

TABLE OF CONTENTS

PRELIMINARY STATEMENT 3

STATEMENT OF FACTS 6

 I. The School Reform Act 6

 II. The District’s Unequal Funding To DCPS And D.C. Charter Schools 9

 A. Funding Through Other Agency Budgets..... 10

 1. Facilities Maintenance and Repair and Facilities-Related Services 11

 2. Teacher Retirement Account Contributions 13

 B. Supplemental Funding Directly to DCPS 14

 C. Enrollment Calculations..... 15

 III. Charter School Funding Litigation 17

LEGAL STANDARD..... 18

ARGUMENT 19

 I. Defendants Violate The School Reform Act’s Uniform Funding Requirement By Funding DCPS’s Operating Expenses Outside The UPSFF 19

 A. The School Reform Act Requires Defendants to Fund All Operating Expenses Exclusively Through The Uniform Per Student Funding Formula. 19

 B. Defendants Have Funded DCPS’s Operating Expenses Outside the UPSFF 24

 1. Funding DCPS Operating Expenses Through Other Agency Budgets..... 24

 2. Providing Additional Operating Funding To DCPS Outside the UPSFF..... 27

 II. Defendants Violate The School Reform Act’s Uniform Funding Requirement By Using Different Methodologies To Fund DCPS And D.C. Charter Schools 28

 III. The School Reform Act’s Uniform Funding Provisions Are Mandatory And Provide No Discretion For Defendants To Deviate From Them 30

 IV. Congress Has Not Approved Or Acquiesced In Defendants’ Violations Of The School Reform Act’s Uniform Funding Requirement..... 34

 A. Congress’s Approval of the District’s Budgets Does Not Constitute Approval Of Unequal Funding Practices That Violate the School Reform Act 34

 B. Congress’s Silence During The 30-day Review Period Does Not Constitute Approval of District Legislation That Violates The School Reform Act. 37

CONCLUSION..... 39

PRELIMINARY STATEMENT

In an effort to address a “dire situation” in D.C. public schools [Mem Op. at 21], Congress passed the District of Columbia School Reform Act of 1995. *See* Pub. L. No. 104-134, 110 Stat. 1321, 107–56 (1996) (the “School Reform Act”). At its core, the School Reform Act created public charter schools for the District of Columbia (“D.C. Charter Schools”) and, most significantly here, required Defendants to uniformly fund the operating expenses of those schools and traditional D.C. public schools (“DCPS”), so that similarly-situated school children in the District would receive the same level of funding for their education regardless of whether they chose to attend DCPS or a D.C. Charter School. As the Court has held, the establishment of charter schools, and Defendants’ obligation to fund them uniformly, are not “optional” – they are critical “structures” set up by Congress “to try to solve the District’s public education crisis.” [Mem. Op. at 21].

The School Reform Act’s uniform funding requirements are clear and unambiguous. Defendants are obligated to establish a formula to calculate the amount of the annual payment that will be made to DCPS and each D.C. Charter School to cover their “operating expenses.” Pub. L. No. 104-134, § 2401(b)(1)(A)–(B), 110 Stat. at 136–37. The amount of the annual payment “shall be calculated by multiplying a uniform dollar amount used in the formula” by the number of students enrolled at DCPS and the number of students enrolled at each D.C. Charter School. *Id.* § 2401(b)(1)(B)(2), 110 Stat. at 137. And once the annual payments have been calculated, the Mayor “shall make annual payments from the general fund of the District of Columbia in accordance with the formula.” *Id.* § 2401(a), 110 Stat. at 136. The School Reform Act thus requires Defendants to enact and adhere to a uniform funding formula to serve as the

exclusive mechanism for funding operating expenses, on a per-student basis, for DCPS and D.C. Charter Schools. As Congress made clear:

[T]he funding formula and annual payments derived from per pupil allocations *to both public charter schools and public schools . . . must include the total costs of . . . operations* of the Board of Education itself, all central administration and central office costs, including those applicable to the Superintendent of Schools, all facilities operating costs, including utilities, all local education agency evaluation, assessment, and monitoring costs, and any other direct or indirect costs normally incurred by, or allocated to, schools under the control of the Board of Education and the overall public school system.

H.R. Rep. No. 104-689, at 50 (1996) (emphasis added).

Despite the School Reform Act's mandatory uniform funding requirements, Defendants have funneled hundreds of millions of dollars in additional operating expense funding to DCPS without providing equivalent funding to D.C. Charter Schools. In particular, Defendants have provided more than \$30 million each year directly to the Department of General Services ("DGS") for services DGS provides to DCPS, with no equivalent funding provided to D.C. Charter Schools – resulting in approximately \$184.7 million in additional operating expense funding for DCPS, outside the formula, from FY 2012 through FY 2016. *See infra* at 11-13. In the same period, Defendants also have provided the Teachers' Retirement System fund with more than \$80 million in separate budget appropriations to cover DCPS's teacher retirement contributions – again outside the formula, with no corresponding appropriation made to fund teacher pensions for D.C. Charter Schools. *See infra* at 13-14. And Defendants have provided additional operating expense funding directly to DCPS, through supplemental appropriations bills and other means, when DCPS's operating expenses have exceeded its annual payment under the formula. *See infra* at 14-15.

Defendants also have violated the School Reform Act's uniform funding requirements by using different methodologies, and therefore different formulas, to calculate the annual operating

expense payments for DCPS and D.C. Charter Schools. *See infra* at 15-17. The School Reform Act requires that both DCPS and D.C. Charter Schools receive an annual operating expense payment based on actual student enrollment. § 2401(b)(3), 110 Stat. at 137. Although the annual operating expense payment for both DCPS and D.C. Public Charter Schools is based on *projected* enrollment when Defendants prepare the budget each year, Defendants subsequently adjust the payments for D.C. Charter Schools so that it is based, ultimately, on actual student enrollment. D.C. Code § 28-2906.02. Specifically, D.C. Charter Schools have subsequent payments reduced if, based on an audit conducted each October, actual enrollment is lower than projected enrollment. *Id.* No adjustment is made to the annual payment to DCPS. DCPS keeps its entire payment based on projected enrollment, even if the October audit finds that it was based on inflated projections. *See* D.C. Code § 2906(a). Defendants, therefore, base the annual operating expense payments for D.C. Charter Schools on *actual* enrollment, but base DCPS's annual payment on *projected* enrollment. Defendants' use of different formulas for calculating the annual payments to DCPS and D.C. Charter Schools has resulted in significant disparities in per-pupil funding, as demonstrated below. *Infra* at 15-17.

The effect of these unlawful funding practices on D.C. Charter Schools cannot be overstated. In FY 2014 alone, DCPS received more than \$100 million in additional funding. SUF ¶¶ 55-56, 69, 81-83; 110-111. This Court should not permit this conduct to continue. Plaintiffs, therefore, respectfully request that the Court (i) declare that the School Reform Act requires Defendant to fund all operating expense for DCPS and D.C. Charter Schools through a uniform per-student funding formula and to use the same formula when calculating the annual payment for DCPS and D.C. Charter Schools, and (ii) permanently enjoin Defendants from engaging in any funding practices described below that violate the School Reform Act.

STATEMENT OF FACTS

I. THE SCHOOL REFORM ACT

In April 1996, the United States Congress passed the District of Columbia School Reform Act of 1995 (“School Reform Act”), which President Clinton signed into law on April 26, 1996, as a comprehensive response to a public education system in crisis. *See* Pub. L. No. 104-134, 110 Stat. 1321, 107–56 (1996) (codified as amended at D.C. Code §§ 38-1800.01 to 1809.01). Passage of the School Reform Act “culminate[d] a year of debate, discussion, and negotiation from the local school level to the Congress regarding the amount, shape and pace of education reform necessary in the District of Columbia.” H.R. Rep. No. 104-455, at 141 (1996) (Conf. Rep.). A summary of the key events that preceded the enactment of the School Reform Act is in our Statement of Material Undisputed Facts (“SUF”) at ¶¶ 1-12.

In response to the substantial concerns identified by Congress in its investigation of public schools and public school funding in the District, *id.*, Congress sought through the School Reform Act to “creat[e] the local structures” that would “ensur[e] greater educational opportunity for D.C. children.” *See* H.R. Rep. No. 104-455, at 141-42; *see also* 141 Cong. Rec. H11-704, H11720 (daily ed. Nov. 2, 1995) (stating that the School Reform Act was “designed to transform the current education system into one of the best in the world”). Most relevant here, Congress authorized the establishment of public charter schools. *See* § 2201 *et seq.*, 110 Stat. at 115. Congress required that enrollment at D.C. Charter Schools, like traditional public schools, be open to all D.C. children regardless of color, creed, or ability to pay. § 2206(a)–(b), 110 Stat. at 123. Congress further required that public charter schools be funded by the public, § 2401, 110 Stat. at 136, and be accountable to the public for providing students with a quality education,

see id. § 2204(c)(11), 110 Stat. at 121. Accordingly, D.C. Charter Schools “retain [the] essential elements” of public education. H.R. Rep. No. 104-455, at 143.

Congress was concerned, however, about the possibility of “a two-tiered system of public schools.” 141 Cong. Rec. H11704, H11721 (daily ed. Nov. 2, 1995). To “ensure that [such a system] would not result,” *id.*, Congress mandated a uniform funding mechanism that would cover funding for both DCPS and D.C. Charter Schools. In particular, the School Reform Act expressly requires that:

- the Mayor and Council “shall establish . . . a formula to determine the amount of . . . the annual payment to the Board of Education for the operating expenses of the District of Columbia public schools” and “[t]he annual payment to each public charter school for the operating expenses of each charter school,” § 2401(b)(1)(A)–(B), 110 Stat. at 136–37;
- the amount of the annual payments “shall be calculated by multiplying a uniform dollar amount used in the formula” by the number of students enrolled at traditional public schools and the number of students enrolled at each D.C. Charter School, § 2401(b)(1)(B)(2), 110 Stat. at 137; and
- the Mayor “shall make annual payments from the general fund of the District of Columbia in accordance with the formula,” § 2401(a), 110 Stat. at 136.

The School Reform Act thus requires that the Mayor “shall make annual payments from the general fund” to supply “the operating expenses” of both DCPS and D.C. Charter Schools according to calculations “determine[d]” by a formula that multiplies a “uniform dollar amount” by the “number of students . . . that are enrolled at each” DCPS and D.C. Charter School.

§ 2401, 110 Stat. at 136–37. In a House Report describing the contents of the funding formula, Congress clearly expressed its intent that this funding mechanism be comprehensive, providing that “the funding formula,” and resulting “annual payments,” “*must include*”:

- “all facilities operating costs, including utilities”;
- “all local education agency evaluation, assessment, and monitoring costs”; and

- “any other direct or indirect costs normally incurred by, or allocated to, schools under the control of the Board of Education and the overall public school system.”

H.R. Rep. No. 104-689, at 50 (emphasis added). The *only* costs that could be excluded from the funding formula were expenditures for “state level (agency) functions” and “federal grant programs,” and “to comply with court ordered mandates that are not applicable to public charter schools.” *Id.*

The School Reform Act includes only two “exceptions” to the requirement to fund all operating expenses for DCPS and D.C. Charter Schools through a uniform per-student funding formula. § 2401(b)(3)(A), 110 Stat. at 137. First, in consultation with the Board and Superintendent, the Mayor and D.C. Council “may adjust the formula to increase or decrease the amount of the annual payment” to DCPS or a D.C. Charter School based on a calculation of “the number of students served by such schools in certain grade levels” and “the cost of educating students at such certain grade levels.” § 2401(b)(3)(A), 110 Stat. at 137. Second, the Mayor and D.C. Council may adjust the annual payment amount if a school “serves a high number of students with special needs” or “who do not meet minimum literacy standards.” § 2401(b)(3)(B)(i)–(ii), 110 Stat. at 137.

The School Reform Act also establishes the manner in which enrollment is to be calculated in making the annual operating expense payments to DCPS and D.C. Charter Schools. No later than September 15, each DCPS and D.C. Charter School must “submit a report to the Mayor and the Board of Education” with the number of students “enrolled in each grade from kindergarten to grade 12 of [DCPS] and [D.C. Charter Schools].” § 2402(a)(1), (b)(1), 110 Stat. at 137–38. Then, by October 15, the Board of Education “shall calculate” the number of students enrolled in each grade, including students with special needs. § 2402(b)(1), 110 Stat. at 137–38. The School Reform Act also requires an independent audit of the enrollment

calculations reported by DCPS and D.C. Charter Schools and requires the auditor to “provide an opinion as to the accuracy of the information contained in the report” and “identify any material weaknesses in the systems, procedures, or methodology used by the Board of Education” in determining the number of students actually enrolled in DCPS and D.C. Charter Schools.

§ 2402(d), 110 Stat. at 138.

Two years after Congress passed the School Reform Act, the D.C. Council passed the Per Student Funding Formula for Public Schools and Public Charter Schools Act of 1998 (“Funding Act”), which created the Uniform Per Student Funding Formula (“UPSFF”). *See* D.C. Code §§ 38-2901 to 38-2912. The UPSFF provides the formula by which funding for DCPS and D.C. Charter Schools is calculated based on student enrollment and applies “to operating budget appropriations for District of Columbia resident students in DCPS and Public Charter Schools” made “from the District of Columbia General Fund.” *Id.* § 38-2902(a)–(b).

II. THE DISTRICT’S UNEQUAL FUNDING TO DCPS AND D.C. CHARTER SCHOOLS

Notwithstanding the School Reform Act’s express uniform funding mandates, Defendants have consistently provided D.C. Charter Schools with less per-pupil funding than DCPS. Indeed, Defendants have not only acknowledged these disparities, but have long promised to remedy them. In 2010, for example, former Mayor Vincent Gray, who at the time was the Chair of the D.C. Council, introduced (and the D.C. Council passed) an amendment requiring “that parity between DC public schools and charter schools be reached in the Fiscal Year 2012 budget.” Fiscal Year 2011 Budget Support Act of 2010, Committee of the Whole Report, attached as Exhibit 1 at pp. 12–13. The Council, however, has voted every year to delay implementation of the amendment. *See, e.g.*, Fiscal Year 2014 Budget Support Act of 2013, D.C. Law 20-61, § 4102 (Dec. 24, 2013) (substituting “fiscal year 2015” for “fiscal year 2014”

in D.C. Code § 38-2913), attached as Exhibit 2. Similarly, in 2011, an independent commission established by the District concluded that the District inappropriately “provid[ed] additional funding to” traditional schools for functions that should have been funded through the uniform funding mechanism. *See* Dist. of Columbia Pub. Educ. Fin. Reform Comm’n, *Equity and Recommendations Report for the Deputy Mayor for Education* 19 (Feb. 2012).

Most recently, a December 2013 study commissioned by former Mayor Gray’s Deputy Mayor for Education confirmed that education funding in the District “is inequitable.” The Finance Project et al., *Cost of Student Achievement: Report of the DC Education Adequacy Study* 112–13 (2013) (“Adequacy Study”). The Adequacy Study analyzed many of the District’s funding practices and concluded that the

funding disparities are contrary to DC law, which mandates that [traditional] and public charter schools be funded through the [uniform funding formula] for operating expenses, that services provided by DC government agencies be on an equal basis, and that costs covered by the [uniform funding formula] should also not be funded by other DC agencies and offices.

Id. at 113. The Adequacy Study recommended, among other things, that *all* operating expenses for traditional schools and D.C. Charter Schools be funded through a uniform funding formula subject only to specific and limited exceptions and that the District create “greater transparency and accountability in education budgeting, resource allocation, and reporting.” *Id.* at 113.

Despite the Mayor’s and D.C. Council’s repeated promises and the findings and recommendations of the Adequacy Study, the District continues to fund DCPS and D.C. Charter Schools unlawfully, including through the following devices:

A. Funding Through Other Agency Budgets

Defendants fund certain DCPS operating expenses through the District’s annual budget process without accounting for such funding in calculating the per-student payments made to

D.C. Charter Schools for their operating expenses. Specifically, through the annual budget process, each year since FY 2012, Defendants have provided funds to DGS¹ to pay for facilities maintenance and related facilities management services DGS provides to DCPS. Defendants also have provided funds to the Teachers' Retirement System fund to cover the costs of DCPS's teacher retirement account contributions. No equivalent funding has been provided to D.C. Charter Schools for these expenses.

1. Facilities Maintenance and Related Management Services

Since FY 2012, Defendants have allocated more than \$30 million each year to DGS for facilities maintenance and related management services DGS provides to DCPS – resulting in more than \$184.7 million in funding provided to DCPS for facilities-related operating expenses, outside the funding formula, from FY 2012 through FY 2015. SUF ¶¶ 46-59. *See also* Exhibits 10 at A-132-33; Exhibit 14 at A-136-37; Exhibit 20 at A-164-65; and Exhibit 25 at A-111-12. And Defendants have signaled that they intend to continue the practice. The approved FY 2016 budget for facilities-related services is \$35.4 million, SUF ¶ 60, Exhibit at 25 at A-111-12; and the requested budget for FY 2017 is \$30.9 million. SUF ¶ 63, Exhibit 25 at A-111-12.

In FY 2015 alone, for example, Defendants provided DGS with more than \$34 million to fund “facilities operations” services for DCPS, but did not provide such funding to D.C. Charter Schools. SUF ¶ 58, Exhibit 25 at A-112, line item (3009) (listing \$34.809 million spent on “Facilities – Public Ed”).² The services related to facilities operations provided by DGS to DCPS include coordinating “the day-to-day operations of many District owned properties”;

¹ The Office of Public Education Facilities Modernization (“OPEFM”) was consolidated into the Department of General Services (“DGS”) in FY 2012. Department of General Services Establishment Act, D.C. Code §§ 10-551.01, 10-441.04, D.C. L. 19-21, §§ 1022, 1025 (2011).

² “Facilities - Public Education” includes “facility maintenance and repair costs for [DCPS]”. Exhibit 25 at A-113.

“maintaining building assets and equipment”; and “performing various repairs and non-structural improvements”. Exhibit 25 at A-113. In other words, in FY 2015, Defendants provided to DCPS more than \$34 million in DGS services related to the maintenance, repair, and management of DCPS buildings but did not provide such funding to D.C. Charter Schools.

Funding provided to DGS has also supported an array of other DCPS facilities-related management services for which D.C. Charter Schools do not receive similar funding – including millions of dollars per year for agency management and contracting and procurement services, and hundreds of thousands of dollars per year for asset management and construction services. SUF ¶¶ 50, 53, 56, 59, 62, and 65; Exhibit 10 at A132-33; Exhibit 14 at A136-37; Exhibit 20 at A164-65; and Exhibit 25 at A111-12. Figure 1 summarizes the services that have been provided to DCPS through DGS since FY 2012.

Fiscal Year	Facilities Operations	Agency Management Costs	Asset Management Costs	Construction Services	Contracting/Procurement Services	Total
2012	\$42,701,000	\$3,155,000	\$421,000	\$213,000	\$1,354,000	\$47,844,000³
2013	\$42,793,000	\$3,493,000	\$368,000	\$211,000	\$1,502,000	\$48,367,000⁴
2014	\$45,189,000	\$4,200,000	\$364,000	\$242,000	\$730,000	\$50,725,000⁵
2015	\$34,809,000	\$2,398,000	\$403,000	\$201,000		\$37,811,000⁶
*2016	\$31,580,000	\$3,068,000	\$454,000	\$235,000		\$35,337,000⁷
**2017	\$27,224,000	\$2,900,000	\$486,000	\$281,000		\$30,891,000⁸

*Approved **Proposed

Agency management services include administrative support for the facilities-related services DGS provides to DCPS. Exhibit 25 at A-114. Asset Management services, which are tied to

³ SUF ¶¶ 48-50, Exhibit 10 at A132-33.

⁴ SUF ¶¶ 51-53, Exhibit 14 at A136-37.

⁵ SUF ¶¶ 54-56, Exhibit 20 at A164-65.

⁶ SUF ¶¶ 57-59, Exhibit 25 at A111-12.

⁷ SUF ¶¶ 60-62, Exhibit 25 at A111-12.

⁸ SUF §§ 63-65, Exhibit 25 at A111-12.

“Public Education Realty” services DGS provides to DCPS, include “allowing access and utilization of school buildings and grounds into use agreements, licenses, and lease agreements.” *Id.* at A-113. Construction services expenditures include “operating budget costs” for DCPS, such as “non-capital eligible positions and administrative costs.” *Id.* at A-114. Contracting and Procurement services include providing “service and support ... in procuring goods and services” such as “construction, architecture and engineering; facilities maintenance and operation; real estate asset management (including leasing and auditing); and utility contracts and security.” *Id.*

In contrast, D.C. Charter Schools must pay for all facilities-related expenses such as maintenance and repair, asset management, constructions services, and contracting and procurement costs, as well as other operating expenses, out of their own budgets. In FY 2015 alone, this funding practice resulted in the District spending \$795 more per DCPS student than it spent on his or her D.C. Charter School counterpart. *See* Exhibit 25 at A-111-12; Exhibit 16 Attachment B.1 at p.3 (FY 2015 total of \$37.8 million divided by 47,548 enrolled students.).

2. Teacher Retirement Account Contributions

Defendants fund DCPS’s teacher retirement account contributions through a separate budget appropriation to the Teachers’ Retirement System fund. SUF ¶¶ 66-72. No such appropriation is made to fund pensions for D.C. Charter Schools. As a result, in FY 2015, DCPS received an additional \$828 per pupil that was not provided to D.C. Charter Schools. *See* Exhibit 26 at D-29, line item (1100); Exhibit 16 at Attachment B.1 at p.3 (FY 2015 total \$39.4 million divided by 47,548 students.). And the disparity has increased exponentially over the last five years, as the numbers have grown from \$3 million provided to the Teachers’ Retirement System fund in FY 2012 to cover DCPS retirement account contributions, SUF ¶ 67, Exhibit 11 at D-25;

to a proposed \$56.8 million for FY 2017. *SUF* ¶ 72, Exhibit 26 at D-29. *See also* *SUF* ¶ 68, Exhibit 15 at D-45 (\$6.4 million in FY 2013); *SUF* ¶ 69, Exhibit 21 at D-43 (\$31.6 million in FY 2014); *SUF* ¶ 70, Exhibit 26 at D-29 (\$39.4 million in FY 2015); and *SUF* ¶ 71, Exhibit 26 at D-29 (\$44.5 million approved for FY 2016).

B. Supplemental Funding Directly to DCPS

Defendants have provided additional, or “supplemental”, operating expense funding directly to DCPS, outside the UPSFF, when DCPS’s operating expenses exceed its annual UPSFF appropriation. *SUF* ¶¶ 73-86. Each year during the budget process, DCPS, like D.C. Charter Schools, receives its annual UPSFF appropriation. *See* Exhibit 3 at D-19 (FY 2012); Exhibit 7 at D-19 (FY 2013); Exhibit 11 at D-22 (FY 2014); Exhibit 15 at E-1 (FY 2015); Exhibit 21 at E-1 (FY 2016) and Exhibit 26 at D-26 (FY 2017). The UPSFF appropriation is intended to cover the total funding, from local funds, for DCPS’s operating expenses for that fiscal year. *SUF* ¶ 75. When DCPS’s actual expenditures are reported two years later, however, its actual operating expenditures, from local funds, have exceeded its UPSFF appropriations, in some years, by millions of dollars.⁹ *SUF* ¶¶ 76-86. In FY 2012, for example, DCPS’s approved annual UPSFF appropriation was \$611,817,000. Exhibit 3 at D-19. But its actual operating expenditures from local funds for FY 2012 were \$638,879,000, Exhibit 11 at D-2, a difference of more than \$27 million. In some years, such as 2012, Defendants have provided additional funding to DCPS to cover the difference between its annual UPSFF payment and actual operating expenditures, in large part by enacting a supplemental appropriations bill. *SUF* ¶ 80, Exhibit 5 at p.2. But in most years, Defendants simply provide DCPS additional funding to cover operating expenses that exceed its UPSFF payment. *SUF* ¶¶ 81-86. The amount of

⁹ This has occurred every year between FY 2012 and FY 2015, except for FY 2013.

additional operating expense funding provided directly to DCPS outside the funding formula each fiscal year can be calculated by comparing DCPS’s annual UPSFF appropriation for a given fiscal year with its actual operating expenditures, from local funds, for that fiscal year, as detailed in Figure 2 below.

Fiscal Year	UPSFF Appropriation	Actual DCPS Operating Expenditures	Supplemental Operating Expense Funding
2012	\$611,817,320	\$638,879,000	\$27,061,680¹⁰
2014	\$644,302,106	\$653,800,000	\$ 9,497,894¹¹
2015	\$701,344,630	\$708,087,000	\$ 6,742,370¹²

C. Enrollment Calculations

Under the District’s uniform funding formula, D.C. Charter Schools are funded based on actual student enrollment, as required by the School Reform Act, while DCPS is funded based on projected, and often inflated, student enrollment. *SUF ¶¶ 55-62.* As a result, when DCPS’s projected enrollment in any category exceeds actual enrollment, DCPS receives an overpayment. *SUF ¶ 94.* Put another way, payment based on inflated enrollment projections rather than on actual student enrollment means that DCPS is effectively receiving a higher per pupil payment in that category. *Id.* From 2012 through 2016, DCPS has consistently overestimated either general student enrollment or special education and limited English proficiency students, *SUF ¶¶ 100-13,*

¹⁰ Compare Exhibit 3 at D-19 (“Total FY 2012 Proposed Local Budget”) with Exhibit 11 at D-28 “Local Funds” (“Actual FY 2012” Column); *SUF ¶¶ 77-79.*

¹¹ Compare Exhibit 11 at D-22 (“Total FY 2014 Proposed Local Budget”) with Exhibit 21 at D-28 “Local Funds” (“Actual FY 2014” Column); *SUF ¶¶ 81-83.*

¹² Compare Exhibit 15 at E-1 (“Total FY 2015 Local Funds Budget Projections”) with Exhibit 26 at D-14 “Local Funds” (“Actual FY 2015” Column); *SUF ¶¶ 84-86.*

which add additional “weighting” to the foundation level,¹³ or both, by thousands of students, as follows:

- In FY 2012, DCPS overestimated general student enrollment by 2,056 students and special education enrollment by 394 students. *Compare* Exhibit 3 at D-19 with Exhibit 4 at pp. 1-3; *see also* Exhibit 6.
- In FY 2013, DCPS overestimated general enrollment by 1,617 students and special education enrollment by 1,324 students. *Compare* Exhibit 7 at D-19 with Exhibit 8 at pp. 1-5; ¹⁴ *see also* Exhibit 9.
- In FY 2014, DCPS overestimated special education enrollment by 686 students. *Compare* Exhibit 11 at D-22 with Exhibit 12 at pp. 1-2; ¹⁵ *see also* Exhibit 13.
- In FY 2015 DCPS again overestimated general education enrollment by 44 students and overestimated special education and limited and non-English proficiency students by 359 students. *Compare* Exhibit 15 at E-1 with Exhibit 16 Attachment B.1 at pp. 1-3 and Exhibit 17; *see also* Exhibit 18.
- In FY 2016 DCPS overestimated general education students by 751 students and special education by 383 students. *Compare* Exhibit 21 at E-1 with Exhibit 22A, Attachment B.1 at p.3 (audited general education enrollment) and Exhibit 23 at p. 10 (reporting special education enrollment).

This has resulted in more than \$98.9 million in overpayments to DCPS from FY 2012 through FY 2016 for students who, in fact, were not enrolled in DCPS, as summarized below in Figure 3.

¹³ The overestimation of students with special needs and with limited English proficiency results in an even greater disparity in funding to DCPS. The Act provides that the Mayor and D.C. Council may increase the amount of annual payments if the DCPS or D.C. Charter school “serves a high number of students (i) with special needs; or (ii) who do not meet minimum literacy standards.” § 2401(b)(3)(B), 110 Stat. at 137.

¹⁴ Audit data for FY 2013 is also reported on OSSE’s website <http://osse.dc.gov/publication/fy13-lea-and-school-level-enrollment-audit-reports> (“2012 LEA by LEA and School by School Level Reports.xlsx,” School by School Tab, line 132), plus line 8 (Alternative Schools), and line 13 (Special Education Schools), which account for the ungraded student total in line 132).

¹⁵ Audit data for FY 2014 is also reported on OSSE’s website at: <http://osse.dc.gov/publication/sy-2013-14-general-education-enrollment-audit-data-and-overview> (“SY 2013-2014 School by School Enrollment Audit Data.xlsx” line 122).

Fiscal Year	Number of students by which DCPS projections exceeded (were less than) actual audited enrollment			Overpayment to DCPS
	General education	Special education	Limited and non-English proficiency	
2012	2056	394	(259)	\$24,562,737 ¹⁶
2013	1,617	1,324	(115)	\$43,141,696 ¹⁷
2014	(334)	686	(111)	\$20,414,803 ¹⁸
2015	44	244	115	\$1,952,903 ¹⁹
2016	751	383	(78)	\$8,839,668 ²⁰

These overestimations have resulted in millions of dollars of additional funding that DCPS is not required to return, and Defendants have not reconciled these overpayments with payments made to D.C. Charter Schools.

III. CHARTER SCHOOL FUNDING LITIGATION

After repeated but unsuccessful attempts to persuade Defendants to fund D.C. Charter Schools consistent with the mandates of the School Reform Act, Plaintiffs filed a Complaint alleging that the actions described above exceed the authority Congress granted to the District through the District of Columbia Home Rule Act (Count I); violate the Supremacy Clause of the United States Constitution (Count II); and violate the School Reform Act's uniform funding requirements (Count III).

¹⁶ Exhibit 6 (Comparing projected v. actual enrollment for DCPS).

¹⁷ Exhibit 9 (Comparing projected v. actual enrollment for DCPS).

¹⁸ Exhibit 13 (Comparing projected v. actual enrollment for DCPS).

¹⁹ Exhibit 18 (Comparing projected v. actual enrollment for DCPS).

²⁰ Exhibit 24 (Comparing projected v. actual enrollment for DCPS). This reflects the overpayment only for general education students because special education-level detail was not available for 2016. Given the high per-pupil funding provided for special education students, the overpayment for FY 2016 will be much higher when the additional funding for the 383 special education students that were projected but not enrolled are included. The foundation amount alone for those 383 special education student was \$3,635,436 (383 x \$9,492).

On September 29, 2014, Defendants moved to dismiss each count of the Complaint and, after extensive briefing by the parties, the Court issued its Memorandum Opinion on October 1, 2015, in which it denied Defendants' motion as to Counts I and III, and granted Defendants' motion as to Count II.

Relying on “[t]he text, context, and history of the School Reform Act,” the Court held that “Congress did not intend on the Council treating the [Funding Formula] as optional.” Mem. Op. at 16. Instead, the Court held that the School Reform Act effects an “implied withdrawal of the Council’s delegated authority” to legislate in a manner that conflicts with the Act’s requirements, including the uniform funding mandate. *Id.* at 21–22. The Court left open the question whether Defendants’ actions in fact “contravene Congress’ intent” based on what the School Reform Act “does or does not allow” Defendants to do with respect to funding DCPS and D.C. Charter Schools, *id.* at 22, and the subordinate question “whether Congress has acquiesced in [the challenged] actions,” *id.* at 16.

LEGAL STANDARD

Summary judgment is appropriate when the moving party demonstrates there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *George v. Leavitt*, 407 F.3d 405, 410 (D.C. Cir. 2005). A material fact is genuinely disputed if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). With regard to materiality, the Supreme Court has explained that “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.* Accordingly, “the mere existence of some alleged factual dispute between the parties will not

defeat an otherwise properly supported motion for summary judgment. The requirement is that there be no genuine issue of material fact.” *Id.* at 247–48 (emphasis in original).

This case is particularly appropriate for summary judgment because Plaintiffs challenge Defendants’ official public acts as to which there can be no dispute.

ARGUMENT

I. DEFENDANTS VIOLATE THE SCHOOL REFORM ACT’S UNIFORM FUNDING REQUIREMENT BY FUNDING DCPS’S OPERATING EXPENSES OUTSIDE THE UPSFF

It is undisputed that Defendants fund certain DCPS operating expenses, such as facilities maintenance and repair and related management services, *SUF* ¶¶ 46-65, as well as teacher retirement accounts, outside the UPSFF, and without making equivalent payments to D.C. Charter Schools. *SUF* ¶¶ 66-72. It is also undisputed that Defendants have provided supplemental funding to DCPS for operating expenses, outside the UPSFF, when DCPS’s operating expenses have exceeded its annual UPSFF appropriation. *SUF* ¶¶ 73-86. These actions clearly “contravene Congress’ intent” as expressed in the School Reform Act, that all operating expenses for DCPS and D.C. Charter Schools be funded through a uniform per-student funding formula. *See Mem. Op.* at 16. Congress left Defendants with no discretion to provide operating expense funding for DCPS “in addition to or outside of the formula.” *See id.* at 22. By funding DCPS operating expenses outside the UPSFF, Defendants violate the express requirements of the School Reform Act.

A. The School Reform Act Requires Defendants to Fund All Operating Expenses Exclusively Through The Uniform Per-Student Funding Formula.

Congress clearly intended for Defendants to fund all operating expenses for DCPS and D.C. Charter Schools through the UPSFF. In determining Congress’s intent, the inquiry “must begin with the language employed by Congress” in the School Reform Act “and the assumption

that the ordinary meaning of that language accurately expresses the legislative purpose.” *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175 (2009) (quoting *Engine Mfrs Ass’n v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted)). The words used in a statute “are the primary, and ordinarily the most reliable source of interpreting the meaning of any writing.” *Wolverine Power Co. v. FERC*, 963 F.2d 446, 452 (D.C. Cir. 1992) (citation omitted). The Court must examine whether the statutory language has a “plain and unambiguous meaning” and the resulting “statutory scheme is coherent and consistent.” *See United States v. Wilson*, 290 F.3d 347, 352 (D.C. Cir. 2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (internal quotation marks omitted)); *see also Blackman v. District of Columbia*, 456 F.3d 167, 176 (D.C. Cir. 2006). Whether the meaning of the statutory language is plain and unambiguous depends on “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Wilson*, 290 F.3d at 352 (quoting *Robinson*, 519 U.S. at 341).

Here, the language and context of the School Reform Act clearly reflect Congress’s intent to require Defendants to fund all DCPS and D.C. Charter School operating expenses through the UPSFF. The School Reform Act expressly requires Defendants to establish a formula to determine the amount of the annual payment for “the operating expenses of the District of Columbia public schools,” § 2401(b)(1)(A), 110 Stat. 1321–136 (emphasis added), and “the operating expenses of each public charter school.” § 2401(b)(1)(B), 110 Stat. 1321–137 (emphasis added). The use of the definite article “the” refers to something specific and identifiable. *See Noel Canning v. NLRB*, 705 F.3d 490, 500 (D.C. Cir. 2013) (“Unlike ‘a’ or ‘an’” [the] definite article “suggests specificity”); *Am. Bus. Ass’n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (“It is a rule of law well established that the definite article ‘the’ particularizes the

subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of ‘a’ or ‘an’”). Moreover, when the definite article “the” is used before plural nouns, such as “operating expenses,” it includes all of the noun that it modifies. *See e.g., Woods v. Standard Ins. Co.*, 771 F.3d 1257, 1263 (10th Cir. 2014) (“The use of the definite article, ‘the,’ before the plural noun, ‘primary defendants,’ . . . leaves no doubt Congress intended the state action provision to preclude . . . jurisdiction only when *all* of the primary defendants are states, state officials, or state entities.” (emphasis added)); *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 155 (3d Cir. 2009) (“[T]he definite article preceding the term ‘claims’ indicates that ‘the claims asserted’ means *all* the claims asserted.”) (emphasis in original)); *Frazier v. Pioneer Americas, LLC*, 455 F.3d 542, 546 (5th Cir. 2006) (using the definite article before the plural noun, “the primary defendants,” means “all primary defendants.”); *Nelson v. Comm. of Internal Revenue*, 130 T.C. 70, 77–78 (U.S. Tax. Ct. 2008) (use of definite article “the” before “income” required farmers to report “all income” received from crop insurance proceeds).

Had Congress intended to allow Defendants to fund some operating expenses through the funding formula and others outside the formula, it could have left the term “operating expenses” unqualified and open to interpretation. *See Frazier*, 455 F.3d at 546 (“Had Congress desired the opposite, it would have used ‘a’ and the singular, or no article.”). But it did not. Congress directed the Mayor and Council to establish a formula to determine “the annual payment . . . for the operating expenses” for DCPS and D.C. Charter Schools. § 2401(b)(1), 110 Stat. 1321-136 (emphasis added). This necessarily includes all of the operating expenses for DCPS and D.C. Charter Schools and forecloses any interpretation that would allow Defendants to apply the formula to dispense some but not all operating expenses or to ignore this requirement entirely.

The statutory context confirms the interpretation that the UPSFF is the exclusive mechanism for funding all operating expenses for DCPS and D.C. Charter Schools. *See Wilson*, 290 F.3d at 353 (courts consider the “specific context in which [the] language is used, and the broader context of the statute as a whole” to determine whether statute is plain or ambiguous) (internal citations and quotation marks omitted). In particular, the same section of the School Reform Act requires the Mayor to “make annual payments from the general fund of the District of Columbia *in accordance with the formula*,” § 2401(a), 110 Stat. at 136 (emphasis added), and does not provide for any alternate mechanism other than the formula.

In addition, Congress specifically delineated only two exceptions to the strict application of the funding formula. The first allows the Mayor and the Council to “adjust the formula to increase or decrease the amount of the annual payment” to DCPS or a D.C. Charter School based on “the number of students served by such schools in certain grade levels” and “the cost of educating students at such certain grade levels.” § 2401(b)(3)(A), 110 Stat. at 137. The second allows the Mayor and the Council “to increase the amount of [the annual] payment” to DCPS or a D.C. Charter School that “serves a high number of students with special needs or who do not meet minimum literacy standards.” § 2401(b)(3)(B), 110 Stat. at 137. Neither exception allows Defendants to fund operating expenses outside the UPSFF. Where, as here, Congress provides a list of enumerated exceptions, that list is presumed to be exhaustive. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) (“[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” (internal quotation marks and citation omitted)).

When the language of a statute is plain and unambiguous, as it is here, a court need not look any further. *Blackman*, 456 F.3d at 176 (“If the language has a plain and unambiguous

meaning, our inquiry ends so long as the resulting statutory scheme is coherent and consistent.”) (internal citations and quotation marks omitted). A court, however, may consult the legislative history of a statute to confirm its view of the plain meaning and to ensure that its interpretation is not at variance with the policy of the legislation as a whole. *Cf. Chandler v. Roudebush*, 425 U.S. 840, 848 (1976) (“The legislative history of the 1972 amendments reinforces the plain meaning of the statute and confirms that Congress intended to accord federal employees the same right to a trial de novo as is enjoyed by private-sector employees.”).

The legislative history of the School Reform Act confirms that Congress intended the formula to be the exclusive mechanism for funding all operating expenses for DCPS and D.C. Charter Schools. Congress explicitly stated that the funding formula to be established “*must include the total costs of the operations of the Board of Education . . . , all facilities operating costs, including utilities, . . . [and] any other direct or indirect costs normally incurred by, or allocated to, schools under the control of the Board of Education and the overall public school system.*” H.R. Rep. 104-689, at 50 (emphasis added). Congress went on to explain that the only costs that “may be excluded from the funding formula, per pupil allocations and consequently annual payments to charter schools” are expenditures incurred for “state level (agency) functions” and “Federal grant programs,” and “to comply with court ordered mandates that are not applicable to public charter schools.” *Id.* Consistent with the plain language of the statute, the legislative history of the School Reform Act confirms that Congress intended Defendants to fund all operating expenses for DCPS and D.C. Charter Schools through the UPSFF, and nothing in the legislative history suggests that Congress intended to give Defendants authority to fund operating expenses outside the UPSFF.

B. Defendants Have Funded DCPS's Operating Expenses Outside the UPSFF

Despite Congress's clear intent that Defendants fund all operating expenses for both DCPS and D.C. Charter Schools through the UPSFF, Defendants have continuously disregarded that requirement and have provided additional funding for DCPS's operating expenses outside the UPSFF, in violation of the School Reform Act. This additional operating expense funding has been provided to DCPS, outside the UPSFF, in two ways. First, through its annual budget process, Defendants have funded DCPS operating expenses, such as facilities maintenance and related management services, as well as teacher retirement accounts, by appropriating funds to other D.C. government agencies and accounts to cover these costs for DCPS. *SUF* ¶¶ 46-86. Specifically, Defendants have appropriated funds to DGS to pay for DCPS's facilities maintenance and related management services, *SUF* ¶¶ 46-65, and to the Teachers' Retirement System fund to cover DCPS's retirement account contributions. *SUF* ¶¶ 66-72. Second, Defendants have provided additional, or "supplemental", operating expense funding directly to DCPS, outside the UPSFF, when DCPS's operating expenses exceed its annual UPSFF appropriation. *SUF* ¶¶ 73-86. Each of these funding practices violates the School Reform Act's requirement that all operating expenses be funded through the UPSFF.

1. Funding Operating Expenses Through Other Agency Budgets

It is commonly understood that "operating expenses" include expenses incurred in carrying out an organization's day-to-day operations. *See* Black's Law Dictionary (10th ed. 2014) (defining "operating expense" as an "expense incurred in running a business and producing output").²¹ There can be no genuine dispute that, for each of the last several years,

²¹ *See also* *Levenstein v. Salafsky*, 414 F.3d 767, 770 (7th Cir. 2005) ("school operating expenses [include] faculty salaries and maintenance"); *Renaissance Acad. for Math and Sci. of Mo., Inc. v. Imagine Schs., Inc.*, No. 4:13-cv-00645, 2014 WL 3828558, at *5 (W.D. Mo. Aug. 4,

Defendants have funded expenses incurred by DCPS in carrying out its day-to-day operations, including for facilities maintenance and related facilities management services, as well as contributions to teacher retirement accounts, outside the UPSFF, by appropriating funds to other D.C. Government agencies and accounts to cover these expenses. SUF ¶¶ 46-72.

In FY 2015 alone, for example, Defendants provided more than \$34 million to DGS to provide “facilities operations” services to DCPS. SUF ¶ 58, Exhibit 25 at A-112, line item (3009). These appropriations permit the Facilities Operations unit of DGS to manage “the day-to-day operations of . . . District owned properties” including by covering “facility maintenance and repair costs” incurred by DCPS. Exhibit 14 at A-134. But these are standard operating expenses that must be funded through the formula. H.R. Rep. No. 104-689, at 50 (stating that annual payments to DCPS and D.C. Charter Schools made in accordance with the formula “must include . . . all facilities operating costs”).

Likewise, in FY 2015, Defendants provided DGS more than \$3 million to cover the agency management costs incurred by DGS in providing facilities-related services specifically to DCPS. SUF ¶ 59, Exhibit 25 at A-111-12. This includes administrative support and financial services. *Id.* Costs incurred for administrative support, including financial services, also are standard operating expenses. *See Thomas Jefferson Acad. Charter Sch.*, 778 S.E.2d at 301

2014) (referring to “facility payments, equipment lease payments, and other operating expenses”); *Long v. Franklin Cnty. Sch. Corp.*, No. 1:08-cv-0890, 2010 WL 3781350, at *4 (S.D. Ind. Sept. 21, 2010) (school corporation’s operating expenses “include[e] salaries and benefits for teachers, supplies and utilities”); *Thomas Jefferson Academy Charter School v. Cleveland Cnty. Bd. of Ed.*, 778 S.E.2d 295, 301 (N.C. Ct. App. 2015) (charter school “operating expenses” include “accounting, payroll, purchasing, facilities management, and utilities”); *Berkeley Cnty. Sch. Dist. v. S.C. Dep’t of Revenue*, 679 S.E.2d 913, 919 (S.C. 2009) (“in the business realm, the phrase ‘operating expenses’ has been defined to ‘include payroll, sales commissions, employee benefits and pension contributions, transportation and travel, amortization and depreciation, rent, repairs, and taxes’” (internal citations omitted)).

(“operating expenses” include “accounting, payroll, [and] purchasing”); *Berkeley Cnty. Sch. Dist.*, 679 S.E.2d at 919 (“‘operating expenses’ has been defined to ‘include payroll, sales commissions . . . amortization and depreciation . . . and taxes’”).

DGS has provided other facilities-related services for DCPS, such as asset management and construction services that are clearly DCPS operating expenses. SUF ¶ 59(b)(c), Exhibit 25 at A111-112, line items (2101) and (5101). Indeed, Defendants’ own budget documents state that construction services include “operating budget costs” for DCPS. Exhibit 25 at A-114. And expenses for realty asset management services such as arranging licenses and lease agreements, *see id.* at A-113, are operating expenses. *See e.g. Thomas Jefferson Acad. Charter Sch.*, 778 S.E.2d at 301 (charter school “operating expenses” include “facilities management . . . and utilities”); *Berkeley Cnty. Sch. Dist.*, 679 S.E.2d at 919 (operating expenses includes “amortization and depreciation, rent, repairs, and taxes”).

Finally, Defendants have funded DCPS’s teacher retirement account contributions outside the UPSFF through a separate budget appropriation to the Teachers’ Retirement System fund. SUF ¶¶ 66-72. Again, in FY 2015, Defendants provided more than \$39 million to the Teacher Retirement System fund to cover DCPS’s teacher retirement expenses. SUF ¶ 70, Exhibit 26 at D-29, line item (1100). Employee benefits, such as teacher pensions, are operating expenses. Like facilities maintenance and repair, these expenses clearly fall within the expansive definition of “operating expenses.” *See Levenstein*, 414 F.3d at 770 (“school operating expenses [include] faculty salaries”); *Long*, 2010 U.S. Dist. LEXIS 99997, at *134 (school corporation’s operating expenses “include[e] salaries and benefits for teachers”); *Berkeley Cnty. Sch. Dist.*, 679 S.E.2d at 919 (“‘operating expenses’ has been defined to ‘include . . . employee benefits and pension contributions.’”) (internal citations omitted).

By providing money to DGS to cover DCPS's facilities-related expenses and making separate budget appropriations to the Teachers' Retirement System fund to cover DCPS's teacher retirement costs, Defendants have funded operating expenses outside the UPSFF in direct conflict with the plain language of the School Reform Act.

2. Providing Additional Operating Funding Outside the UPSFF

There also can be no genuine dispute that, for each of the last several years, Defendants have provided DCPS additional operating expense funding, from local funds and outside the UPSFF, when DCPS's operating expenses exceed its annual UPSFF appropriation. SUF ¶¶ 73-86. Each year during the budget process, DCPS, like D.C. Charter Schools, receives its annual UPSFF appropriation, which is intended to cover the total costs, from local funds, of DCPS's operating expenses for that fiscal year. SUF ¶¶ 74-75; Exhibit 3 at D-19 (FY 2012); Exhibit 7 at D-19 (FY 2013); Exhibit 11 at D-22 (FY 2014); Exhibit 15 at E-1 (FY 2015); Exhibit 21 at E-1 (FY 2016) and Exhibit 26 at D-26 (FY 2017). When DCPS's actual expenditures from local funds are reported two years later, however, those expenditures have almost always exceeded DCPS's UPSFF appropriation, and in some years by millions of dollars. SUF ¶ 76-86. In FY 2012, for example, DCPS's approved annual UPSFF appropriation was \$611,817,000. SUF ¶ 77, Exhibit 3 at D-19. But its actual operating expenditures from local funds for FY 2012 were \$638,879,000, SUF ¶ 78, Exhibit 11 at D-2, a difference of more than \$27 million. SUF ¶ 79. The majority of this additional operating expense funding was provided through a supplemental appropriations bill enacted by the Council that provided DCPS more than \$25 million in additional funding. SUF ¶ 80; Exhibit 5 at p.2. In other years, Defendants simply provide DCPS additional operating expense funding, from local funds and outside the UPSFF, to cover its costs.

SUF ¶¶ 81-86. This clearly violates the School Reform Act’s requirement that all operating expenses for DCPS and D.C. Charter Schools be funded through the UPSFF.

II. DEFENDANTS VIOLATE THE SCHOOL REFORM ACT’S UNIFORM FUNDING REQUIREMENT BY USING DIFFERENT METHODOLOGIES TO FUND DCPS AND D.C. CHARTER SCHOOLS

The School Reform Act requires Defendants to adopt a uniform per-student funding formula and to use the same formula to calculate the annual operating expense payment for DCPS and D.C. Charter Schools. *See* H.R. Rep. No. 104-455, at 143-44, 146 (A “uniform formula will be used to provide operating budgets on the basis of enrollment for the school system as a whole and for individual public charter schools,” and “[t]he *same formula* will be used for students enrolled in individual public charter schools and [DCPS Schools].”) (emphasis added). The School Reform Act further requires that the annual payment to DCPS and D.C. Charter Schools be based on actual student enrollment. § 2401(b)(2), 110 Stat. at 137. Specifically, the School Reform Act requires Defendants to establish a uniform dollar amount to be multiplied by “the number of students ... that *are enrolled* at [DCPS and D.C. Charter Schools].” § 2401(b)(2)(A)-(B), 110 Stat. at 137 (emphasis added). Section 2402 of the School Reform Act establishes the precise method for calculating student enrollment and confirms that the calculation is based on actual enrollment. No later than September 15 each year, DCPS and each D.C. Charter School is required “to submit a report to the Mayor and the Board of Education” with “[t]he number of students, including nonresident students and students with special needs, *enrolled* in each grade from kindergarten through grade 12” § 2042(a)(1), (b)(1) 110 Stat at 137-38, and the number of students “*enrolled* in preschool and kindergarten” § 2402(b)(3), adult, and other programs, § 2402(b)(5) (emphasis added). Then, by October 15, the Board of Education is required to calculate the same information – the number of students

enrolled by grade and program level – including students with special needs. § 2402(b)(1), 110 Stat at 137-38.

The UPSFF conflicts with the School Reform Act because it allows Defendants to use different methodologies for calculating student enrollment, and consequently different formulas for calculating the annual payment for DCPS and D.C. Charter Schools. Specifically, the annual payment to DCPS is based on *projected*, and in practice often inflated, student enrollment, *see* D.C. Code § 38-2906(a), while the payment to D.C. Charter School ultimately is based on *actual* student enrollment, as determined by an annual audit. *See* D.C. Code § 38-2906.02.

This is not a distinction without a difference. By applying different methodologies for calculating student enrollment for DCPS and D.C. Charter Schools, Defendants have effectively used different formulas for calculating the annual operating expense payments,²² and have created significant disparities in per-pupil funding between DCPS and D.C. Charter Schools. From 2012 through 2016, DCPS has overestimated either general student enrollment or special education and limited English proficiency students, or both, by thousands of students.²³ SUF ¶¶ 100-113; Exhibits 6, 9, 13, 18, and 24. These overestimations have resulted in millions of dollars of additional funding – \$20 million in FY 2014 alone – that DCPS is not required to return, SUF ¶ 110-111, and far more than it was entitled to receive if the per-pupil payment were

²² For the annual payment to D.C. Charter Schools, Defendants use the following funding formula – $E \times PPF = AP$ where “E” equals the number of enrolled students and “PPF equals the per-pupil funding amount, the product of which is the annual payment “AP” for each category of students). In contrast, the funding formula Defendants use to calculate the annual payment for DCPS is – $P \times PPF = AP$, where “P” equals the number of projected students in each category, not students actually enrolled in DCPS.

²³ Because the weightings are cumulative, the overestimation of students with special needs and with limited English proficiency results in an even greater disparity in funding to DCPS. SUF ¶¶ 33-42. The Act provides that the Mayor and D.C. Council may increase the amount of annual payments if the DCPS or D.C. Charter School “serves a high number of students (i) with special needs; or (ii) who do not meet minimum literacy standards.” § 2401(b)(3)(B), 110 Stat. at 137.

properly based on actual student enrollment as required by the School Reform Act. Exhibit 13. These payments for nonexistent students effectively increase the per-pupil amount DCPS receives for each actual student. Defendants' use of different formulas to calculate the annual payment for DCPS and D.C. Charter Schools is in direct conflict with the School Reform Act's requirement that same formula be used to calculate the annual payment for DCPS and D.C. Charter Schools and undermines the very purpose of the uniform funding requirement – to ensure that all students receive the same per-pupil funding for their public education regardless of whether they attend a traditional public or a public charter school.

III. THE SCHOOL REFORM ACT'S UNIFORM FUNDING PROVISIONS ARE MANDATORY AND PROVIDE NO DISCRETION FOR DEFENDANTS TO DEVIATE FROM THEM

The School Reform Act sets forth a Congressional mandate – a uniform funding requirement – and its explicit language does not allow Defendants discretion to ignore that requirement. It requires the District to fund all operating expenses for DCPS and D.C. Charter Schools using a single, clearly-defined method: multiplying a uniform dollar amount by the number of students actually attending DCPS and each D.C. Charter School. With respect to both the requirement to fund all operating expenses through a uniform per-student funding formula and to base the annual payment for those operating expenses on actual student enrollment, Congress used language that is mandatory, not permissive. With respect to each funding directive, Congress used the word “shall” – the Mayor “shall make annual payments in accordance with the formula,” § 2401(a), 110 Stat. 1321-136; the Mayor and the Council “shall establish ... a formula to determine the amount of ... the annual payment for the operating expenses” § 2401(b)(1)(A)-(B), 110 Stat. 1231-136; and the amount of the annual payment “shall be calculated by multiplying a uniform dollar amount used in the formula ... by the number of students” enrolled. § 2401(b)(2), 110 Stat. 1321-137.

“The form of the verb used in a statute” whether something “‘may,’ ‘shall,’ or ‘must’ be done, is the single most important textual consideration in determining whether [that] statute is mandatory or directory.” *Riggs National Bank of Washington v. D.C.*, 581 A.2d 1229, 1257 (D.C. 1990). “It is well-settled that when a statute uses the term ‘shall’, it creates a mandatory duty.” *Kakeh v. United Planning Organization*, 655 F. Supp. 2d 107, 123 (D.D.C. 2009); *see also Pierce v. Underwood*, 487 U.S. 552, 569-70 (1988) (Congress’s use of “shall” in a housing subsidy statute constitutes “mandatory language”). Further, the word “shall” “generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.” *Ass’n. of Civilian Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994).²⁴ There is nothing in the School Reform Act or its legislative history to suggest that Congress intended to depart from these principles in drafting the School Reform Act. To the contrary, as this Court noted its October 1, 2015 Memorandum Opinion, “Congress clearly knew how to make some sections of the School Reform Act mandatory and others not, and ‘when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.’” Mem. Op. at 18 (internal citation omitted).

Nor are Plaintiffs aware of any case law or statutory authority that supports the proposition that one should or could ignore these rules of statutory construction for statutes enacted by Congress exclusively for the District or supports the notion that Congress’s use of the directive “shall” in such a statute means something different than it does in every other statute Congress enacts and allows discretion rather than imposing a mandatory obligation.

²⁴ *See also Lopez v. Davis*, 531 U.S. 230, 241 (2001) (“Congress used ‘shall’ to impose discretionless obligations”).

The fact that the District is “another legislature” or “shares” legislative authority with Congress is irrelevant to whether it has authority to ignore mandatory language in the School Reform Act. The District is not sovereign and is subordinate to Congress. It therefore must identify the source of its authority to act in conflict with the intent of the School Reform Act or ignore its mandatory language.²⁵ See e.g., *Mapp v. District of Columbia*, 993 F. Supp. 2d, 28-29 (D.D.C. 2014) (“The legislative power of the City Council is subordinate to the sovereign power of the Congress . . . and as such, the Council must legislate within the boundaries drawn by Congress.”) (internal citations and quotation marks omitted); *Banner v. United States*, 303 F. Supp. 2d 1, 19 (D.D.C. 2004), *aff’d*, 428 F.3d 303 (D.C. Cir. 2005) (“The Council, moreover, was created by Congress, exercises only those powers granted to it by Congress, and has no sovereignty. . .”). That authority cannot be found in the School Reform Act. Interpreting the word “shall” in the School Reform Act to mean the funding provisions are suggestions rather than obligations would effectively render Congress’s choice of language – be it “may” or “shall” – meaningless.

Finally, as this Court recognized in its October 1, 2015 Memorandum Opinion, it is well established that the doctrine of preemption – whether one finds it grounded in the District Clause, federal common law, or some other source – applies to laws and regulations enacted by the D.C. Council that conflict with laws enacted by Congress. See *Maryland & District of Columbia Rifle & Pistol Asso. v. Washington*, 442 F.2d 123 (D.C. Cir. 1971) (evaluating whether

²⁵ The Court notes in its October 1, 2015 Memorandum Opinion that the D.C. Council has, in the past, repealed two provisions of the School Reform Act and takes this proof that the Council had the authority to do so. Mem. Op. at 18. But the fact that the Council repealed those provisions of the School Reform Act does not prove it had the authority to do so, and the fact that the Council’s actions were not challenged at the time does not mean it is lawful. This is the first case to challenge the Council’s authority to take action that conflicts with the School Reform Act.

an act of Congress that applied exclusively to the District preempted local regulations promulgated by the D.C. Council); *Biotechnology Industry Organization v. D.C.*, 496 F.3d 1362, 1371 (Fed. Cir. 2007) (“[A]s between District statutes and superior enactments by Congress, the general principles of preemption from Supremacy Clause law apply); *Lederman v. U.S.*, 2007 U.S. Dist. LEXIS 27521, at *12 (D.D.C. 2007) (“In case of conflict, acts of Congress prevail over enactments by the municipal authority of the District.”). Put another way, Congress and the District are not equals and their enactments do not carry equal weight; rather, “[t]he legislative power of the City Council is subordinate to the sovereign power of the Congress, and as such, the Council must legislate within the boundaries drawn by Congress.” *Mapp*, 993 F. Supp. 2d at 28-9; *see also, e.g., Banner*, 303 F. Supp. 19 n. 18 (the District of Columbia is a “municipal subordinate of Congress”). Applying these principles, courts have consistently held that acts of Congress – including those that apply exclusively to the District of Columbia – prevail over District of Columbia legislation and regulations that conflict with the congressional legislation. *Firemen's Ins. Co. v. Washington*, 483 F.2d 1323 (D.C. Cir. 1973) (preempting a District of Columbia insurance regulation that conflicted with an act of Congress that applied exclusively to the District of Columbia); *Don't Tear it Down, Inc. v. Pennsylvania Avenue Development Corp.*, 642 F.2d 527 (D.C. Cir. 1980) (preempting District of Columbia regulations that conflicted with an act of Congress exclusive in application to the District of Columbia).

The language and intent of the School Reform Act is clear and mandatory. There can, therefore, be no doubt that Defendants are preempted from acting in conflict with Congress's funding requirements, cannot treat the School Reform Act's funding directives as mere suggestions, and are required to fund operating expenses for DCPS and D.C. Charter Schools

through the formula and to base the annual payment for those operating expenses on actual student enrollment.

IV. CONGRESS HAS NOT APPROVED OR ACQUIESCED IN DEFENDANTS' VIOLATIONS OF THE SCHOOL REFORM ACT'S UNIFORM FUNDING REQUIREMENT

A. Congress's Approval of the District's Budgets Does Not Constitute Approval Of Unequal Funding Practices That Violate the School Reform Act

The fact that the District's annual budget requests have been included in appropriations bills passed by Congress does not mean that Congress has approved Defendants' unequal and, therefore unlawful, funding practices. It is well established that congressional appropriations do not evince congressional approval of actions of the funded entity unless Congress is indisputably aware of those actions, and can never constitute approval of actions that violate statutory authority. *See City of Santa Clara, Cal. v. Andrus*, 572 F.2d 660, 672 (9th Cir. 1978) ("To show ratification" based on congressional appropriations, a party "must sustain the heavy burden of demonstrating congressional knowledge of the precise course of action alleged to have been acquiesced in."); *Newspaper Ass'n. v. U.S. Postal Ser.*, 816 F. 2d 8, at *6 (D.C. Cir. 1987) (declining to interpret congressional appropriation as a "stamp of approval" on administrators' allegedly unlawful actions).

Nothing in the proposed budgets Defendants have submitted to Congress disclosed the fact that Defendants were not complying with the School Reform Act's uniform funding requirement such that Congress was indisputably aware of Defendants' violations. To the contrary, in the annual budgets that have been submitted to Congress for FY 2012 through FY 2016, Defendants expressly represented to Congress that "[p]ublic charter schools receive the same level of District funding for their enrolled students as students enrolled in the District of Columbia Public Schools, pursuant to the District's Uniform Per Student Funding Formula"

SUF ¶ 116; Exhibit 3 at D-49; Exhibit 7 at D-55; Exhibit 11 at D-55; Exhibit 15 at D-77; and Exhibit 21 at D-73. Defendants have further affirmatively represented to Congress in each of these budget submissions that the UPSFF “is intended to cover all local educational agency operational costs for District public schools” and is “designed to ensure that all public schools across the District receive the same level of funding on a per-student basis” SUF ¶ 114; Exhibit 3 at D-50; Exhibit 7 at D-56-57; Exhibit 11 at D-57; Exhibit 15 at D-79; and Exhibit 21 at D-75. Similar language appears in the District proposed budget for FY 2017. SUF ¶ 115, Exhibit 26 at D-48.

The means Defendants use to provide DCPS with additional funding for operating expenses, outside the formula, also are not obvious from a review of the proposed budget for DCPS. Operating expense funding that is provided to DCPS through other agency budgets and accounts are buried in line items in those agency budget chapters, which are submitted along with the District’s proposed budget and financial plan each year. They do not appear in DCPS’s proposed budget. They also do not appear in the annual Budget Request Acts that are transmitted to Congress, which include only the overall agency funding totals for each agency. *See* Fiscal Year 2016 Budget Request Act, D.C. Act 21-99, tit. III (2015) (requesting \$324,253,000 for Department of General Services), attached as Exhibit 19. The allocation to DGS, for example, makes no mention of services to be provided to DCPS. To uncover these School Reform Act violations would require members of Congress to consult the agency chapters or operating appendices of the District’s Proposed Budget and Financial Plan each fiscal year and conduct a meticulous review of individual line items across a host of D.C. government agencies to identify those services earmarked for DCPS in other agencies’ budgets.

There is likewise nothing in the District's Proposed Budget and Financial Plan or Budget Request Act each year that would alert Congress to the fact that Defendants provide additional or "supplemental" operating expense funding directly to DCPS when DCPS's operating expenses exceed its annual UPSFF appropriation. Indeed, in most years, the fact that DCPS has received operating expense funding beyond that provided through its annual UPSFF payment for any fiscal year does not come to light until DCPS's actual expenditures are reported in the District's Proposed Budget and Financial Plan two years later. *SUF* ¶¶ 76.

Finally, none of the budget documents Defendants submit to Congress each year reveal the fact that Defendants use different formulas for calculating the annual operating expense payments for DCPS and D.C. Charter Schools in violation of the School Reform Act. The fact that DCPS's annual UPSFF payment is based on projected student enrollment while D.C. Charter Schools annual UPSFF payment is based, ultimately, on actual, audited enrollment, and the significant per-pupil funding disparities that have occurred as a result, are not discussed anywhere in the District's budget submissions.

In the light of Defendants' affirmative representations that DCPS and D.C. Charter Schools receive the same level of funding for their enrolled students and the fact that Defendants' unequal funding practices discussed in Parts I and II above are not fully or fairly disclosed in the budget documents submitted to Congress, this Court should not assume that, by adopting the Defendants' budget requests, Congress had "knowledge of the precise course[s] of action" that Defendants took in violation of the School Reform Act. *City of Santa Clara, Cal.*, 572 F.2d at 672.

B. Congress’s Silence During The 30-day Review Period Does Not Constitute Approval of District Legislation That Violates The School Reform Act.

Inaction or silence by Congress during the 30-day review period for District legislation does not render the District’s legislation lawful or preclude judicial review to determine whether, in fact, the Council had the legal authority to enact the legislation. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (“Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction”) (citation omitted); *see also Girouard v. United States*, 328 U.S. 61, 69 (1946) (noting that “[i]t is at best treacherous” to place undue emphasis on “congressional silence”); *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940) (“To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.”). Nor does Congress’s failure to disapprove Council legislation during the 30-day review period constitute tacit approval of the legislation or render it immune to judicial review. *Council of the District of Columbia v. Gray*, 42 F. Supp.3d 134, 150, n.7, *vacated and remanded on other grounds*, 2015 U.S. App. LEXIS 8881 (D.C. Cir. May 27, 2015) (citing *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (“[C]ongressional silence lacks persuasive significance, particularly where administrative regulations are inconsistent with the controlling statute.”)). Indeed, in *Pharmaceutical Research & Manufacturers of America v. District of Columbia*, 406 F. Supp. 2d 56 (D.D.C. 2005), this Court vacated legislation that had been enacted by the Council even though it had “cleared” the 30-day Congressional review period without objection or modification by Congress because it exceeded the Council’s authority and violated the Supremacy and Commerce Clauses of the

Constitution.²⁶ *See Id.* at 67, 72. Accordingly, Congress’s failure to reject District legislation during the 30-day Congressional review does not constitute Congressional approval or acquiescence in legislation that violates the School Reform Act.

Finally, there is no basis for the proposition that a subsequent Congress’s approval of the District’s annual budget requests or failure to reject Council legislation somehow sheds light on the intent of the Congress that enacted the School Reform Act. *See U.S. Ass’n of Reptile Keepers, Inc. v. Jewell*, 103 F. Supp. 3d 133, 153 (D.D.C. 2015)(“[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one”) (internal quotation marks and citations omitted); *see also O’Gilvie v. United States*, 519 U.S. 79, 90 (1996) (“[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute.”). For that, the Court must look to the language of the School Reform Act itself and, only if necessary, its legislative history. *See Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175 (2009) (internal citations and quotation marks omitted); *Blackman*, 456 F.3d at 176 (“If the language has a plain unambiguous meaning, our inquiry ends so long as the resulting statutory scheme is coherent and consistent.”) (same).

²⁶ *See also Sun Dun Inc. v. The Coca Cola Company*, 740 F. Supp. 381, 395 (D. Md. 1990) (“Congress has specifically determined that the legislative enactments of the D.C. Council are subject to the same constitutional constraints as are those of the states,” including “analysis under the federal preemption doctrine ... even though the Council’s enactments are subject to congressional review.”) (citations omitted); *Goudreau v. Standard Federal Savings & Loan Association*, 511 A.2d 386 (D.C. 1986) (finding that federal banking law preempted a District of Columbia statute enacted after congressional review); *Doe v. Stephens*, 851 F.2d 1457 (D.C. Cir. 1988) (finding that federal statute preempted District of Columbia Act enacted after congressional review).

CONCLUSION

For all these reasons, summary judgment should be entered for Plaintiffs and the Court should grant the relief requested herein.

Respectfully submitted,

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June 24, 2016