, of the Maryland Constitution, and to afford appropriate relief which was additional state funding.

This Court in *Hornbeck v. Somerset Co. Bd. of Educ.*, *supra*, 295 Md. at 620-632, 458 A.2d at 770-777, however, reviewed the history and meaning of Article VIII, § 1, and concluded as follows (295 Md. at 632, 458 A.2d at 776):

"The development of the statewide system under § 1 is a matter for legislative determination; at most, the legislature is commanded by § 1 to establish such a system, effective in all school districts, as will provide the State's youth with a basic public school education."

Chief Judge Murphy's opinion for the Court in *Hornbeck*, 295 Md. at 624, 458 A.2d at 772, pointed out that the framers of Article VIII, § 1, in the Constitutional Convention of 1867, rejected any constitutional requirement of a "detailed system" of public

education, and decided "that the constitution should not be encumbered with the details"; and that the "best plan was to leave the details . . . to the legislature." The *Hornbeck* opinion stated that "[t]he central theme emerging from the debates [at the 1867 Constitutional Convention] was . . . to permit the legislature to adopt any system . . . and to implement it by statute." 295 Md. at 626, 458 A.2d at 773. The history of Article VIII, § 1, set forth in *Hornbeck* is replete with the concept that "the legislature be left free to adopt the system it deemed best," that the Constitution "reserv[ed] to the Legislature full authority to provide for a system of education in each county and the city of Baltimore," that the amount of funds necessary "is properly confided to the Legislature," and that the Constitution does not prescribe a "system of public schools" which is "perfect[]." 295 Md. at 627, 458 A.2d at 774. The Court in *Hornbeck* made it clear that Article VIII, § 1, authorized "the principle of shared responsibility between State and local governments for public school education," 295 Md. at 630, 458 A.2d at 775.

It appears somewhat difficult to reconcile the plaintiffs' theory and the circuit court's declaratory judgment with the *Hornbeck* opinion and the constitutional history therein reviewed. *Hornbeck* and the history of Article VIII, § 1, indicate that it is for the General Assembly, and not the circuit court, to determine the nature of the public school system and the method of funding.

Furthermore, it seems doubtful that the framers of Article VIII, § 1, contemplated that students' scores on particular tests would be the standard for judicially measuring the General Assembly's compliance with its constitutional responsibility.

There is an additional aspect of the plaintiffs' theory which would have seemed to reinforce the view that ultimate judicial relief might be difficult to obtain and that their complaints should have been directed to the political branches of the Government. As discussed earlier, the plaintiffs complained on behalf of a "class" of "at risk" children who are disadvantaged chiefly because they "live in poverty," "live with fewer than two parents," have parents who did not graduate from high school, "live with parents who are unemployed," "are homeless," "are parents or pregnant," or live under threats of violence. The plaintiffs' argument was that such children, because of these disadvantages not caused by the school system, "require greater or different resources and services than others to receive an adequate education from the public schools." Although it is certainly desirable, from a social standpoint, for government to take steps to rectify the results of poverty, unemployment, etc., as a general rule government is not *constitutionally* responsible for deprivations not caused by government action. See, e.g., *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 461, 102 L.Ed.2d 469, 484 (1988); *Blum v. Yaretsky*, 457 U.S. 991, 1002-

1003, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534, 545 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-840, 102 S.Ct. 2764, 2769-2771, 73 L.Ed.2d 418, 425-427 (1982); *Waters v. State*, 320 Md. 52, 57-59, 575 A.2d 1244, 1246-1247, *cert. denied*, 498 U.S. 989, 111 S.Ct. 529, 112 L.Ed.2d 539 (1990); *State v. Burning Tree Club, Inc.*, 315 Md. 254, 293-294, 554 A.2d 366, 386, *cert. denied*, 493 U.S. 816, 110 S.Ct. 66, 107 L.Ed.2d 33 (1989); *Riger v. L&B Ltd. Partnership*, 278 Md. 281, 288-289, 363 A.2d 481, 485-486 (1976).

Of course, the State's obligation under Article VIII, § 1, of the Maryland Constitution to provide a free public education, fully extends to "at risk" students, and remedial measures are obviously called for. Nevertheless, the nature of the remedial measures, the amount of funding, etc., involves a balancing of educational, political, social, and fiscal considerations which is peculiarly within the province and expertise of the political branches of government.

By pointing to apparent difficulties in the plaintiffs' legal theories and in their requests for judicial relief, I am not suggesting that their lawsuits were frivolous, or that the *Hornbeck* opinion cannot be reexamined, or that *Hornbeck* may not be distinguishable in light of evidence that might be adduced at a trial, or that the Maryland system of public school financing, with its significant reliance on local funding ability, is absolutely immune from judicial challenge. I do suggest that, in light of the

apparent uphill legal battle that was facing the plaintiffs, the position of the Attorney General and the State defendants, as well as the declaratory judgment of unconstitutionality without any trial, is extremely surprising and highly unusual. A situation is presented which clearly calls for intervention by a truly adverse party.

(3)

In refusing to consider the State defendants' and Attorney General's apparent acquiescence in the plaintiffs' questionable legal position, and their consent to a declaratory judgment that Article VIII, § 1, has been violated, the majority opinion seems to hold that "subsequent events" have no relevance to the matter of intervention in these cases. The majority again myopically views the present cases as if they constituted ordinary local lawsuits. Nevertheless, in major public interest cases involving challenges to the validity of statutes or other governmental action, this Court, in reviewing the matter of intervention, has considered "subsequent events."

Thus, in *Board of Trustees v. City of Baltimore, supra*, 317 Md. at 88-92, 562 A.2d at 727-729, the Board of Trustees of Baltimore City's employee pension systems challenged the validity of city ordinances requiring that the pension systems divest their holdings in corporations doing business in South Africa. Prior to trial, four pension fund beneficiaries moved to intervene on the

side of the Board, and the Circuit Court for Baltimore City denied the motion for intervention. In holding that the circuit court erred, this Court pointed to the possibility that the Board, as a city agency, might not fully contest the position of Baltimore City. In this connection we noted the event, *subsequent* to the circuit court's denial of intervention, "that, during Baltimore's last mayoral election campaign, one of the issues between the candidates concerned the propriety of permitting the Trustees to prosecute an appeal in the present case." 317 Md. at 91, 562 A.2d at 729. Moreover, in our opinion upholding the right of the beneficiaries to intervene, we pointed to the *subsequent* possibility "that the Trustees might not ask the United States Supreme Court to review an unfavorable ruling in this Court," *ibid.* See the discussion in *Coalition v. Annapolis Lodge, supra*, 333 Md. at 369-371, 635 A.2d at 416-417.<sup>13</sup> See also *Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471, 1478 (11th Cir. 1993); *Nash v. Blunt, supra*, 140 F.R.D. at 402-403; *Palmer v. Nelson*, 160 F.R.D. 118, 122

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<sup>13</sup> It should be noted that, at the time the circuit court denied intervention, there were indications of the possibility that the litigation might become collusive. The State defendants, represented by the Attorney General, vigorously opposed Montgomery County's motions to intervene on the side of the State defendants and to support the validity of the General Assembly's enactments. This opposition was unusual; ordinarily parties in the position of the State defendants would have gladly welcomed the assistance of Montgomery County and the very able attorneys representing the County. Moreover, the State defendants, in responding to the motions for intervention, seem to have adopted much of the plaintiffs' theory regarding the nature of the cases.

(D. Neb. 1994) ("intervention necessarily focuses upon potential *future harm* to the non-party's interest in the subject matter of the pending litigation") (emphasis in original).

III.

The present cases are ones in which the public interest and the integrity of the judicial process require intervention. There is no existing party either defending the constitutionality of the public school system provided by the General Assembly under Article VIII of the Maryland Constitution, or challenging the circuit court's jurisdiction to abolish a government agency and create a new one with specified organization, powers and duties, or challenging the court's decree that 250 million additional dollars be provided for the Baltimore City public school system. The position of the State defendants and the nature of the circuit court's decree are so unusual that one might reasonably wonder whether the parties and the court have incorporated a particular political agenda into the "Consent Decree," and are using the judicial process and the decree simply as leverage to attain their political goals from the General Assembly.<sup>14</sup> In any event, if the

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<sup>14</sup> References in newspaper articles and editorials to pending proposed legislation in the General Assembly, relating to Baltimore City schools, as having the purpose "to enact the terms of a court consent decree" or being "court-approved" have become legion during the past several months. See, e.g., *The Sun*, March 27, 1997, at 12A, 22A. Furthermore, the view has apparently been expressed to the General Assembly that the language of the pending legislation cannot deviate "from the consent decree" unless the deviation is  
(continued...)

Circuit Court for Baltimore City is going to assume the role of a super legislature for Maryland public education, at least the largest Maryland political subdivision should be represented in that legislature.

Judge Raker has authorized me to state that she concurs with the views expressed herein.

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<sup>14</sup>(...continued)  
"agreed to by all parties" to this litigation. See *The Sun*, March 28, 1997, at 10B.