APPENDIX

APPENDIX A-
OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
DATED MARCH 2, 2022

WENDELL TABB,

Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF
THE DURHAM PUBLIC SCHOOLS

Defendant-Appellee.

OPINION ISSUED: MARCH 2, 2022

No. 20-2174

03-02-2022

Wendell TABB, Plaintiff - Appellant, v. BOARD OF EDUCATION OF the DURHAM PUBLIC SCHOOLS, Defendant - Appellee.

ARGUED: Quintin DeVon Ithiel Byrd, Q BYRD LAW, Raleigh, North Carolina, for Appellant. Colin Alexander Shive, THARRINGTON SMITH LLP, Raleigh, North Carolina, for Appellee. ON BRIEF:

Monica E. Webb-Shackleford, WEBB SHACKLEFORD PLLC, for Appellant.

NIEMEYER, Circuit Judge

ARGUED: Quintin DeVon Ithiel Byrd, Q BYRD LAW, Raleigh, North Carolina, for Appellant. Colin Alexander Shive, THARRINGTON SMITH LLP, Raleigh, North Carolina, for Appellee. ON BRIEF: Monica E. Webb-Shackleford, WEBB SHACKLEFORD PLLC, for Appellant.

Before NIEMEYER, MOTZ, and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion in which Judge Richardson joined. Judge Motz wrote an opinion concurring in part and dissenting in part.

NIEMEYER, Circuit Judge: Wendell Tabb, a longtime and successful drama teacher at Hillside High School in Durham, North Carolina, commenced this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* , and 42 U.S.C. § 1981, alleging that the Board of Education of the Durham Public Schools (the "School Board") discriminated against him on the basis of race in refusing to hire another teacher in the drama department to assist him with tech work in connection with his staging of student performances or, alternatively, in refusing to provide him with additional compensation for the tech work that he performs. He also alleged that the School Board discriminated against him on the basis of race when compensating him for his "extra-duty" work in connection with other events at Hillside High School.

The district court dismissed a portion of his complaint for failing to state a claim and, with respect to the remaining claims, granted the School Board's motion

for summary judgment based on Tabb's failure to present sufficient evidence to support his claims.

For the reasons that follow, we affirm.

I

Tabb is employed as a drama teacher at Hillside High School in the Durham Public Schools system ("School System") and has held that position since 1987. Not only has he taught theater classes, but he has also helped students put on theatrical productions. And by all accounts, he has been extraordinarily successful, receiving numerous awards for his work. But, as he has emphasized, to produce plays at a high level requires long hours, beyond just his teaching hours.

Tabb is compensated in accordance with salary schedules established by North Carolina law. Under those schedules, he receives a base pay, which takes into account his years of experience, level of educational achievement, and special certifications. He also receives a local school board supplement based on his years of experience and advanced degrees. Finally, he receives a "Performing Arts Supplement" for the extra work he does as a "Theater Director" in supporting students' extracurricular activities, such as staging student performances.

The School System pays a Performing Arts Supplement to teachers who are Theater Directors, Theater Technical Directors, Band Directors, and Dance/Music Directors. While Theater Directors and Theater Technical Directors are subject to the same State-approved teaching standards for theater arts, Theater Technical Directors have particular knowledge for teaching the technical aspects of theater productions and the skills necessary for planning, designing, and implementing lighting, sound, sets, and costumes.

Over the years, Tabb requested that the School Board and the principal of Hillside High School provide him with a Theater Technical Director to relieve him of the hours he has had to devote to technical issues when staging student performances. He noted that some of the other high schools in the School System had both a Theater Director and a Theater Technical Director, and he requested that Hillside High School be one of them. Over the years, many of the principals at Hillside High School supported his requests, including the principal during the relevant years of his complaint. The School Board, however, did not grant Tabb's requests.

Under the School System's hiring process, the School Board allocates a number of teachers to each school based on projected student enrollment numbers, and the same mathematical formula has been used for each of the high schools in the School System. But, as a general practice, the School Board does not allocate teachers to schools for specific positions or subjects. Rather, the principal of each school does the hiring and makes the assignments, taking into account mandatory core curricula, as well as the school's particular special missions and needs.

Hillside High School has an International Baccalaureate magnet program to staff, as well as a separate remedial program for lower performing students. Yet, while its principals did request larger teacher allocations during the period relevant to Tabb's complaint — 2013 to 2017 — Hillside High School did not receive an allocation sufficient for the principal to hire a Theater Technical Director. Moreover, the School Board had never allotted an additional teacher to a school specifically to serve as a Theater Technical Director. The high schools that did hire Theater Technical Directors did so with their existing teacher allotments.

Dr. William Logan, Hillside High School's principal from 2012 to well after 2017, testified that, to assist

in his determination of whether to staff a technical theater class at Hillside High School, he initiated a student registration process. Indeed, he did so two to three times, but on each occasion, there was a lack of demand for such a class from the students. Accordingly, he used the allotment that he might have used for a Theater Technical Director to instead hire a photography teacher. As a result, Tabb was never provided the assistance of a Theater Technical Director to help him stage student performances. Tabb contends that the refusal to provide him with such assistance was because he is African American and that the School Board discriminated against him on that basis.

Tabb commenced this action in August 2017 against the School Board, and he amended his complaint in October 2017, alleging that the School Board violated his rights under Title VII and § 1981 by (1) failing to staff Hillside High School with a Theater Technical Director; (2) failing to pay him a Theater Technical Director Supplement in addition to the Theater Director Supplement he was receiving, because he was doing the work of both jobs; and (3) failing to pay him for work he performed in connection with non-school related events that took place at Hillside High School. With respect to his claim that the School System refused to pay him an additional supplement, he demanded damages of $40,800 per year.

Tabb also alleged in his amended complaint that the School Board's failure to employ a Theater Technical Director at Hillside High School and to pay him fairly for all the work he performed violated the Americans with Disabilities Act insofar as the School Board's decisions were motivated by retaliation for his 2006 lawsuit against the School Board in connection with his disabled child. The district court dismissed that claim, and Tabb does not challenge the court's ruling on appeal.

To support his claims, Tabb referred to the staffing of drama departments at three other high schools in the School System as comparators — Riverside High School, Jordan High School, and Durham School of the Arts. He alleged that the School Board had not provided the same level of staffing to Hillside High School as it had to these three schools. As a result, he alleged, he was "forced to do the work of two or three teachers in order to maintain the Hillside High School Drama Program, while White Theatre Directors at White high schools with comparable theatre programs have had two or more teachers assigned to assist them." He alleged specifically that during the relevant period Riverside High School had two Theater Directors, one Black and one White, and one White Theater Technical Director; that Durham School of the Arts had four drama teachers, although he recognized that the school was "part of a magnet program for arts and drama"; and that Jordan High School had one Theater Director, who was a Hispanic female, although historically Jordan High School had employed more than one drama department employee. In alleging history before the relevant period, he described different hiring configurations at each of the schools, which had historically been more heavily staffed in the drama department than had Hillside High School.

Tabb also alleged in his complaint that "for many years [he] performed work *unrelated to his theatre program* at the request of Hillside administrators and at the direction of the [School System's] administration." (Emphasis added). He noted that in this regard he did work in connection with "new student orientations, open houses, senior orientations, senior pictures, class and yearbook pictures, class meetings, ring ceremonies, pageants, coronations, quiz bowls, science fairs, step shows, career and technology education events, leadership summits, awards day programs, banquets, and athletic awards ceremonies." Yet, he claimed, his "extra-duty" work went uncompensated. At the other

schools, he alleged, the Theater Directors were not "asked to do this same type and volume of unpaid extra work or have been paid an extra-duty payment or a contractual payment for performing this type of work."

Tabb attributed all of the disparate treatment alleged in his complaint to racial discrimination by the School Board.

On the School Board's motion to dismiss Tabb's complaint under Federal Rule of Civil Procedure 12(b)(6), the district court granted the motion to the extent that Tabb alleged that he was not paid the Theater Technical Director Supplement in addition to the Theater Director Supplement that he was receiving. The court reasoned that the School Board's "failure to pay [Tabb] a technical supplement [did] not constitute an adverse employment action" because he failed to allege that the School Board required him to perform the technical work as a condition of his employment. The court added that Tabb's "independent decision to produce high-quality plays, while laudable, was a decision he made for the benefit of his students rather than a task he performed as a requirement of his position." Alternatively, the court ruled that even if the denial of the Theater Technical Director Supplement could be considered an adverse action, Tabb had nonetheless not plausibly alleged that the School Board had "denied him a technical supplement due to his race" because he had not alleged "that a single white theater director was paid such a supplement at any time."

In its order dismissing Tabb's claim for a Theater Technical Director Supplement, the district court also excluded Durham School of the Arts as a legitimate comparator for Tabb to demonstrate any discrimination. The court noted that because the School of the Arts was a specialized high school "for arts and drama," as Tabb acknowledged in his complaint, the School Board's decision to operate such

a magnet school "provides an obvious alternative explanation for increased drama department staffing [there]: the school's focus on acting and drama." The court concluded, therefore, that Tabb could not plausibly allege racial discrimination "based upon different circumstances at [that school]."

With respect to the remaining allegations of Tabb's complaint, the district court denied the School Board's motion to dismiss.

After discovery, the School Board filed a motion for summary judgment with respect to all the remaining counts of the complaint, and the district court granted the motion. Addressing Tabb's claim that the School Board illegally discriminated against him in failing to hire a Theater Technical Director to assist him, the court concluded first that such a refusal, albeit attributable only to his principal (who was not sued) and not the School Board, was not in any event an adverse employment action as necessary to support a claim for discrimination. The court reasoned that the hiring of another drama teacher to assist him was not "a 'part and parcel' benefit for theater teachers in [the School System]." Rather, "the allocation of resources, including the hiring of teachers, [were] matters intended to benefit the students." The court added that, in any event, "at the time [Tabb] filed his [administrative complaint in 2016], only two out of six [School System] high schools [with drama programs] had theater techs." The court also noted that the record was undisputed that the School Board "never provided an additional theater tech allotment to another school," thus foreclosing Tabb's claim that the School Board "discriminated against him when it denied his request for an additional allotment." Finally, the court noted that Tabb had "not come forward with comparator evidence that would lead a reasonable jury to conclude that [the School Board] acted with discriminatory intent toward [him]." Indeed, "the undisputed facts reveal that, during the relevant limitations period, there were no Caucasian

comparators who received preferential treatment." Yet, there was another African American drama teacher at Riverside High School who did benefit from technical theater support.

With respect to Tabb's claim that the School System failed to compensate him for extra duty work, the court noted that Tabb had "failed to come forward with any evidence 'that similarly-situated employees outside the protected class received' extra-duty pay when he did not." To the contrary, the School Board offered "undisputed evidence that comparable Caucasian teachers were treated the same as [or worse than] [Tabb] when it came to extra-duty contracts and pay." The court noted that the record showed that Tabb received $11,000.07 in extra pay, and during the same period, no other performing arts teacher received more than $2,076, and Tabb offered no evidence to contradict those figures. Moreover, Tabb failed to come forward with any White comparator to support his claim that he was denied extra-duty pay due to his race.

From the district court's judgment dated September 28, 2020, Tabb filed this appeal, challenging the district court's rulings on three of his claims — (1) the refusal to pay him a Theater Technical Director Supplement; (2) the refusal to hire an additional teacher to assist him; and (3) the refusal to pay him extra-duty pay.

II

Tabb contends first that the district court erred in dismissing under Rule 12(b)(6) his claim that the School Board discriminated against him on the basis of race in not paying him a Theater Technical Director Supplement in addition to the Theater Director Supplement that he had been receiving. He claims that he is entitled to the second supplement because he also performed the work of a Theater Technical

Director and that the School Board refused to pay him that supplement because he is African American.

Of course, a motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim and not the truth of the facts alleged to support it. Thus, at this stage, the facts must be taken as true. But the test is not legally myopic. Rather, it must be applied with common sense to determine whether a complaint contains the "sufficient factual matter, accepted as true, to state a claim to relief *that is plausible on its face* ," not merely conceivable. *Ashcroft v. Iqbal* , 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (emphasis added) (cleaned up); *see also id.* (allowing "reasonable inference[s]" in assessing a complaint).

With respect to this claim, Tabb's complaint alleged that the School System's "[t]eachers in the performing arts ... who engage in extracurricular activities" are paid a "performing arts supplement," as they "work after hours with students." The supplement is paid to Theater Directors, Theater Technical Directors, Band Directors, and Dance/Music Directors. The complaint alleged that as a Theater Director, Tabb is paid a supplement because he does in fact work after hours with students, "directing [them] in the extracurricular theatrical productions." And in doing so, as he alleged, he also "do[es] the lighting, sound, sets and other technical duties necessary" to put on the theatrical productions. He stated that since doing lighting, sounds, sets and other technical duties is the type of work performed by the Theater Technical Director, he does the "work of two teachers" and therefore should receive the supplements that two teachers would receive. He alleged, however, that the School Board "refused" to pay him two supplements and that the reason "was because of his race."

Tellingly, however, despite the detailed nature of Tabb's 39-page complaint, it failed to allege that *any* performing arts teacher in the School System, whether Black or White, received two supplements.

He does allege that teachers at other schools were not "required to work the excessive overtime hours that [he] worked," but he also does not allege that he was himself *required* to work excessive overtime hours.

The district court held that Tabb failed to state a claim based on this failure to pay him a second supplement for two reasons. First, it noted that Tabb would be required to show that *affirmative acts of his employer* adversely affected the terms and conditions of his employment, rather than acts by him in deciding to "work harder or longer" than others, citing *Boone v. Goldin* , 178 F.3d 253, 256 (4th Cir. 1999). Yet, the court observed that the complaint failed to make this allegation:

Here, Plaintiff has not alleged that the technical work he performed was required as a condition of his employment; rather, he alleges only that he has worked overtime to handle "the lighting, sound, sets and other technical duties necessary to stage high-quality theater productions." Plaintiff fails to allege that Defendant expected or required him to work these hours or to produce plays with high-quality technical features. Plaintiff's independent decision to produce high-quality plays, while laudable, was a decision he made for the benefit of

his students rather than a task he performed as a requirement of his position.

As a consequence, the court found that the complaint failed to allege an adverse employment action necessary to state a claim under either Title VII or § 1981. Second, the court noted that Tabb "failed to allege that a single white Theater Director was paid such a supplement at any time. Plaintiff identifies only one similarly-situated Theater Director without technical assistance, Olivia Garcia Putnam at Jordan [High School]. Putnam is white, [but] Plaintiff does not allege that she is paid a technical supplement." Again, without alleging a comparator, the court concluded that the complaint failed to state a claim.

Based on our own review of the complaint, we reach the same conclusion reached by the district court — that Tabb had failed to allege plausibly that the School Board's failure to pay him a Theater Technical Director Supplement constituted race-based employment discrimination. While the complaint certainly alleged that Tabb worked "excessively" long hours, it did not allege that those hours were mandated by the School Board as a requirement of his job. The complaint did allege that Tabb was required to "work after hours with students," but it also alleged that he was paid for after-hours work with the Theater Director Supplement. And the complaint did not allege that *any* performing arts teacher in the School System, regardless of the teacher's race, received more than one supplement.

We accordingly affirm the district court's ruling dismissing Tabb's complaint with respect to his claim that the School Board discriminated against him on the basis of his race in not paying him a second supplement for the technical work he performed in staging student performances.

III

Tabb also contends that the district court erred in refusing to consider Durham School of the Arts as a comparator school for purposes of his racial discrimination claims, thereby leaving only Riverside High School and Jordan High School as comparators. The court ruled that Durham School of the Arts was not an appropriate comparator to Hillside High School because Durham School of the Arts has a specialized program that is, as Tabb alleged in his complaint, "part of a magnet program for arts and drama," thus providing, as the district court concluded, "an obvious alternative explanation for its increased drama department staffing." The court apparently confirmed this conclusion by going beyond the complaint and viewing the school's website. Tabb argues that this also constituted error.

While we agree that it was error for the district court to consult the School of the Arts' website in determining whether the complaint properly alleged that the School of the Arts was an appropriate comparator, we conclude the error was harmless. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.* , 637 F.3d 435, 450 (4th Cir. 2011) ("Where a district court errs in going beyond the complaint on a Rule 12(b)(6) motion, the error is harmless if the complaint would not have withstood the motion to dismiss on its face"). Here, the complaint on its face supports the district court's conclusion that the School of the Arts' specialized focus on arts and drama would require that it have enhanced staffing to serve that mission. *See McCleary-Evans v. Md. Dep't of Transp.* , 780 F.3d 582, 588 (4th Cir. 2015) (relying on an "obvious alternative explanation" in holding that a discrimination claim had not been plausibly pleaded (quoting *Iqbal* , 556 U.S. at 682, 129 S.Ct. 1937)). Moreover, when granting the School Board's motion for summary judgment, the district court, on the basis of the developed record, reaffirmed that the School of the Arts was not a valid comparator, therefore confirming the harmlessness of its earlier error in looking beyond the complaint.

IV

Tabb contends next that the district court erred in granting summary judgment to the School Board on his claim that the School Board discriminated against him based on his race in failing to hire another drama teacher to serve at Hillside High School as a Theater Technical Director. To establish a prima facie case under both Title VII and 42 U.S.C. § 1981, a plaintiff must show (1) his membership in a protected class; (2) his satisfactory job performance; (3) an adverse employment action; and (4) similarly situated employees outside the protected class who received more favorable treatment. *See Gerner v. Cnty of Chesterfield, Va.* , 674 F.3d 264, 266 (4th Cir. 2012) ; *see also Bryant v. Bell Atl. Md., Inc.* , 288 F.3d 124,

133 n.7 (4th Cir. 2002) (noting that "[t]he required elements of a prima facie case of employment discrimination are the same under Title VII and Section 1981").

The district court acknowledged that "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion," *Hishon v. King & Spalding* , 467 U.S. 69, 75, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), but concluded that the hiring of a Theater Technical Director to assist Tabb was not " 'part and parcel' of employment as a high school drama teacher within [the School System]." Therefore, it reasoned, Tabb suffered no adverse employment action when the school refused to hire such a teacher. Indeed, the court noted that at the time Tabb filed his complaint, only two of six high schools in the School System with drama programs had Theater Technical Directors.

We agree with the district court. Nothing in the record supports a claim that the terms and conditions of a drama teacher's employment by the School System included the benefit of having the School Board or a school's principal hire other teachers to assist him or her. Moreover, doing so would be beyond the School Board's role as alleged. The School Board allocated teachers to schools based on student population and mission needs, and each school's principal then exercised discretion about who to hire to fulfill its mission with the allocation. There is thus nothing in this process to suggest that the School Board was doling out a "benefit" of a Theater Technical Director in a discriminatory manner. Indeed, the district court noted that it was telling that the School Board had never provided an additional, specific allotment to any school to hire a Theater Technical Director, as Tabb requested.

In rejecting Tabb's staffing-assistant claim, the district court also concluded that Tabb failed to provide valid comparators. While Tabb pointed to

Riverside High School as a comparator and emphasized that a White drama teacher there, Kee Strong, had technical staffing help, it was also undisputed that Strong departed Riverside High School in 2015, leaving Monique Taylor, an African American woman, as the school's only drama teacher. Because Taylor thereafter also had the benefit of technical staffing, Riverside High School was not a valid comparator for purposes of Tabb's racial discrimination claim. Tabb also pointed to Jordan High School as a comparator, but that school had a White theater teacher since 2011 who had never received a Theater Technical Director, despite her repeated requests for one. Therefore, it too was not a valid comparator.

Tabb also sought, in a supplemental letter to the court, to support further his argument that we consider comparators in circumstances prior to the relevant period in this case. Our consideration of the cases he cites and circumstances to which he points do not, we conclude, advance his cause.

We conclude that no reasonable jury could have returned a verdict for Tabb on his discrimination claim based on the denial of assistance, and accordingly, we affirm the district court's order granting the School Board summary judgment on that claim.

V

Finally, Tabb contends that he was discriminated against in the payment of extra-duty pay for work he performed in connection with non-theater related events that took place at Hillside High School. His evidence on that claim, however, is lacking in two respects. First, the record shows that from 2009 to 2019, he received over $11,000 in extra-duty pay, while the next most compensated teacher received approximately $2,076 over the same period. More

importantly, however, Tabb also failed to provide a comparator to show that he was discriminated against in the payment of extra-duty pay. While he identified Will Holley, who is White and works in a technical theater support role at Riverside High School, the court explained that Holley was not a valid comparator because his classification under the Fair Labor Standards Act ("FLSA") made Holley "more likely to have received extra-duty pay for after-hours work" than an exempt employee such as a teacher. Because Holley was not a certified teacher, but a classified employee, he was not similarly situated to Tabb. *See* 29 U.S.C. § 213(a)(1) ; 29 C.F.R. § 541.303(b). Accordingly, we agree with the district court that Tabb did not provide a valid comparator for purposes of supporting this racial discrimination claim.

* * *

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

DIANA GRIBBON MOTZ, Circuit Judge, concurring in part and dissenting in part:

Hillside High School has employed Wendell Tabb since 1987, first as a drama teacher and eventually as the Director of the Drama Department. In 2017, Tabb brought this action alleging that the school board that oversees Hillside (the "Board") discriminated against him on the basis of race and thereby violated Title VII and 42 U.S.C. § 1981.

Tabb alleges that the Board discriminated against him in three ways: (1) the Board failed to provide him extra-duty pay for work he performed at district-wide, school-sponsored events (the "Extra-Duty Pay claim"); (2) the Board failed to hire a technical

director at Hillside to assist him with technical theater work (the "Technical Staffing claim"); and (3) the Board failed to pay him a supplement for the technical theater work he performed in the absence of a technical director (the "Technical Supplement claim").

Although I agree with the majority that the district court correctly granted summary judgment to the Board on Tabb's Extra-Duty Pay and Technical Staffing claims, I would hold that the court erred in dismissing his Technical Supplement claim.

I.

A.

Like the majority, I would affirm the district court's grant of summary judgment to the Board on Tabb's Extra-Duty Pay and Technical Staffing claims. In opposing summary judgment on the Extra-Duty Pay claim, Tabb identified a single comparator and offered evidence that the Board gave that comparator extra-duty pay for one district-wide event. But Tabb himself admitted in his deposition that the Board had given *him* extra-duty pay for at least one district-wide event as well. With respect to Tabb's Technical Staffing claim, I agree with the majority that Tabb cannot make the required showing that having the assistance of a technical director is "part and parcel" of his employment as a theater teacher. *Hishon v. King & Spalding* , 467 U.S. 69, 75, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). That is so because the record indicates that schools do not hire technical directors to "assist" theater teachers; rather, a technical director is merely another type of teacher, on par with theater teachers, whose role is to teach and benefit students.

Unlike the majority, I would not hold that Tabb could not succeed on this claim solely because he has

received more extra-duty pay overall than other teachers. The total amount of extra-duty pay that Tabb received makes no difference to his discrimination claim. Rather, what matters is that Tabb alleges that the Board denied certain requests he made for extra-duty pay *and that it did not similarly deny such requests made by white theater teachers.*

I disagree, however, with the majority's suggestion that Tabb could not show that a valid comparator exists for this claim solely because a Black theater teacher at another school had the benefit that Tabb was denied. For the purpose of a Title VII claim, it makes no difference that the plaintiff's employer happened to treat another employee of the plaintiff's race better than the plaintiff. *Cf. Bostock v. Clayton County* , —— U.S. ——, 140 S. Ct. 1731, 1741, 207 L.Ed.2d 218 (2020) ("It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex.").

B.

Unlike the Extra-Duty Pay or Technical Staffing claims, Tabb's Technical Supplement claim did not make it to the summary-judgment stage. That is so because the district court had already granted the Board's motion to dismiss the Technical Supplement claim, solely on the basis of the complaint. But I believe that in his complaint, Tabb adequately alleged that the Board discriminated against him by failing to pay him a *supplement* for the technical theater work he performed in the absence of a technical director. I would thus reverse the district court's dismissal of the Technical Supplement claim.

To allege a Title VII disparate treatment claim, a plaintiff must plead that his employer took an adverse action against him — namely, an action that "adversely affect[s] 'the terms, conditions, or benefits' of [his] employment." *James v. Booz-Allen & Hamilton, Inc.* , 368 F.3d 371, 375 (4th Cir. 2004) (first alteration in original) (quoting *Von Gunten v. Maryland* , 243 F.3d 858, 865 (4th Cir. 2001)). Tabb alleges such an action. He alleges that, due to the Board's failure to hire a technical director, he regularly needed to perform significant additional work (managing "the lighting, sound, sets and other technical duties" for student productions) to fulfill his own role in directing those productions. Needing to perform such additional work would certainly adversely affect the conditions of a plaintiff's employment. *Cf. Vega v. Hempstead Union Free Sch. Dist.* , 801 F.3d 72, 88 (2d Cir. 2015).

According to the majority, Tabb failed to allege that the Board took an adverse action against him because he purportedly failed to plead that he *needed* to perform that technical work as a requirement of his job. But in fact, Tabb has alleged just that — he alleges that he has "been forced to do the work of two or three teachers in order to maintain the Hillside High School Drama Program." That allegation is enough to survive a motion to dismiss. It is certainly plausible to infer that, if nobody handled "the lighting, sound, sets and other technical duties" for the productions, there would be no productions for Tabb to direct.

I also disagree with the majority that Tabb has failed to allege a valid comparator for this claim. To be sure, the majority correctly notes that Tabb "did not allege that *any* performing arts teacher in the School System, regardless of the teacher's race, received more than one supplement." Op. at 156. But that is not surprising given that Tabb has premised his claims on the allegation that white theater teachers at other schools *did* have the benefit of a technical

director, and thus that they would not need to perform extra work that would necessitate a technical theater supplement in the first place. For that reason, I think that Tabb need not allege that the Board paid similarly situated white theater teachers a technical supplement. Rather, to defeat a motion to dismiss, Tabb must merely allege — as he has done — that the Board "has not forced white Theatre Directors in its comparable high school theatre programs to work the unreasonable and excessive number of extracurricular overtime hours that [he] has worked."

C.

I would also reverse the district court's holding that the Durham School of the Arts ("DSA") was not a proper comparator for any of Tabb's claims. In determining that the DSA was not a proper comparator, the district court improperly weighed matters outside of the pleadings — namely, information found on the DSA's website — against Tabb's allegations. *Clatterbuck v. City of Charlottesville* , 708 F.3d 549, 558 (4th Cir. 2013), *abrogated on other grounds by Reed v. Town of Gilbert* , 576 U.S. 155, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). The majority acknowledges that this was error but maintains it was harmless. I cannot agree.

Because I would affirm the court's grant of summary judgment on Tabb's Technical Staffing claim, any comparison to the DSA on that claim would be moot. But a comparison to the DSA would also be relevant to Tabb's Technical *Supplement* claim. Tabb alleges that the DSA had a white theater director and that it also employed technical directors. He could thus argue that, unlike white theater teachers at the DSA, he was forced to work extra hours and did not receive a supplement for that work.

The majority first asserts that this error was harmless because the district court could have arrived

at the same conclusion solely by consulting the complaint, reasoning that the complaint "supports the district court's conclusion that the [DSA's] specialized focus on arts and drama would require that it have enhanced staffing to serve that mission." Op. at 156. But in fact, the allegations in the complaint suggest just the opposite. Tabb alleges that the drama program at Hillside "has become one of the premier high school drama programs in the United States" and that Hillside "has produced at least as many (and in most years more) theatre productions than DSA." It is thus reasonable to infer that, even though the school district has not specifically labeled Hillside as a "drama" or "arts" school, Hillside's drama department would require a similar level of drama staffing as a school that has received such a label.

Nor would I hold that this error was harmless solely because the district court later reaffirmed its holding that the DSA was not a proper comparator when granting the Board's motion for summary judgment. *See* Op. at 157. Because the court rejected Tabb's attempt to rely on the DSA as a comparator at the motion-to-dismiss stage, it is not at all clear that the parties pursued the full discovery necessary to determine whether the DSA was a proper comparator at the summary-judgment stage.

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For the foregoing reasons, I respectfully concur in part and dissent in part.

APPENDIX B- UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA DATED SEPTEMBER 28, 2020

WENDELL TABB,

Plaintiff

v.

BOARD OF EDUCATION OF THE DURHAM PUBLIC SCHOOLS

Defendant

OPINION ISSUED: SEPTEMBER 28, 2020

1:17CV730

09-28-2020

WENDELL TABB, Plaintiff, v. BOARD OF EDUCATION OF THE DURHAM PUBLIC SCHOOLS, Defendant.

OSTEEN, JR., District Judge

MEMORANDUM OPINION AND ORDER OSTEEN, JR., District Judge

Before the court is the Motion for Summary Judgment filed by Defendant Board of Education (the "Board") of the Durham Public Schools ("DPS"). (Doc. 38.) Plaintiff Wendell Tabb, a drama teacher in the DPS system, is suing Defendant for disparate treatment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., and 42 U.S.C. § 1981. Plaintiff alleges that Defendant denied him technical support staffing and extra-duty pay based on his race. For the reasons stated herein, the court finds Defendant's motion should be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

A majority of the facts are described here, but additional relevant facts will be addressed as necessary throughout the opinion. The majority of facts are not disputed; any material factual disputes will be specifically addressed in the relevant analysis. The facts described in this summary are taken in a light most favorable to Plaintiff. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). As explained more fully below, see infra Section III.A.1.b.iii, the statute of limitations has run on any § 1981 claims that occurred and of which Plaintiff was aware prior to August 9, 2013. Therefore, the relevant time period for Plaintiff's claims is August 2013 to August 2017.

A. The Parties

Plaintiff Wendell Tabb is an African-American male and is a teacher and the Director of the Drama Department at Hillside High School ("Hillside") in Durham, North Carolina. (Verified Amended Complaint ("Am. Compl.") (Doc. 14) ¶¶ 19, 25.) Plaintiff has been a drama teacher at Hillside since 1987. (Id. ¶ 24.) By all accounts and any measure, Plaintiff has had an incredibly successful career as a drama teacher. (See, e.g., Pl.'s Resp. to Def.'s Mot. for Summ. J. ("Pl.'s Resp.") (Doc. 40), Deposition of

William Terrence Logan, III ("Logan Dep.") (Doc. 40-4) at 18, 22; Deposition of James Franklin Key, II ("Key Dep.") (Doc. 40-5) at 32; Deposition of Mary Wild Casey ("Casey Dep.") (Doc. 40-8) at 99; Deposition of Minnie Mae Forte-Brown ("Forte-Brown Dep.") (Doc. 40-9) at 24.) Plaintiff has received numerous honors and awards, to include an honorable mention during the Tony Awards. (Casey Dep. (Doc. 40-8) at 132.) The Board recently named Hillside's theater and stage after Plaintiff. (Forte-Brown Dep. (Doc. 40-9) at 36.)

During the discovery period, Plaintiff verified his Amended Complaint. (Doc. 40-12.)

All citations in this Memorandum Opinion and Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

Defendant Board of Education of the Durham Public Schools is a corporate entity under North Carolina law with the capacity to sue and be sued. N.C. Gen. Stat. § 115C-40. Defendant employs or employed the members of the Board, superintendents, assistant superintendents, deputy superintendents, chief officers, directors, and high school principals relevant to this action. (Am. Compl. (Doc. 14) ¶ 17.)

B. Technical Theater Position

Until recently, Plaintiff provided theater instruction as well as technical theater support for the drama program at Hillside High School ("Hillside"). (Logan Dep. (Doc. 40-4) at 42-43, 113.) Hillside hired a technical theater teacher on October 21, 2019. (Def.'s Mot. for Summ. J. ("Def.'s Mot.") (Doc. 38), Affidavit of Arasi Adkins ("Adkins Aff.") (Doc. 38-8) ¶ 12.) Plaintiff is pursuing this action to recover $251,328 in pay he claims he is owed for technical theater

work he did during the period Defendant denied him technical support. (Doc. 40-13 at 1.)

Technical theater (or "theater tech") tasks include lighting, set construction, sound, and other various support tasks needed to produce a play. (Logan Dep. (Doc. 40-4) at 42-43.) For almost eleven years, Plaintiff has been asking Defendant to hire a technical theater teacher or assistant for Hillside. (Forte-Brown Dep. (Doc. 40-9) at 85.) The Board was aware that Plaintiff wanted technical theater support. (Pl.'s Resp. (Doc. 40), Deposition of Thomas Johns Crabtree ("Crabtree Dep.") (Doc. 40-3) at 93; Forte-Brown Dep. (Doc. 40-9) at 45, 85.)

Whereas a technical theater teacher is a certified teacher who can teach classes, a technical theater assistant is a non-certified employee who assists with technical theater tasks but cannot teach classes.

1. Allotment Process

Durham schools are allotted a certain number of teachers based on student enrollment numbers. (Crabtree Dep. (Doc. 40-3) at 45; Logan Dep. (Doc. 40-4) at 38-39; Key Dep. (Doc. 40-5) at 39.) "[B]ased on how many children you have, that's how many teachers you have." (Forte-Brown Dep. (Doc. 40-9) at 98.) "The allocation of resources to schools is determined by formula." (Pl.'s Resp. (Doc. 40), Deposition of Bertrand Paul L'Homme ("L'Homme Dep.") (Doc. 40-6) at 25.) That mathematical formula used to allocate teacher positions is the same for every high school in the district. (Logan Dep. (Doc. 40-4) at 162.)

Allotments are not broken down by subject area, but principals are required to hire enough teachers to teach the minimum state-required curriculum in English, Math, Science, and Social Studies.

(Crabtree Dep. (Doc. 40-3) at 50-51; Key Dep. (Doc. 40-5) at 43, 75.) In addition to those requirements, DPS has designated some of its schools as magnet schools. (Forte-Brown Dep. (Doc. 40-9) at 25; Logan Dep. (Doc. 40-4) at 146-47.) Magnet designations are Board, not school decisions. (Key Dep. (Doc. 40-5) at 63.) In order to support a magnet program, schools must use some of their enrollment-based teacher allotments to support the magnet program. (Logan Dep. (Doc. 40-4) at 146.) Hillside has been designated as an International Baccalaureate ("IB") magnet program. (Id.) In addition to magnet and state requirements, some schools, such as Hillside, are also required to allocate teachers to help improve academic achievement and student test scores. (Pl.'s Resp. (Doc. 40), Affidavit of Henry J. Pankey ("Pankey Aff.") (Doc. 40-10) ¶ 18; Affidavit of Hans Lassiter ("Lassiter Aff.") (Doc. 40-11) ¶ 17.)

The Board had input about the use of allotments when administrators would meet with principals to ensure they had the allotments to "support all content areas." (Logan Dep. (Doc. 40-4) at 85.) Once all a school's requirements were met, the principal had discretion to use the school's allotments as he or she saw fit. (Crabtree Dep. (Doc. 40-3) at 51.)

Principals may ask for additional teachers beyond their enrollment-based allotment. (Logan Dep. (Doc. 40-4) at 39.) The form used is a "New Position Form." (Doc. 40-31 at 1.) The form offers two ways to get a new teacher allotment: (1) re-appropriating an existing allotment, or (2) requesting a new teaching allotment beyond what student enrollment justifies. (Logan Dep. (Doc. 40-4) at 70-71; Doc. 40-31 at 1.)

The Board had to approve a new teaching position above a school's enrollment-based allotment and any new use of funds. (Logan Dep. (Doc. 40-4) at 72; L'Homme Dep. (Doc. 40-6) at 96; Forte-Brown Dep. (Doc. 40-9) at 100; Doc. 40-31 at 1.) Normally, a request for a new teaching position would come from

a school's principal, (Forte-Brown Dep. (Doc. 40-9) at 59-61), but the Superintendent himself could request a new position be created at a school, (Crabtree Dep. (Doc. 40-3) at 76; Key Dep. (Doc. 40-5) at 105-06).

2. Hillside from August 2013 until August 2017

Dr. Logan has been Hillside's principal since 2012. (Logan Dep. (Doc. 40-4) at 18). Dr. Logan once told Thomas Crabtree, Assistant Superintendent for Human Resources ("HR") at the time, that he would have liked to get Plaintiff a technical theater teacher but could not spare a position. (Crabtree Dep. (Doc. 40-3) at 11, 92.)

At one point during Dr. Logan's tenure as principal at Hillside, Hillside had an additional allotment to use for an arts teacher, but rather than using it to hire a theater tech, Dr. Logan used it to hire a photography teacher. (Logan Dep. (Doc. 40-4) at 100; Doc. 40-32 at 4; Casey Dep. (Doc. 40-8) at 91-94.) Dr. Logan initiated the student registration process for technical theater classes "two to three times," but "there wasn't a demand from the students." (Logan Dep. (Doc. 40-4) at 43.)

There was a registration issue in 2013 when Hillside personnel failed to include Technical Theater as an offering for the next school year. (Logan Dep. (Doc. 40-4) at 103-04.)

Dr. Logan had to use part of his enrollment-based allotments to support Hillside's IB magnet program. Hillside receives some additional allotments for its IB magnet program, (Doc. 40-41 at 129), but the majority of the teachers supporting the program come from the school's enrollment-based allotment, (Logan Dep. (Doc. 40-4) at 147-48). But for the magnet requirement, Dr. Logan stated he "possibly" could have supported a technical theater position at Hillside. (Id. at 148.)

Dr. Logan knew how to request an additional teacher allotment using the New Position Form. Dr. Logan was aware of the New Position Form and used it in the past but does not recall filling one out for a theater tech position. (Logan Dep. (Id. at 74.) Dr. Logan never had any additional teacher allotments approved for any subjects, even though he had at least one request a year. (Id. at 156.) Dr. Logan said the only times he got a new teacher allotment is when student enrollment at Hillside increased. (Id. at 44.)

Dr. Logan also stated that he was aware he could have converted a teaching allotment, assuming one was available, into a "classified" teaching position. (Id. at 64.) A classified position is one that can be filled by someone who does not have a teaching license. (Crabtree Dep. (Doc. 40-3) at 24.) This approach would have enabled Dr. Logan to hire a noncertified teaching assistant to help Plaintiff with technical theater work, but the individual could not teach classes. (Logan Dep. (Doc. 40-4) at 63-64.) Converting an existing classified position into a theater tech job, another option, would have required terminating another classified employee. (Crabtree Dep. (Doc. 40-3) at 167; Key Dep. (Doc. 40-5) at 55.)

3. Hillside Prior to Dr. Logan (Before August 2012)

Plaintiff provides affidavits from two former Hillside principals that he claims create a factual dispute about whether it was Hillside principals or the Board who made the decision not to hire a technical theater teacher. Henry Pankey was principal at Hillside starting in 2001. (Pankey Aff. (Doc. 40-10) ¶ 16.) Hans Lassiter was principal at Hillside from August 2009 until February 2012. (Lassiter Aff. (Doc. 40-11) ¶ 8.)

It is not clear from the record when Mr. Pankey's tenure at Hillside ended.

Mr. Pankey averred that his proposals to create a "Hillside School of the Arts" were repeatedly rejected by Defendant. (Pankey Aff. (Doc. 40-10) ¶¶ 31-33.) Mr. Pankey also averred that Defendant's position that principals were responsible for staffing the schools is a "false way of framing the issue." (Id. ¶ 34.) Mr. Pankey stated that "[a]s principal, my hands were tied regarding hiring new staff. Because of decisions made by the central administration, I had no discretionary funds or teaching allotments that I could use." (Id.) Mr. Pankey averred that all of his allotments "based on student population were already allocated to positions mandated by the administration and the School Board to teach the core curriculum of subjects and the specialized program (like IB) that had been placed at Hillside." (Id. ¶ 35.) Additionally, "[t]here was strong pressure to use any extra positions to enhance the reading and math skills necessary for the standardized tests." (Id.) Mr. Pankey also averred that his teaching assistant allotments were dedicated to other "mandatory positions, such as the Exceptional Children's Program . . . and the English As a Second Language Program . . . ." (Id. ¶ 36.)

Mr. Lassiter claimed the same requirements mentioned by Mr. Pankey also meant he had "little true discretion regarding allotments." (Lassiter Aff. (Doc. 40-11) ¶ 17.) Mr. Lassiter averred it was "untrue" that principals at Hillside decided not to use their allotments to hire a theater tech. (Id. ¶ 16.) Mr. Lassiter claims Defendant "required the use of [Hillside's] allotments for these other purposes," like supporting the IB magnet program and teaching remedial classes. (Id. ¶ 17.)

As will be explained hereafter, whether Defendant or the individual principal has ultimate control of teaching positions or hiring a technical director is

not a material fact necessary to resolution of Defendant's motion for summary judgment.

4. Theater Techs at Other Schools

Plaintiff relies upon comparison to other schools to prove that he, as an African-American theater director, was treated differently from similarly-situated Caucasian theater directors. There were other schools in the district with technical theater teachers. Those schools who had technical theater positions used a "regular teacher allotment to support a technical theatre art teacher[]"; "[n]o school in the district has received a specific allotment for a technical theatre arts teacher." (Logan Dep. (Doc. 40-4) at 92; Doc. 40-31 at 18.)

The email quoted is from Dr. Eric Becoats, a former superintendent and African-American male. (Crabtree Dep. (Doc. 40-3) at 33.)

Plaintiff argues that three schools are valid comparators: Riverside, Jordan, and Durham School of the Arts ("DSA"). (Pl.'s Resp. (Doc. 40) at 15-21.) For reasons explained hereafter, the court continues to find that DSA is not a valid comparator. See infra note 21. Therefore, two schools in the district are valid comparators in this case: Riverside High School ("Riverside") and Jordan High School ("Jordan"). During Mr. Key's tenure as Area Superintendent from 2011 to 2014, Riverside and Jordan were the largest high schools in the district. (Key Dep. (Doc. 40-5) at 13, 87.) Riverside, in particular, had roughly 1,850 to 2,000 students each year during that time. (Id. at 87.) During the same period, Hillside varied from between 1,200 and 1,300. (Id. at 86.) In the 2014-15 school year, Jordan had 1,854 students. (Doc. 40-41 at 175.)

a. Riverside High School

Mr. Key was principal at Riverside from 2004 to 2010. (Key Dep. (Doc. 40-5) at 76.) Mr. Key was able to hire a technical theater teacher by using his enrollment-based allotment; Riverside was large enough to have allotments supporting two visual arts teachers, and Mr. Key decided to use one of the positions to allow for an extra drama teacher in light of student demand. (Key Dep. (Doc. 40-5) at 74, 85, 92; Doc. 40-38 at 11.) While Mr. Key was principal at Riverside, there were roughly seventy-five students per semester in Riverside's technical theater classes. (Key Dep. (Doc. 40-5) at 199.) Mr. Key wanted a technical theater class because Riverside did not have a "shop" class providing students with hands-on technical or mechanical training. (Id. at 200.) Also, Riverside needed an extra art elective but did not have physical space for another class, so they converted part of the theater wing into a theater tech shop. (Casey Dep. (Doc. 40-8) at 34.)

Riverside has had several teachers come through its drama department both before and after Mr. Key's time. Kee Strong, a Caucasian female, was a theater teacher at Riverside from July 1, 2002, until she retired on June 30, 2015. (Doc. 42 at 17; Key Dep. (Doc. 40-5) at 77; Crabtree Dep. (Doc. 40-3) at 128.) While she was at Riverside, Ms. Strong had several theater techs who worked with her. (Crabtree Dep. (Doc. 40-3) at 131.) Wesley Schultz was a theater teacher who taught at Riverside from January 26, 2011, until summer of 2012. (Id. at 133.). Michael Krauss worked as a theater tech teacher from summer of 2011 until June 12, 2012. (Casey Dep. (Doc. 40-8) at 33; Doc. 42-8 at 1.) After Wesley Schultz and Michael Krauss left Riverside in summer of 2012, Monique Taylor was hired. (Casey Dep. (Doc. 40-8) at 34.)

Monique Taylor was hired as a technical theater teacher for Riverside on August 20, 2012. (Crabtree Dep. (Doc. 40-3) at 155.) Ms. Taylor is African-American. (Id.)

After Ms. Taylor was hired, Glenn Fox worked as a technical theater teacher at Riverside from August 20, 2012, through June 14, 2013. (Doc. 40-43 at 125.) Andrew Way was then hired to work as a technical theater teacher from September 5, 2013, until June 12, 2015. (Id.; Adkins Aff. (Doc. 38-8) ¶ 7.)

After Ms. Strong's retirement in June 2015, Tom Nevels then worked at Riverside as a theater teacher at Riverside for a short time in fall of 2015. (Casey Dep. (Doc. 40-8) at 35.)

As Mr. Crabtree acknowledged during his deposition, there are inconsistencies in Mr. Nevels's file about how long Mr. Nevels was at Riverside. (Crabtree Dep. (Doc. 40-3) at 149-50.) Mr. Crabtree believed Mr. Nevels was at Riverside from August 17, 2015 until November 20, 2015. (Id. at 149.)

After Mr. Nevels left in November 2015, Monique Taylor was the only theater teacher at Riverside. In 2016, Riverside created two "classified" employee positions by converting a teacher allotment. (Crabtree Dep. (Doc. 40-3) at 159; Key Dep. (Doc. 40-5) at 73; Deposition of William Lawayne Holley, Jr. ("Holley Dep.") (Doc. 40-7) at 45; Adkins Aff. (Doc. 38-8) ¶ 9.) Using one of those classified positions, William Holley was hired to work as a theater tech at Riverside on January 4, 2016 - Mr. Holley still works at Riverside. (Crabtree Dep. (Doc. 40-3) at 135-36.) When Mr. Holley was hired as a classified employee, Monique Taylor was the only other employee in the Riverside theater department. (Holley Dep. (Doc. 40-7) at 76; Casey Dep. (Doc. 40-8) at 34-38.) Mr. Holley had been working at Riverside as early as 2008 as an external contractor. (Holley Dep. (Doc. 40-7) at 29.)

b. Jordan High School

Olivia Bellido is the theater teacher at Jordan High School. (Crabtree Dep. (Doc. 40-3) at 156.) Ms. Bellido is Caucasian. (Id. at 157.) Ms. Bellido was hired to teach theater and technical theater and has been teaching both since 2011. (Def.'s Reply Brief ("Def.'s Reply") (Doc. 43), Affidavit of Olivia Bellido ("Bellido Aff.") (Doc. 43-1) ¶ 2; Adkins Aff. (Doc. 38-8) ¶ 3.) Ms. Bellido is the only theater instructor at Jordan and has been since 2011. (Bellido Aff. (Doc. 43-1) ¶ 3.) Ms. Bellido has asked her principals, as well as past and present DPS Directors of Arts Education, to hire a technical theater teacher "as early as 2011," but her requests have all been denied. (Bellido Aff. (Doc. 43-1) ¶¶ 7-8.) Ms. Bellido has been told by her principals that Jordan does not have the teacher allotments to support a technical theater teacher. (Bellido Aff. (Doc. 43-1) ¶ 8.) A previous drama teacher at Jordan, Hope Hynes, a Caucasian female, left DPS to teach in another district because she did not get the theater tech teacher she wanted. (Casey Dep. (Doc. 40-8) at 30, 32.)

C. Extra-Duty Pay

Defendant would regularly use Hillside Theater for district-wide events. (Casey Dep. (Doc. 40-8) at 116.) Hillside was a preferable location because they had good parking and a good auditorium. (L'Homme Dep. (Doc. 40-6) at 131.)

Plaintiff would often be present in Hillside Theater when it was being used for district-wide events in order provide technical support. (Pl.'s Resp. (Doc. 40), Deposition of Plaintiff Wendell Tabb ("Tabb Dep.") (Doc. 40-2) at 33.) Plaintiff stated he generally "was not getting paid for the district events and they've only paid me for a very slim few." (Id. at 27.) Plaintiff has always been paid for outside theater rentals ("facility rentals"), which are rentals made by groups outside DPS. (Id. at 27-28.)

Plaintiff asked Board officials for compensation for "all of the events" for which he had not been compensated. (Id. at 38.) In his Verified Amended Complaint, Plaintiff alleges that, "[d]espite repeated requests, he has not been paid for this work." (Am. Compl. (Doc. 14) ¶ 130.)

Plaintiff's Verified Amended Complaint also includes a long list of district-wide events he claims to have not received extra-duty pay for working. (Id.) However, Plaintiff did receive extra-duty contracts for two of the events on that list. Plaintiff received an extra-duty contract for the 2015 Summer School graduation and was paid for that event. (Tabb Dep. (Doc. 40-2) at 60, 111; Doc. 40-15 at 26-28.) Plaintiff also received an extra-duty contract for a May 2015 DPS Career and Technical Education ("CTE") event, (Tabb Dep. (Doc. 40-2) at 113; Doc. 40-15 at 29-31), but Plaintiff does not recall if he was actually paid for that event, (Tabb Dep. (Doc. 40-2) at 113). Dr. Logan cannot confirm or deny that Plaintiff worked all the events in paragraph 130 of his Verified Amended Complaint. (Logan Dep. (Doc. 40-4) at 114.) Plaintiff admits he did receive extra-duty contracts prior to filing his Complaint. (Tabb Dep. (Doc. 40-2) at 103-04.)

CTE is the modern nomenclature for vocational instruction. (Crabtree Dep. (Doc. 40-3) at 58.)

Plaintiff, in pointing to comparators for his extra-duty claim, named William Holley as a Caucasian employee who was receiving extra-duty pay when Plaintiff was not. (Id. at 71.) Specifically, Plaintiff noted that Mr. Holley was compensated for his yearly work at DPS's Evening of Entertainment Event. (Id. at 72.) Plaintiff also claimed Bill Thomason, an IT employee, received extra-duty pay for district-wide events. (Tabb Dep. (Doc. 40-2) at 74.) Plaintiff did not name a specific district event Mr. Thomason worked for which he received extra-duty pay. (Tabb Dep. (Doc. 40-2) at 70-74.)

Mr. Holley's sound and light companies were used by DPS for roughly ten years to support district-wide events. (Holley Dep. (Doc. 40-7) at 42, 51-52.) This was before Mr. Holley was hired as a classified employee at Riverside in January 2016. (Id.) Mr. Holley's first company to receive contracts was Holley Johnson Sound, Lighting and Production Company, Inc. (Doc. 40-43 at 105.) That company was administratively dissolved, and Mr. Holley later founded Ferret Sound Company, LLC ("Ferret Sound"). (Doc. 40-43 at 110, 112.) Ferret Sound continued to perform contracts for DPS after Mr. Holley was hired at Riverside. (Holley Dep. (Doc. 40-7) at 51; Casey Dep. (Doc. 40-8) at 38-39.)

Mr. Holley received extra-duty contracts for work he did as a Riverside employee outside normal hours. (Doc. 40-16 at 115-19.) Mr. Holley's earliest extra-duty contract in the record is for work done between June 1-3, 2017. (Id. at 119.) Only one of Mr. Holley's extra-duty contracts is for a district-wide event. (Id. at 117.) Though Mr. Holley has never been denied extra-duty pay when he asked for it, he has worked district events without pay. (Holley Dep. (Doc. 40-7) at 77.) Mr. Holley said he is sometimes there "voluntarily" to support the events. (Id. at 78.)

Ms. Bellido, a Caucasian female and Jordan's only drama teacher, averred that she is "present in Jordan's theater for all school and district-wide events, including during nights and on weekends," and she does "not receive extra-duty pay for any of these events." (Bellido Aff. (Doc. 43-1) ¶ 11.)

D. Procedural History

Plaintiff originally filed suit in this court on August 9, 2017, alleging causes of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and the Americans with Disabilities Act (the "ADA"). (Doc. 1 at 1.) Plaintiff's original Complaint alleged

that Defendant discriminated against him in giving other schools technical theater support, in failing to pay Plaintiff for his additional work in light of his lack of technical theater support, in failing to pay him extra-duty pay for working district-wide events held at Hillside, and in retaliating against Plaintiff under the ADA. (Doc. 1 at 26-28.)

After Defendant filed its first Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), (Doc. 12), Plaintiff filed an Amended Complaint, (Doc. 14). Defendant filed a second Motion to Dismiss Plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). (Doc. 18.) The court granted in part and denied in part Defendant's second Motion to Dismiss. (Doc. 25.) Specifically, the court held:

(1) Defendant's motion to dismiss Plaintiff's Title VII and 42 U.S.C. § 1981 claims, as those claims relate to the alleged denial of technical staffing assistance (compared to Riverside and Jordan) and the alleged non-payment of special event-related overtime is DENIED WITHOUT PREJUDICE, (2) Defendant's motion to dismiss Plaintiff's Title VII and 42 U.S.C. § 1981 claims, as those claims relate to the alleged non-payment of a technical supplement and the alleged denial of technical staffing assistance (compared to DSA only) is GRANTED, and (3) Defendant's motion to dismiss Plaintiff's ADA retaliation claim is GRANTED.

Tabb v. Bd. of Educ. of Durham Pub. Sch., No. 1:17CV730, 2019 WL 688655, at *13 (M.D.N.C. Feb. 19, 2019).

Following discovery, Defendant submitted a Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(a). (Doc. 38.) Defendant filed a supporting brief, (Doc. 39); Plaintiff responded, (Doc. 40); and Defendant replied, (Doc. 43). Defendant's Motion for Summary Judgment is now ripe for ruling.

II. STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). This court's summary judgment inquiry is whether the evidence "is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The moving party bears the initial burden of demonstrating "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325. If the "moving party discharges its burden . . . , the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." McLean v. Patten Cmtys., Inc., 332 F.3d 714, 718-19 (4th Cir. 2003) (citing Matsushita Elec., 475 U.S. at 586-87). Summary judgment should be granted "unless a reasonable jury could return a verdict in favor of the nonmovant on the evidence presented." McLean, 332 F.3d at 719 (citing Liberty Lobby, 477 U.S. at 247-48).

When considering a motion for summary judgment, courts must "construe the evidence in the light most favorable to . . . the non-moving party. [Courts] do not weigh the evidence or make credibility determinations." Wilson v. Prince George's Cnty., 893 F.3d 213, 218-19 (4th Cir. 2018).

III. ANALYSIS

Title VII and 42 U.S.C. § 1981 each prohibit employment discrimination on the basis of race. 42 U.S.C. § 2000e-2(a)(1); 42 U.S.C. § 1981. A race-based employment discrimination claim must assert that the plaintiff "belongs to a racial minority" and was either not hired, fired or suffered some adverse employment action due to his race. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The legal standard for Title VII and Section 1981

claims is the same. Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649 n.1 (4th Cir. 2002).

"To establish a prima facie case of [racial] discrimination, a plaintiff must show: '(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) that similarly-situated employees outside the protected class received more favorable treatment." Gerner v. Cnty. of Chesterfield, 674 F.3d 264, 266 (4th Cir. 2012) (quoting White v. BFI Waste Servs., LLC, 375 F.3d 288, 295 (4th Cir. 2004)); Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010).

"At the summary judgment stage, the plaintiff carries the initial burden of establishing the prima facie elements of his claims under Title VII upon challenge by an adverse party. This burden is met by utilizing either direct or circumstantial evidence." Reid v. Dalco Nonwovens, LLC, 154 F. Supp. 3d 273, 284 (W.D.N.C. 2016); accord Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005); Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993), holding modified by Stokes v. Westinghouse Savannah River Co., 206 F.3d 420 (4th Cir. 2000).

If the plaintiff succeeds in proving a prima facie case, the burden of going forward shifts to the employer, who must articulate a non-discriminatory reason for the difference in disciplinary enforcement. Should the employer articulate such a non-discriminatory reason, the burden shifts back to the plaintiff to demonstrate that the employer's reasons are not true but instead serve as a pretext for discrimination. The plaintiff, however, always bears the ultimate burden of proving that the employer intentionally discriminated against him.

Cook v. CSX Transp. Corp., 988 F.2d 507, 511 (4th Cir. 1993); accord Engler v. Harris Corp., 628 F. App'x 165, 167 (4th Cir. 2015).

Plaintiff offers no direct evidence of discrimination — Plaintiff is proceeding under the McDonnell Douglas framework by offering indirect evidence of discrimination. There is no genuine dispute of material fact that Plaintiff is a member of a protected class and was performing his job satisfactorily. Plaintiff, as an African-American, is a member of a protected class under Title VII and § 1981. Defendant does not contest that Plaintiff has exceeded expectations in the performance of his job. (See generally Def.'s Mem. of Law in Supp. of Mot. for Summ. J. ("Def.'s Br.") (Doc. 39); Def.'s Reply (Doc. 43).) Indeed, the record is replete with evidence of Plaintiff's stellar performance as a drama teacher.

The court, therefore, will only analyze Plaintiff's claims to determine if there is a genuine dispute of material fact as to whether Plaintiff experienced an adverse employment action and, if so, whether that action occurred under circumstances that give rise to an inference of racial discrimination. Plaintiff alleges two adverse employment actions: discriminatory technical theater staffing and failure to pay extra-duty pay. The court addresses each in turn.

A. Discriminatory Staffing Claim

Plaintiff alleges that Defendant denied him technical theater staffing because of his race. (Am. Compl. (Doc. 14) ¶¶ 41-45.)

Defendant moves for summary judgment largely on two grounds. First, Defendant argues that the undisputed evidence shows that the decision to hire or not hire theater techs at other schools was made by principals at those schools, not by the Board. Defendant argues it did not provide a specific theater tech allotment to any school. Therefore,

Defendant argues, there is no genuine dispute that Defendant did not take an adverse employment action. Second, Defendant argues that Plaintiff can point to no evidence of a Caucasian comparator during the limitations period who received the benefit that Plaintiff sought. Therefore, Defendant argues, Plaintiff cannot make out a prima facie case of discrimination

Plaintiff argues that summary judgment is inappropriate here because there is a genuine dispute of material fact as to whether it was Defendant or Hillside principals who were responsible for "the failure to hire a Theatre tech." (Pl.'s Resp. (Doc. 40) at 7.) Plaintiff argues that Defendant, specifically the Superintendent, had the authority to create a new position for a theater tech at Hillside by either giving an additional allotment to the school or hiring a classified employee but chose not to do so. (Id. at 13-14.) Plaintiff argues this creates a genuine dispute as to whether it was Hillside principals or the Board denying Plaintiff the staffing he requested.

Plaintiff also argues that Defendant made it impossible for Hillside principals to hire a theater tech because of the magnet and academic achievement requirements they placed on Hillside principals. (Id. at 9.) Because of these requirements, Plaintiff argues, Hillside principals had no real discretion in how they used their enrollment-based teacher allotments. (Id. at 7, 9.) Therefore, Plaintiff argues, there is a factual dispute about whether Hillside principals were the real decision makers.

As for comparators during the limitations period, Plaintiff points to Riverside and DSA as examples of Caucasian theater teachers being provided theater techs. Plaintiff argues that Jordan is not a valid comparator, because Ms. Bellido, the Caucasian theater director at Jordan, has not requested a theater tech and she herself is a "theater tech." (Id.

at 17-18.) Plaintiff then points to the string of theater techs provided to Riverside High School as evidence of a pattern of providing the technical staffing to Caucasian teachers but denying it to Plaintiff. (Id. at 16-17.) Plaintiff argues that, until 2015, Riverside's drama program was "run" by Kee Strong, a Caucasian female, and that the theater support hired was hired to support her. (Id. at 15-16.)

For reasons explained below, infra note 21, the court continues to find that DSA is not a valid comparator.

1. Adverse Employment Action

The court begins by analyzing whether there is a genuine dispute of material fact that Defendant's actions in or effecting the failure to hire a theater tech are an adverse employment action.

a. Theater Tech is not "Part and Parcel"

This court found, in its order denying Defendant's 12(b)(6) motion, that Hishon and the factual allegations plausibly stated a claim. See Tabb, 2019 WL 688655, at *7; Hishon v. King & Spalding, 467 U.S. 69, 75 (1984). However, at this stage of the proceedings, considering the facts in the light most favorable to Plaintiff, Plaintiff has not come forward with evidence to support a claim based on Hishon that Defendant took an adverse employment action as to technical staffing. In its previous order allowing Plaintiff's discriminatory staffing claim to proceed, this court stated the following: "Here, Defendant was under no obligation to provide technical staffing assistance to any district theater departments. However, once an employer offers a benefit to certain employees, it assumes the obligation to do so in a non-discriminatory manner." Tabb, 2019 WL 688655, at *7.

Following the development of the record during discovery, it does not appear the facts support a finding that a theater tech is "part and parcel" of employment as a high school drama teacher within DPS. See Hishon, 467 U.S. at 75 ("A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all."). The Hishon Court explained that those "benefits that comprise the 'incidents of employment,' or that form 'an aspect of the relationship between the employer and employees,' may not be afforded in a manner contrary to Title VII." Id. at 75-76 (quoting Allied Chem. & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971)). Hishon itself dealt with a law firm's implicit promise to consider an attorney for partnership, a significant incident of employment for any new lawyer. In a later Supreme Court case, the Court cited to Hishon when discussing paid versus unpaid leave, Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 71 (1986); another discussed continued employment beyond a mandatory retirement age, see Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 114-16 (1985). The Fourth Circuit's only case to fully address Hishon's "part and parcel" analysis dealt with severance benefits. Gerner, 674 F.3d at 267. The Gerner court cited other cases that dealt with severance benefits and supervisory opportunities necessary to advancement. See id.

The factual background of those and other cases suggests Hishon only applies to objective employment benefits that inure directly to the employee and are also so fundamental as to be considered "part and parcel" of the employment relationship. The record indicates that providing a technical theater teacher or theater tech is not an objective benefit that inures directly to a theater teacher in the DPS.

Although not argued by the parties, this court would find alternatively that the failure to hire a theater tech is not an adverse action with respect to Plaintiff's employment. Generally speaking, teachers and curriculum are designed for the benefit of the students, not other faculty. Plaintiff's desire for a theater tech to improve the quality of the theater, as well as Plaintiff's willingness to perform the additional technical work when possible, are all commendable. Nevertheless, the allocation of resources, including the hiring of teachers, are matters intended to benefit the students. Regardless, the parties have not raised this issue, and the court finds that a theater tech is not part of the employment relationship.

Regardless of whether the benefit inures to theater teachers directly, the record indicates that a theater tech is not a "part and parcel" benefit for theater teachers in DPS. At the time Plaintiff filed his Charge, only two out of six DPS high schools had theater techs. (See, e.g., Doc. 40-34 at 22; Pl.'s Resp. (Doc. 40) at 15-19.) That indicates that theater tech staffing is not "part and parcel" of employment as a high school drama teacher in DPS as the majority of schools described do not have a theater tech. Plaintiff's claim fails to allege an adverse employment action on that fundamental point.

b. No Adverse Action and No Pretext

Even if a theater tech is part and parcel of employment as a drama teacher in DPS, Plaintiff's claim fails for other reasons. Plaintiff's argument that Defendant took an adverse employment action is two-pronged.

First, Plaintiff argues that Defendant took an adverse employment action in denying Plaintiff and Hillside principals' requests to provide an additional allotment or funds, beyond the school's enrollment-

based allotment or normal funds, which they could use to hire a technical theater teacher. The second argument is that Defendant took an adverse employment action in preventing Hillside principals from using their enrollment-based allotments to hire a theater tech.

As to the first, there is no genuine dispute of material fact that Defendant never provided an additional allotment to any other school. Therefore, Defendant did not deny that benefit in a discriminatory way, because it did not provide it to anyone else. As to the second, that Defendant's requirements prevented Hillside principals from using their enrollment-based allotments to a hire a theater tech, the court finds that, when viewing the record in a light most favorable to Plaintiff, he has come forward with evidence supporting a prima facie case of discrimination. However, Plaintiff has failed to come forward with evidence upon which a reasonable jury could rely in determining that Defendant's magnet program and academic achievement requirements were pretext for preventing Hillside from hiring a theater tech due to Plaintiff's race.

i. No Additional Allotment for Other Schools

There is no genuine dispute of material fact that Defendant never provided an additional theater tech allotment to another school. Therefore, Defendant did not discriminate against Plaintiff when it denied his requests for an additional allotment.

Once an employer offers a benefit to certain employees, it assumes the obligation to offer it to other employees in a non-discriminatory manner. Hishon, 467 U.S. at 75. As the Fourth Circuit noted, "courts have consistently recognized that the discriminatory denial of a non-contractual

employment benefit constitutes an adverse employment action." Gerner, 674 F.3d at 267.

Again, assuming the benefit is, in fact, "part and parcel."

There is a fundamental difference between the Hishon line of cases and how theater techs were hired at other schools in DPS. The cases cited by the Gerner Court all involved situations where an employer obviously provided a benefit to some employees, but then withheld it from others in a discriminatory fashion. See Trans World Airlines, 469 U.S. at 120-21 (airline's discriminatory policy of allowing some pilots to "bump" less-senior flight engineers, but not allowing others because of their age); Paquin v. Fed. Nat'l Mortg. Ass'n, 119 F.3d 23, 32 (D.C. Cir. 1997) (employer offered a noncontractual severance package, but then withdrew it); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 722-23, 25 (3d Cir. 1995) (noncontractual severance benefit was offered in discriminatory fashion); Judie v. Hamilton, 872 F.2d 919, 921-22 (9th Cir. 1989) (employer permitted Caucasian employees to engage in noncontractually required supervisory responsibilities, but denied same opportunity to minority employee). Gerner itself dealt with a situation where an employer offered a less favorable severance package to a female employee than it offered to its male employees. Gerner, 674 F.3d at 265.

Another case cited by the Gerner Court, Cunico v. Pueblo School District No. 60, 917 F.2d 431 (10th Cir. 1990), cited Hishon to support the proposition that employers can avoid discriminating against employees by either giving every employee the same benefit, or providing no benefit at all. See Cunico, 917 F.2d at 442.

By contrast to those cases, there is no genuine dispute that Defendant did not provide an additional allotment or additional funding to any school for the purpose of hiring a theater tech. (Logan Dep. (Doc. 40-4) at 92; Doc. 40-31 at 18; Def.'s Mot. (Doc. 38), Affidavit of Alexander Modestou ("Modestou Aff.") (Doc. 38-9) ¶ 17.) Dr. Eric Becoats, the DPS superintendent before Dr. L'Homme, and an African-American male, was straightforward when he wrote to Plaintiff saying, "[n]o school in the district has received a specific allotment for a Technical Theatre Arts Teacher. Both DSA and Riverside utilize a regular teacher allotment to support a Technical Theatre Art Teacher." (Doc. 40-31 at 18.)

Plaintiff claims it will be for the jury to decide if Dr. Becoats or Mr. Lassiter is telling the truth about whether Defendant or principals denied Plaintiff's request, but even if a conflict exists, it is not material. Mr. Lassiter's account, however, does not contradict this statement. It seems Mr. Lassiter asked Dr. Becoats for an additional allotment to support a theater tech. (See Lassiter Aff. (Doc. 40-11) ¶¶ 18-19.) If he was in fact asking for an additional allotment, there is no dispute that Dr. Becoats denied it. Even so, he was denying Plaintiff something that nobody else in the district received: an additional allotment for a theater tech position. No jury is needed to resolve this fact.

DPS high schools are given unassigned teacher allotments based on the school's enrollment. (Crabtree Dep. (Doc. 40-3) at 45; Logan Dep. (Doc. 40-4) at 38-39; Key Dep. (Doc. 40-5) at 38-39; Modestou Aff. (Doc. 38-9) ¶¶ 12-13.) The mathematical formula used to allocate teacher positions is the same for every high school in the district. (Logan Dep. (Doc. 40-4) at 162; Doc. 40-42 at 84 (state allocation formula).) Each school's principal then uses those allotments to hire enough teachers to meet state and local curriculum requirements. (Crabtree Dep. (Doc. 40-3) at 50-51.)

Despite Plaintiff's argument to the contrary, Plaintiff offers no evidence to support the claim that schools were provided additional "discretionary" allotments. (Pl.'s Resp. (Doc. 40) at 9.) There is no genuine dispute that Defendant did not provide any other school a technical theater teaching allotment.

The way in which comparator schools hired or did not hire theater techs demonstrates this point. There is no genuine dispute that Riverside used its enrollment-based teacher allotment to hire its theater tech staff. (Key Dep. (Doc. 40-5) at 85, 92, 199-200; Doc. 40-38 at 11.) Even Mr. Holley was hired using an enrollment-based allotment after it created a "classified" employee position by converting a teacher allotment. (Crabtree Dep. (Doc. 40-3) at 160; Key Dep. (Doc. 40-5) at 73; Holley Dep. (Doc. 40-7) at 42.) There is no genuine dispute that Jordan has not had a theater tech since 2011, before the limitations period, because Jordan's principals do not have an enrollment-based allotment to spare. (Bellido Aff. (Doc. 43-1) ¶ 7.) Indeed, a previous drama teacher at Jordan, Hope Hynes, a Caucasian female, left DPS to teach in another district because she did not get the theater tech teacher she requested. (Casey Dep. (Doc. 40-8) at 30, 32.)

Plaintiff has come forward with no evidence that other principals were acting at Defendant's direction when they hired or did not hire theater techs. Indeed, Mr. Key's undisputed testimony indicates that he chose to use an allotment to hire a theater tech for reasons specific to Riverside, such as the other arts courses it offered and the physical space available.

Plaintiff is correct that Defendant could have provided a new allotment from local funds, (Logan Dep. (Doc. 40-4) at 39; Crabtree Dep. (Doc. 40-3) at 76; Key Dep. (Doc. 40-5) at 105-06; L'Homme Dep. (Doc. 40-6) at 90-91, 94; Doc. 40-31 at 1), or it could have provided local funds to create a new classified

position, (Crabtree Dep. (Doc. 40-3) at 159). In fact, in the past, Defendant has approved additional allotments for Hillside to support the IB magnet program as well as additional teaching positions to boost test scores. (L'Homme Dep. (Doc. 40-6) at 90-91.) There is no genuine dispute as to whether Defendant could give Plaintiff the theater tech support he requested in the form of an additional allotment. But again, as the cases relied upon by the Gerner Court demonstrate, employers are only under an obligation to equitably provide non-contractual benefits that the employer has provided to others.

Even though Defendant could give the position, Dr. Logan stated he never had any additional allotments approved, though he did have at least one request per year from people other than Plaintiff. (Logan Dep. (Doc. 40-4) at 44, 155-56.) This fact further undermines Plaintiff's claim that the Board's failure to provide an additional allotment had anything to do with him or his race.
Dr. Logan also stated that he was told any request for an allocation above Hillside's enrollment-based allotment would be denied since Hillside was over allotted, (id. at 77); the record separately supports that account. In 2017, Hillside had the lowest student-to-teacher ratio in the DPS by almost four students per teacher. (Crabtree Dep. (Doc. 40-3) at 161; Key Dep. (Doc. 40-5) at 206-08.) In fact, when Dr. Logan first started at Hillside, he had too many teachers left over from the School Improvement Grant ("SIG") allotments given to Hillside for academic improvement. (Logan Dep. (Doc. 40-4) at 143.)

Mr. Pankey and Lassiter's efforts to get a theater tech for Plaintiff beyond Hillside's enrollment-based allotment also do not create a genuine dispute of material fact on this point. Mr. Pankey's efforts to get Plaintiff a theater tech were wrapped up in his proposal to create a "Hillside School of the Arts."

(Pankey Aff. (Doc. 40-10) ¶¶ 26-27, 32-33.) Such a request required more from Defendant than just hiring an additional teacher. (See id.) Defendant's decision to reject the creation of a second school of the arts does not support the conclusion that Defendant was discriminating against Plaintiff. Mr. Lassiter also advocated for such an academy at Hillside by using funds from a Federal Student Improvement Grant, but "core area subjects outlasted needs in PE, world languages, and as we're now seeing, CTE." (Key Dep. (Doc. 40-5) at 157; Doc. 40-39 at 11.) Plaintiff has produced no evidence that another school received SIG funds to hire a theater tech.

There is no genuine dispute of material fact that Defendant never provided a theater tech allotment to any school, nor did Defendant ever approve an additional allotment for a school that it could convert to a classified position, nor has Plaintiff produced evidence that Defendant provided discretionary funds for a school to use to hire theater tech support that he did not receive. Plaintiff, therefore, has not provided any evidence that Defendant provided the benefit of a theater tech allotment to one drama teacher that was correspondingly denied to Plaintiff. To the extent that Plaintiff's disparate staffing claim rests on Defendant's refusal to provide Plaintiff an allotment above Hillside's enrollment-based allotment, there is no genuine dispute of material fact that Defendant did not take adverse employment action against Plaintiff. See Hishon, 467 U.S. at 75.

ii. Plaintiff has not come forward with Evidence that Defendant's Requirements for Hillside were Pretext for Discriminating Against Plaintiff

Plaintiff also argues that Defendant took an adverse employment action in the way it prevented Hillside principals from using their enrollment-based

allotments to hire a theater tech for Plaintiff. (Pl.'s Resp. (Doc. 40) at 9.) Plaintiff does not contest that Hillside principals were responsible for hiring teachers, and there is no genuine dispute as to that fact. Instead, Plaintiff claims Defendant's magnet program and academic achievement priorities meant Hillside principals had to hire teachers that supported Defendant's goals, meaning Hillside did not have the "discretionary allotments" to hire a theater tech for Plaintiff. (Id.)

Even Mr. Pankey and Mr. Lassiter implicitly concede that fact. Mr. Pankey said that Defendant's priorities meant his "hands were tied," since he had to hire teachers to meet Defendant's expectations. (Pankey Aff. (Doc. 40-10) ¶ 34.) Mr. Pankey did not aver that Defendant told him who to hire or how to meet those requirements. Likewise, Mr. Lassiter said he had "little true discretion" about what kinds of teachers to hire since he, too, had to support the IB magnet program and other academic priorities. (Lassiter Aff. (Doc. 40-11) ¶ 17.) Mr. Lassiter did not say he did not make hiring decisions, only that he had to do so within the parameters set by Defendant. Dr. Logan described in detail the process for hiring a new teacher, a process that starts with a principal identifying a need, posting a position, and interviewing candidates, and picking the candidate to hire. (Crabtree Dep. (Doc. 40-3) at 26-27; Logan Dep. (Doc. 40-4) at 43.)

Viewing the record in light most favorable to Plaintiff, the court will assume without deciding that Plaintiff has come forward with evidence supporting his prima facie case, to include an adverse employment action, on the theory that Defendant's requirements limited Hillside's discretion on how to use its enrollment-based allotments. However, Plaintiff himself, through his own affiants, supports the conclusion that Hillside's discretion was limited by Defendant for nondiscriminatory reasons, that was to focus on improving academic achievement

and supporting the IB magnet program. Plaintiff has come forward with no evidence that Hillside's discretion was limited in an effort to deny Plaintiff a theater tech based on his race.

The undisputed record evidence is that Dr. Logan, the only Hillside principal during the relevant period, exercised his discretion at least once in choosing to hire a photography teacher over a theater tech. (Logan Dep. (Doc. 40-4) at 100; Doc. 40-32 at 4; Casey Dep. (Doc. 40-8) at 91-94.) Dr. Logan made that decision because there was a higher student demand for photography than there was for technical theater. (Casey Dep. (Doc. 40-8) at 93.) Dr. Logan also stated that he initiated the student registration process for technical theater classes "two to three times," but "there wasn't a demand from the students." (Logan Dep. (Doc. 40-4) at 43.) In 2019, Dr. Logan was given a list of 37 students who were interested in taking technical theater; as he stated, that number of students justifies a technical theater class, but not hiring a new fulltime technical theater teacher. (Id. at123-24.)
Despite this evidence, Plaintiff has come forward with other evidence upon which a reasonable jury could rely in reaching the conclusion that Defendant prevented Hillside principals from using their enrollment-based allotments to hire a theater tech. (See Pankey Aff. (Doc. 40-10) ¶ 34; Lassiter Aff. (Doc. 40-11) ¶¶ 16-20.) Dr. Logan also stated he wanted to hire a technical theater teacher but could not spare a teacher allotment. (Crabtree Dep. (Doc. 40-3) at 92.) The Board and administrators were in agreement that Dr. Logan would have to use his enrollment-based allotments to hire a theater tech. (Id. at 40-41.) These facts indicate that the Board both required Hillside to use their allotments in various ways and also expected Dr. Logan to use those limited allotments to provide Plaintiff with the staffing he requested.

After a plaintiff establishes his prima facie case, the employer "must articulate a non-discriminatory reason for the difference in disciplinary enforcement. Should the employer articulate such a non-discriminatory reason, the burden shifts back to the plaintiff to demonstrate that the employer's reasons are not true but instead serve as a pretext for discrimination." Cook, 988 F.2d at 511. "Once an employer meets its burden of producing a legitimate, non-discriminatory reason, 'the plaintiff may attempt to establish that he was the victim of intentional discrimination by showing that the employer's proffered explanation is unworthy of credence.'" Bibichev v. Triad Int'l Maint. Corp., 951 F. Supp. 2d 839, 847 (M.D.N.C. 2013) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000)). "[A] reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993). "Under the McDonnell Douglas framework, in order to survive a motion for summary judgment, the plaintiff must have developed some evidence on which a juror could reasonably base a finding that discrimination motivated the challenged employment action." Mackey v. Shalala, 360 F.3d 463, 469 (4th Cir. 2004) (citing Reeves, 530 U.S. at 148).

Defendant devotes the majority of its briefing to attacking Plaintiff's prima facie case as it pertains to an adverse employment action and the lack of comparator evidence. (See generally Def.'s Br. (Doc. 39).) Defendant also implicitly argues that, regardless of Plaintiff's ability to make out a prima facie case, the objective way in which teacher allotments are allocated to schools is a nondiscriminatory reason for Defendant's denial of Plaintiff's staffing request. (See id. at 21.) Defendant makes the argument more explicit in its Reply when it states that it:

has not argued that DPS high schools have limitless teacher positions and are not faced with hard choices about staffing and programs. . . . In emphasizing Hillside's need for remedial courses and the existence of the IB program, Plaintiff is simply highlighting additional legitimate, non-discriminatory reasons why Hillside may have not hired another theater teacher to teach technical theater courses.

(Def.'s Reply (Doc. 43) at 9.) Though that argument was raised in Defendant's Reply, Plaintiff was on notice that Defendant had come forward with evidence of a legitimate, nondiscriminatory reason for why Defendant's requirements limited Hillside's discretion. (Pl.'s Resp. (Doc. 40) at 15 ("A jury must determine whether the defense being asserted is a pretext for racially discriminatory actions by administrators.").) "[D]istrict courts may enter summary judgment sua sponte 'so long as the losing party was on notice that she had to come forward with all of her evidence.'" Penley v. McDowell Cnty. Bd. of Educ., 876 F.3d 646, 661 (4th Cir. 2017) (quoting Celotex Corp., 477 U.S. at 326); cf. Hodgin v. UTC Fire & Sec. Ams. Corp., 885 F.3d 243, 251 n.3 (4th Cir. 2018) ("[W]e may affirm a grant of summary judgment on any ground that the law and the record permit." (quoting Thigpen v. Roberts, 468 U.S. 27, 29-30 (1984)). Plaintiff anticipated Defendant's arguments and was on notice that he had to "come forward with all of his evidence" as to an alleged pretext. Therefore, the court analyzes Defendant's proffered nondiscriminatory reason and Plaintiff's argument that the reason is pretextual. Defendant never concedes that it was not high school principals who made hiring decisions.

The record contains substantial evidence that Defendant required Hillside principals to: support the IB magnet program, which was aimed at increasing racial integration; to improve standardized test scores; and to provide remedial

instruction to students coming in below grade level. (See, e.g., Logan Dep. (Doc. 40-4) at 145-48, 152-53.) Indeed, the Pankey and Lassiter Affidavits provided by Plaintiff affirm that Hillside principals were required to support core subject areas, boost test scores, and support the IB magnet program. (Pankey Aff. (Doc. 40-10) ¶¶ 35-36; Lassiter Aff. (Doc. 40-11) ¶¶ 16-17.) Mr. Pankey averred that "[a]s principal, my hands were tied regarding hiring new staff. Because of decisions made by the central administration, I had no discretionary funds or teaching allotments that I could use." (Pankey Aff. (Doc. 40-10) ¶ 34.) All of Mr. Pankey's allotments "based on student population were already allocated to positions mandated by the administration and the School Board to teach the core curriculum of subjects and the specialized program (like IB) that had been placed at Hillside." (Id. ¶ 35.) Additionally, "[t]here was strong pressure to use any extra positions to enhance the reading and math skills necessary for the standardized tests." (Id.) Mr. Pankey also averred that his teaching assistant allotments were dedicated to other "mandatory positions, such as the Exceptional Children's Program . . . and the English As a Second Language Program . . . ." (Id. ¶ 36.)

Mr. Lassiter claimed he had "little true discretion regarding allotments" for the following reasons:

First, there was intense pressure from the administration to use the allotments for particular purposes. Many of the allotments were designated for the remedial classes needed to help low performing students in the Hillside population. Other allotments were designated for academic teachers in the International Baccalaureate program. Although I would have been happy to use one of my allotments to hire a Theatre Tech, the administration required the use of the allotments for these other purposes. These programs were a central priority of the Superintendent's office, and

allotments dedicated to them were not within a principal's control.

(Lassiter Aff. (Doc. 40-11) ¶ 17.) Plaintiff does not allege or provide evidence of any other reasons Defendant might have limited principal discretion at Hillside regarding allotments.

Plaintiff argues that since the IB magnet program is designed to increase racial integration, it is "[f]or reasons related to race [that] positions at Hillside were used for academic teachers in the IB program, not for hiring a theatre tech . . . ." (Pl.'s Resp. (Doc. 40) at 19-20.) Regardless of Plaintiff's suggestion, Plaintiff must show that the proffered reason is both false and the real reason for the action was discrimination against Plaintiff. Westmoreland v. TWC Admin. LLC, 924 F.3d 718, 728 (4th Cir. 2019) (citing Reeves, 530 U.S. at 144-45) (noting that a plaintiff must come forward with "evidence as to the falsity of the employer's proffered reason"). Rather than demonstrate any falsity of Defendant's proffered reasons for hiring decisions or any evidence of discrimination based on race, both Defendant's evidence and Plaintiff's evidence establish that the hiring formulas which precluded provision of a theater tech had nothing to do with Plaintiff, his race, or his theater program.

Defendant's requirements were legitimate and nondiscriminatory as to Plaintiff. Federal courts have consistently approved magnet school plans as desegregation tools. See, e.g., Milliken v. Bradley, 433 U.S. 267, 272 (1977); Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 403 (4th Cir. 2001). As to test scores, Mr. Lassiter noted that Hillside was one of the schools mentioned in the North Carolina Leandro case during which Judge Manning "mandated that Hillside had to restructure its program and improve its test scores in basic skills such as math and reading or be taken over by the State." (Lassiter Aff. (Doc. 40-11) ¶ 11.) Even after Mr. Lassiter made large improvements in test scores

during his tenure at Hillside, the passing rate was still 61%. (Id. ¶ 19.)

Plaintiff repeatedly points out that the magnet program has not been successful in drawing white students to Hillside. While true, the point is irrelevant. Defendant's motivation in creating the program is legitimate, nondiscriminatory, and completely unrelated to Plaintiff. What is more, the DPS magnet system as a whole has been successful in increasing racial balance across the DPS system, even if Hillside has not seen the same success. (Doc. 40-41 at 57.)

There is no genuine dispute of material fact that Defendant's requirements for Hillside were legitimate and nondiscriminatory. St. Mary's Honor Ctr., 509 U.S. at 515. Plaintiff's rebuttal evidence, to the extent he offers it, is "not sufficient evidence for jurors reasonably to conclude that" Defendant's proffered reason is pretext, and summary judgment is appropriate. Mackey, 360 F.3d at 468-69.

Mr. Pankey's and Mr. Lassiter's specific accounts of being rebuffed by Defendant when requesting theater tech support are tied to Defendant's push to improve academic achievement at Hillside and support the IB magnet program. None of them create a genuine dispute of material fact regarding pretext.

Mr. Lassiter recounts one encounter with Superintendent Becoats, an African-American male, where he was "dismissive of hiring a Theatre Tech for Hillside . . . ." (Lassiter Aff. (Doc. 40-11) ¶ 19.) That heated encounter does not reveal a discriminatory intent on Defendant's part. First, it appears that Mr. Lassiter was asking Dr. Becoats for an additional allotment, not permission to use a normal allotment for theater tech. Mr. Lassiter stated in a separate email to Plaintiff that he had 30-40 students in core subject classes, and the SIG

funds were the only chance to hire a technical theater teacher. (Doc. 40-39 at 11.) If Mr. Lassiter was asking for an additional allotment for a theater tech, he was asking for something Defendant did not provide anyone else. Second, even if Mr. Lassiter was asking for permission to use an enrollment-based allotment for a theater tech instead of one for Defendant's priorities for Hillside, there are facts surrounding the event that remove any probative value as to racial discrimination against Plaintiff. Dr. Becoats is an African-American, a fact that makes its less plausible that he was denying Plaintiff a theater tech because of his race. Also, Mr. Lassiter himself tied the account to concern over test scores at Hillside. At the time of the event, Hillside's pass rate on standardized tests had improved, but was still 61%. For these reasons, Mr. Lassiter's encounter with Dr. Becoats does not create a genuine dispute regarding pretext.

Plaintiff's assertion that Dr. Becoats was going along with Defendant's allegedly discriminatory scheme to avoid standing up for a fellow African-American is a bald assertion that is not supported by the record. (Pl.'s Resp. (Doc. 40) at 12.)

In a second account, Mr. Lassiter avers that he proposed converting a photography teacher spot to a theater tech position, but his plan was denied after an administrator reviewed enrollment numbers. (Lassiter Aff. (Doc. 40-11) ¶ 20.) This account is missing important details, such as how the position was eventually used. It appears it is related to a 2010 exchange, when Mr. Lassiter told Plaintiff that if an allotment was restored to Hillside, he was going to use it for photography/art, not for technical theater. (Key Dep. (Doc. 40-5) at 135; Doc. 40-31 at 12.) The event recounted by Mr. Lassiter is also outside the limitations period, so even if it were an actionable adverse employment action, Plaintiff is too late in raising it. The averment's scant detail, apparent connection to Mr. Lassiter's decision to use

a restored allotment for another purpose, and different decisionmakers reduce that averment's probative value.

During his deposition, Plaintiff alleged that Earl Pappy, a past principal at Hillside, was told by someone in "central office" that he was not to provide Plaintiff a theater tech. (Tabb Dep. (Doc. 40-2) at 97.) Plaintiff said it was Terri Mozingo who said Hillside "was going to go in a different direction." (Id.) In an email from Dr. Mozingo to Plaintiff, Dr. Mozingo told Plaintiff that, at the time in 2009, Hillside had a need for Math and English teachers. (Doc. 40-31 at 8.) Mr. Pappy was on the same email chain that apparently stretched over a year. (Id. at 9-10.) This encounter is both outside the limitations period and does not create a genuine factual dispute about whether Defendant denied technical staffing to Plaintiff because of his race.

Plaintiff has failed to come forward with evidence that Defendant's requirements which limited Hillside's discretion were pretextual reasons for discriminating against Plaintiff based on his race. There is no genuine dispute of material fact that Defendant required Hillside principals to boost academic achievement and support a magnet program aimed at improving racial integration. There is no genuine dispute of fact that these reasons were not false, nor could any reasonable jury conclude that "discrimination was the real reason" for the requirements. St. Mary's Honor Ctr., 509 U.S. at 515. Plaintiff has failed to come forward with evidence showing pretext as to Defendant's reasons for limiting Hillside's use of its enrollment-based allotments.

iii. No Comparators during the Limitations Period

Plaintiff has also not come forward with comparator evidence that would lead a reasonable jury to conclude that Defendant acted with discriminatory intent toward Plaintiff. McLean, 332 F.3d at 719. The undisputed facts reveal that, during the relevant limitations period, there were no Caucasian comparators who received preferential treatment.

Plaintiff points repeatedly to DPS's long struggle with race and equity. Plaintiff presents evidence that Hillside is and always has been underfunded and under-resourced due to its racial make-up. These arguments are not probative of any racial animus by Defendant toward Plaintiff as an individual. See Ricci v. DeStefano, 557 U.S. 557, 577-78 (2009); Chi. Teachers Union, Local 1 v. Bd. of Educ. of City of Chi., 419 F. Supp. 3d 1038, 1044, 1057 (N.D. Ill. 2020), appeal docketed, No. 20-1167 (7th Cir. Jan. 31, 2020) ("But under a disparate treatment theory, plaintiffs must prove that the statistical disparity is the result of intentional discrimination, and in this case, as the Court has explained, the statistical evidence is rebutted in that regard by undisputed evidence that the layoffs were not the product of intentional discrimination; rather, they were the product of a regular bureaucratic process by which the number of positions and amount of funding allocated to particular schools dropped when the schools' enrollment dropped, which triggered layoffs if the drop in positions and funding impelled individual principals to close positions to balance school budgets." (emphasis added)).

Plaintiff filed the Complaint on August 9, 2017. (Doc. 1.) The parties agree that § 1981's statute of limitations has run on any claims that occurred prior to August 9, 2013 and of which Plaintiff was aware. (Pl.'s Resp. (Doc. 40) at 7; Def.'s Reply (Doc. 43) at 2 n.1.) This court agrees. Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 371, 382 (2004) (noting that a four-year statute of limitations applies to § 1981

claims brought pursuant to the 1991 amendments to § 1981); Delaware State Coll. v. Ricks, 449 U.S. 250, 258 (1980) (noting that the unlawful practice occurs when the plaintiff is informed of the allegedly discriminatory practice or decision).

As to Title VII, its enforcement provisions state that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1); see also Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109-10 (2002) (stating that "a litigant has up to 180 or 300 days after the unlawful practice happened to file a charge with the EEOC," depending on whether the litigant also files their complaint with a state agency). "Each discrete discriminatory act starts a new clock for filing charges alleging that act." Morgan, 536 U.S. at 113. For Title VII, the 180-day window "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (footnote omitted). It is Plaintiff's burden to show that any tolling or estoppel defenses applies. See, e.g., Farris v. Shinseki, 660 F.3d 557, 563 (1st Cir. 2011); Ramirez v. City of San Antonio, 312 F.3d 178, 183 (5th Cir. 2002); McCorkle v. BEB Wright, No. 5:17-CV-117-BO, 2017 WL 3594256, at *2 (E.D.N.C. Aug. 21, 2017); Fulmore v. City of Greensboro, 834 F. Supp. 2d 396, 415 (M.D.N.C. 2011). Plaintiff signed his Charge of Discrimination on May 12, 2016; it was received by the EEOC on May 18, 2016. (Doc. 40-16 at 1.) Plaintiff does not argue that his discriminatory staffing claim is a continuing violation, nor is the court aware of any case that would support that argument. Plaintiff makes no argument for equitable tolling or estoppel. Therefore, Plaintiff's Charge is untimely as to any acts of discrimination that took place prior to November 20, 2015.

The court continues to find that DSA is not a valid comparator. There is no genuine dispute as to the following material facts for Jordan and Riverside's staffing from August 9, 2013, until August 9, 2017.

The court continues to find that DSA is an invalid comparator and that it should not reconsider its previous judgment, see Jiangment Kinwai Furniture Decoration Co. v. IHFC Props., LLC, No. 1:14-CV-689, 2015 WL 12911532, at *1 (M.D.N.C. May 8, 2015) ("[T]he Court will not reward or countenance second bites at the apple."), though the record indicates even DSA used its normal allotments to hire its theater staff.

To help achieve racial balance in its high schools, Defendant established magnet programs at DSA, Hillside, and other schools in the district. (Key Dep. (Doc. 40-5) at 31; Forte-Brown Dep. (Doc. 40-9) at 28-29.) This goal has been largely attained at DSA, where the student population in 2016 was 35.7% African-American, 35.2% white, and 21.9% Hispanic. (Doc. 40-41 at 126.)

However, DSA was established "not to bring just white students. [DSA] was created to bring a central focus on a program that dedicated itself just to arts, a focus on arts." (Forte-Brown Dep. (Doc. 40-9) at 26.) DSA is a "[s]pecialized visual and performing arts secondary school for grades 6-12 focused on rigorous academics and excellence in the visual and performing arts." (Doc. 40-41 at 125.) High school students at DSA must declare an art concentration that they pursue all four years, one of which is theater. (L'Homme Dep. (Doc. 40-6) at 83.) Magnet positions are given to DSA to support its magnet program, but they are not designated for theater. (Key Dep. (Doc. 40-5) at 170.) In 2016, DSA only received three magnet positions in addition to its normal allotment. (Doc. 40-41 at 125.) Almost all of the theater teachers and techs at DSA support both the middle and high school drama programs. (Casey Dep. (Doc. 40-8) at 56.)

DSA's high school and middle school arts focus

explains staffing disparities between it and Hillside. Hillside is not an arts magnet program, but an IB magnet program. The requirement that DSA students pick an art concentration means more students are participating in arts programming, requiring more art teachers, including theater teachers and techs. These differences make DSA an invalid comparator from a staffing perspective, even if Plaintiff has built a drama program of equal (or even surpassing) artistic quality. Finally, as evinced by the few magnet positions given to DSA, even DSA did not receive theater tech allotments from Defendant.

During the relevant period, Jordan had one Caucasian theater teacher, Olivia Bellido. (Crabtree Dep. (Doc. 40-3) at 158; Bellido Aff. (Doc. 43-1) ¶ 3.) Ms. Bellido has been the only theater teacher at Jordan since 2011. (Bellido Aff. (Doc. 43-1) ¶ 3.) Despite Ms. Bellido's repeated requests, Jordan has not hired a theater tech. (Id. ¶¶ 7-8.)

As for Riverside, starting on August 9, 2013, Riverside had two drama teachers: Kee Strong, a Caucasian female, and Monique Taylor, an African-American female. (Casey Dep. (Doc. 40-8) at 34-35.) Andrew Way worked as a theater tech at Riverside from 2013 until June 2015. (Adkins Aff. (Doc. 38-8) ¶ 7.) Mr. Way and Ms. Strong both left Riverside in June 2015, (Casey Dep. (Doc. 40-8) at 35; Adkins Aff. (Doc. 38-8) ¶ 7), leaving just Ms. Taylor. Tom Nevels was then hired to work at Riverside but was only there for several weeks in fall of 2015. (Crabtree Dep. (Doc. 40-3) at 143), once again leaving just Ms. Taylor. On January 4, 2016, Will Holley started work as a classified theater tech; he is still at Riverside. (Id. at 135-36.)

Plaintiff's argument that Ms. Taylor and Mr. Way were both hired to support Ms. Strong is unsupported by the record. Ms. Taylor was hired as a theater teacher before Mr. Way was hired. Ms.

Strong, though she had been at Riverside longer, was not Ms. Taylor's supervisor. Defendant has produced unrebutted evidence that Ms. Strong and Ms. Taylor were both "theater teachers." (Adkins Aff. (Doc. 38-8) ¶ 6.) Plaintif f has produced no evidence to establish that Ms. Strong supervised Ms. Taylor. Ms. Taylor's sealed personnel file includes no evaluation forms or other evidence that might indicate that Ms. Strong supervised Ms. Taylor. (See generally Doc. 42-9.) In making his argument, Plaintiff cites only to a page in Ms. Taylor's file that lists her as a "Teacher-Theater Arts." (Pl.'s Resp. (Doc. 40) at 16; Doc. 42-9 at 32.)

Plaintiff's claim is one for disparate treatment as compared to white teachers. Plaintiff has no direct evidence of discrimination but proceeds under the McDonnell Douglas framework to prove discrimination using indirect evidence. Plaintiff has failed to come forward with valid comparator evidence that white teachers received the benefit Plaintiff sought. See Gerner, 674 F.3d at 266 (quoting White, 375 F.3d at 295); see also Cox v. U.S. Postal Serv. Fed. Credit Union, No. GJH-14-3702, 2015 WL 3795926, at *3 (D. Md. June 17, 2015) ("[A] plaintiff . . . who bases her allegations entirely upon a comparison to another employee must demonstrate that the comparator was similarly situated in all relevant respects."). Indeed, the only comparator school that hired any theater techs from August 9, 2013, until August 9, 2017, was Riverside. Riverside hired a theater tech to support an African-American teacher and a Caucasian teacher, and then hired another tech to support just an African-American teacher. As for Title VII, there was no staffing at comparator schools within 180 days of May 18, 2016, that supports the conclusion that Plaintiff was discriminated against. The only drama teacher at a comparator school who had technical theater support during that time was Monique Taylor, an African-American female.

It is not clear when Plaintiff made his final request for a theater tech. Plaintiff cites Ms. Casey's testimony that Plaintiff was asking for a theater tech the entire time she was employed by DPS; Ms. Casey retired in June 2019. (Casey Dep. (Doc. 40-8) at 9, 89.) It is clear from the record that within 180 days of filing his EEOC charge on May 18, 2016, the only drama teacher at a comparator school with a theater tech was Monique Taylor, an African-American female.

Plaintiff has failed to demonstrate that there is a genuine issue of material fact that Defendants gave a theater tech to a Caucasian teacher when it did not give him one. That Defendant gave a theater tech to another African-American teacher belies Plaintiff's theory and evidence of discrimination. Summary judgment is appropriate on Plaintiff's technical staffing claims because no reasonable jury could conclude, based on the facts during the limitations period, that Defendant acted with discriminatory intent towards Plaintiff. McLean, 332 F.3d at 719. Plaintiff has failed to show there is a genuine dispute of material fact "that similarly-situated employees outside the protected class received more favorable treatment" during the limitations period. Gerner, 674 F.3d at 266 (quoting White, 375 F.3d at 295). No reasonable jury "could return a verdict for the nonmoving party on the evidence presented." McLean, 332 F.3d at 719.

Plaintiff argues that the nondiscriminatory treatment of one member in the protected class does not mean that another protected member was not discriminated against. To support that contention, Plaintiff cites to Davis v. Greensboro News Co., Civ. No. C-84-613-G, 1985 WL 5342 (M.D.N.C. Nov. 13, 1985), a case where an African-American employee was fired and then later replaced by another African-American. In Brown v. McLean, 159 F.3d 898, 905 (4th Cir. 1998), the Fourth Circuit addressed the same principle and listed "exceptions"

to the requirement that a wrongful termination plaintiff show they were replaced by someone outside the protected class. Plaintiff does not argue those exceptions apply to his dissimilatory staffing claim. Further, Davis and the later Fourth Circuit cases require a court to avoid summarily dismissing wrongful termination claims because a member of the protected class was hired to replace a plaintiff. Those cases do not require a court to ignore an extended pattern where a member of the protected class repeatedly received the noncontractual benefit Plaintiff sought.

c. Adverse Employment Action Conclusion

In conclusion, the court does not find that Hishon supports the conclusion that Defendant took an adverse employment action. A theater tech does not appear to be "part and parcel" of employment as a high school drama teacher in DPS.

Regardless, there is also no genuine dispute of material fact that all theater techs at comparator schools were hired using those schools' enrollment-based allotments. There is no genuine dispute of material fact that no school ever received an additional allotment for a theater tech beyond its enrollment- based allotment, nor did another school receive extra funds to hire a classified employee to act as a theater tech. In short, there is no genuine dispute as to whether the Board provided a benefit to another school that it did not provide to Plaintiff; it did not. Defendant cannot be held liable for denying Plaintiff's request for an additional allotment for a theater tech when it did not provide it to anyone else. See Hishon, 467 U.S. at 75.

As to Hillside's use of its enrollment-based allotments, even assuming Defendant's actions in fact dictated the hiring decisions, there is no genuine dispute of material fact Defendant's IB magnet

program requirements, standardized test score improvement efforts, and other academic achievement goals were legitimate, nondiscriminatory reasons for limiting Hillside's discretion as to it enrollment-based allotments. Plaintiff's evidence, far from showing falsity, supports the legitimacy of Defendant's efforts, and Plaintiff has failed to come forward with any evidence that Defendant's requirements for Hillside were related to him in any way. To the extent that Plaintiff's staffing claims rests on Defendant's limitation of Hillside's discretion, the evidence is not such that a "juror could reasonably base a finding that discrimination motivated the challenged employment action." Mackey, 360 F.3d at 469.

B. Extra Duty Pay

Plaintiff has also failed to come forward with evidence establishing a genuine dispute of a material fact on his extra-duty claim — specifically, Plaintiff has failed to come forward with any evidence "that similarly-situated employees outside the protected class received" extra-duty pay when he did not. Gerner, 674 F.3d at 266 (quoting White, 375 F.3d at 295). Most of Plaintiff's evidence supporting his extra-duty pay claim are his own pleadings and sworn statements. These are insufficient in light of the evidence produced by Defendant.

The party moving for summary judgment "bears the initial burden of pointing to the absence of a genuine issue of material fact." Temkin v. Frederick Cnty. Comm'rs, 945 F.2d 716, 718 (4th Cir. 1991) (citing Celotex Corp., 477 U.S. at 322). If the moving party meets their burden, "[t]he burden then shifts to the non-moving party to come forward with facts sufficient to create a triable issue of fact." Id. at 718-19. "The responding party 'may not rest upon mere allegations or denials of his pleading, but must come forward with specific facts showing that there is a genuine issue for trial.'" Jefferies v. UNC Reg'l

Physicians Pediatrics, 392 F. Supp. 3d 620, 625 (M.D.N.C. 2019) (quoting Emmett v. Johnson, 532 F.3d 291, 297 (4th Cir. 2008)). "Mere unsupported speculation is not sufficient to defeat a summary judgment motion if the undisputed evidence indicates that the other party should win as a matter of law." Francis v. Booz, Allen & Hamilton, Inc., 452 F.3d 299, 308 (4th Cir. 2006).

Plaintiff's allegations in his Verified Amended Complaint states the following:

Upon information and belief, the white Theatre Directors and other white teachers working in the theatre programs at Riverside, Jordan and Durham School of the Arts (identified above) have either not been asked to do this same type and volume of unpaid extra work or have been paid an extra-duty payment or a contractual payment for performing this type of work.

(Am. Compl. (Doc. 14) ¶ 132.) When questioned during his deposition, however, Plaintiff only named two Caucasian individuals who he claimed received extra-duty pay when he did not: Will Holley and Bill Thomason. (Tabb Dep. (Doc. 40-2) at 74.) In opposing Defendant's Motion for Summary Judgment, Plaintiff points to only one Caucasian comparator who, Plaintiff alleges, was given extra-duty pay when Plaintiff was not: Will Holley of Riverside High School. (See Pl.'s Resp. (Doc. 40) at 22.) However, the evidence neither supports the conclusion that Mr. Holley was paid when Plaintiff was not, nor does it support the conclusion that Mr. Holley is a valid comparator.

Plaintiff did not provide any evidence, other than his allegations, about a specific district event Mr. Thomason received extra-duty pay for working. Plaintiff does not rely on any comparisons to Mr. Thomason in his Response. (See Pl.'s Resp. (Doc. 40) at 22.)

The record also includes an uncompleted copy of an

extra-duty contract for a Jeffrey Whicker. (Doc. 40-34 at 3.) Plaintiff does not cite to this form, it is not clear who Jeffrey Whicker is, and the form is for an event in 2019, after Plaintiff admits he regularly started receiving extra-duty contracts.

Plaintiff has only come forward with evidence that Mr. Holley was given extra-duty pay once for working at a District event; Defendant has come forward with evidence that Plaintiff was paid for one district event and received an extra-duty contract for another. There is no genuine dispute of material fact "that similarly-situated employees outside the protected class received" extra-duty pay when he did not. Gerner, 674 F.3d at 266 (quoting White, 375 F.3d at 295).

Plaintiff points to one extra-duty contract Mr. Holley was given for a District CTE awards event on May 1, 2018. (Doc. 40-16 at 117.) That single extra-duty contract for Mr. Holley's work on one district-wide event does not support Plaintiff's contention that Mr. Holley was paid more frequently or better than Plaintiff was, because Defendant has provided record evidence that Plaintiff himself received at least two different extra-duty contracts in 2015 before Mr. Holley even started working at DPS on a fulltime basis. (Tabb Dep. (Doc. 40-2) at 60, 111, 113; Doc. 40-15 at 26-31). Other than those two specific events for which Plaintiff received extra-duty contracts, Plaintiff also acknowledged at his July 2019 deposition that Defendant was "paying [him] now" for extra-duty work done at District events. (Tabb Dep. (Doc. 40-2) at 65.) On March 28, 2017, Plaintiff received another request to complete an extra-duty contract for a district event. (Doc. 40-34 at 4-5.) That request came before Plaintiff filed the present suit, but after Plaintiff filed his EEOC Charge. (See Doc. 40-16 at 1.) There is no genuine dispute that Plaintiff was given extra-duty contracts prior to filing his suit and before any contracts offered to Mr. Holley. There is no dispute that, based

on the record Plaintiff has come forward with, Plaintiff got two extra-duty contracts when Mr. Holley got one.

Four other extra-duty forms were provided, but those are for facility rentals. (See Doc. 40-16 at 115, 116, 118, 119.) Plaintiff does not claim he was not paid for facility rentals.

The copies of the 2015 extra-duty contracts provided by Defendant had not yet been completed by DPS personnel, meaning they do not independently establish that Plaintiff was paid, only that he requested payment. Plaintiff stated he was paid for the 2015 Summer School graduation. (Tabb Dep. (Doc. 40-2) at 60, 111.) Plaintiff does not recall if he was actually paid for the 2015 CTE event. (Id. at 113.) Plaintiff has never specifically alleged that he submitted an extra-duty contract only to have it denied by Defendant, but instead that he made broad requests for more extra-duty pay. (Id. at 65; see also Am. Compl. (Doc. 14) ¶ 74.)

Further, Mr. Holley's uncontroverted testimony is that he, too, sometimes worked District events without receiving any extra-duty pay, (Holley Dep. (Doc. 40-7) at 77), an unrefuted assertion that further undermines Plaintiff's claim of disparate treatment. Plaintiff has failed to come forward with evidence supporting his allegation that Mr. Holley was paid more often than Plaintiff or somehow treated differently.

Mr. Holley and his company's contract-based work for DPS does not serve as a basis for Plaintiff's claim. As for the work Mr. Holley was paid for prior to his employment with DPS, it was done on a contractual basis. (Id. at 29.) Mr. Holley's payment during that period cannot support Plaintiff's claim because he was not a similarly-situated employee, but an outside contractor.

Mr. Holley's earnings through contracts between DPS and his companies also does not support Plaintiff's extra-duty pay claim. During the time before Mr. Holley was hired by Defendant, Ferret Sound's predecessor, Holley Johnson Sound, Lighting and Production Company, received a contract to support DPS's "Evening of Entertainment" at the Durham Performing Arts Center. (Id. at 48-50.) After Mr. Holley was hired at Riverside, DPS continued that contract with Ferret Sound for the Evening of Entertainment. (Id. at 54-55, 63.) That DPS contracted with Ferret Sound, an external entity, has no bearing on Plaintiff's claim that he was denied extra-duty pay while Caucasian teachers were given it. Holley noted in his deposition that the contract between Ferret Sound and DPS was a "different contract" than his extra-duty contract. (Id. at 49.) Payments made to Ferret Sound were not extra-duty payments for overtime work done by a DPS employee; they were the product of an external contract. Ferret Sound is therefore not a valid comparator because it is not a "similarly situated employee[] outside [Plaintiff's] class . . . ." Prince-Garrison v. Md. Dep't of Health & Mental Hygiene, 317 F. App'x 351, 353 (4th Cir. 2009).

Plaintiff does not contest the propriety of using outside contractors, nor could he. Plaintiff himself used and paid outside contractors to support Hillside's drama program. (Casey Dep. (Doc. 40-8) at 52.)

Finally, even if Plaintiff had come forward with evidence that Mr. Holley was treated better than he, Mr. Holley is an invalid comparator due to Defendant's classification of Mr. Holley under the Fair Labor Standards Act ("FLSA"); that classification makes him more likely to have received extra-duty pay for after-hours work.

The overtime provisions of the FLSA do not apply to: "any employee employed in a bona fide executive,

administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) . . . ." 29 U.S.C. § 213(a)(1). "Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching." 29 C.F.R. § 541.303(b) (emphasis added). Defendant's 2018-19 employee handbook stated that "[n]onlicensed employees should not work in excess of assigned hours without permission . . . of the supervisor. . . . [N]on-exempt employees will be granted compensatory time in lieu of compensation for hours worked in excess of 40 hours per work week." (Doc. 40-48 at 51.)

Plaintiff appears to clearly fit into the FLSA's teacher exemption. By contrast, Mr. Holley is not a certified teacher, but a classified employee. (Holley Dep. (Doc. 40-7) at 66.) For that reason, according to DPS's Executive Director of Budget Development and Data Analytics, Mr. Holley is considered a non-exempt employee under the FLSA. (Modestou Aff. (Doc. 38-9) ¶ 11.)

Whether this classification is correct is irrelevant to this court's analysis; what matters is that Defendant believed Mr. Holley to be non-exempt, explaining any difference in treatment as to extra-duty pay.

Plaintiff does not dispute Defendant's classification of Mr. Holley, nor does Plaintiff dispute that Defendant has consistently classified Mr. Holley as non-exempt. Plaintiff only argues that the classification is a distinction without merit since the record does not reflect that Plaintiff was asked to work overtime because he was an exempt employee. (Pl.'s Resp. (Doc. 40) at 22.) However, Mr. Holley's status as a non-exempt employee, along with

Defendant's awareness of the FLSA implications, would make it more likely that Defendant's administrative personnel ensured Mr. Holley received extra-duty contracts, explaining any additional efforts made by Defendant to see that he received an extra-duty contract. (See Holley Dep. (Doc. 40-7) at 57 (noting that DPS personnel would send him an extra-duty contract without him having to request one).) Whether Plaintiff was asked to support events because of his exempt status is irrelevant; Mr. Holley's FLSA status and Defendant's awareness of it makes him an invalid comparator.

In addition to Plaintiff's failure to come forward with evidence creating a genuine dispute as to whether similarly-situated Caucasian employees were treated better, Defendant offers uncontroverted evidence that Plaintiff was not discriminated against as to extra-duty pay. Ms. Bellido, the Caucasian female theater director at Jordan, averred that she does "not receive any extra-duty pay" for her technical theater support at district events. (Bellido Aff. (Doc. 43-1) ¶ 11.)

Further, Plaintiff was paid $11,000.07 in extra-duty pay during the period from the 2009-2010 school year until the 2018-2019 school year. (Modestou Aff. (Doc. 38-9) ¶ 10.) Of that total, Plaintiff has come forward with evidence that $5,978.75 was for facility rentals, (Doc. 40-17 at 16-20), a category of pay that Plaintiff does not contest. Subtracting that total, Plaintiff earned $5,021.32 in extra-duty pay during the period. Since Plaintiff was apparently paid $30 per hour for extra-duty, (Doc. 40-15 at 27), that equates to 167 hours of extra-duty pay for which he was compensated, the equivalent of twenty eight-hour days of extra-duty work. "No other performing arts teacher in the district earned more than $2,076 in extra-duty pay during the same time-period." (Modestou Aff. (Doc. 38-9) ¶ 10.)

Plaintiff alleges that the "bulk" of that amount comes from facility rentals. (See Pl.'s Resp. (Doc. 40) at 25 n.5.) The cited portions of Plaintiff's deposition do not include any specifics as to the breakdown of his total extra-duty pay. As computed above, the invoices for facility rentals show that Plaintiff earned almost the same amount from facility rentals that he did from extra-duty pay.

Plaintiff offers no evidence to contest those figures. Plaintiff's allegation that "the white Theatre Directors and other white teachers working in the theatre programs at Riverside, Jordan and Durham School of the Arts" were paid when Plaintiff was not is untenable in light of the fact that Plaintiff earned more than double in extra-duty pay than any other teacher over the same period.

This is especially true given the fact that Ms. Bellido, Jordan's white theater teacher, was at Jordan from the 2009-2010 school year until the 2018-2019 school year. (Bellido Aff. (Doc. 43-1) ¶ 2.) No argument can be made that she made less in extra-duty pay because she was not present during the entire period cited by Mr. Modestou. Plaintiff offers no evidence about which, if any, DSA teachers received extra-duty pay when he did not. Mr. Modestou stated that "[n]o other performing arts teacher in the district earned more than $2,076 in extra-duty pay during the same time-period[,]" (Modestou Aff. (Doc. 38-9) ¶ 10 (emphasis added)), a statement that would presumably include DSA. Plaintiff has offered no evidence or argument to suggest that it does not.

In sum, Plaintiff has failed to come forward with any evidence to support his extra-duty pay claim beyond his own pleadings and allegations. Plaintiff has also failed to identify any Caucasian comparators to support his claim that he was denied extra-duty pay due to his race. Defendant, by contrast, has offered undisputed evidence that comparable Caucasian

teachers were treated the same as Plaintiff when it came to extra-duty contracts and pay. Indeed, Defendant has also offered undisputed evidence that Plaintiff has been treated even better than his fellow teachers in the amount of extra-duty pay he has earned. "Mere unsupported speculation is not sufficient to defeat a summary judgment motion if the undisputed evidence indicates that the other party should win as a matter of law." Francis, 452 F.3d at 308. Summary judgment, therefore, should be granted as to Plaintiff's extra-duty claim.

IV. CONCLUSION

Plaintiff has failed to come forward with evidence establishing a genuine dispute of material facts as to his remaining claims. Plaintiff has adduced no evidence "that similarly-situated employees outside the protected class received more favorable treatment" during the § 1981 or Title VII limitations period. Gerner, 674 F.3d at 266 (quoting White, 375 F.3d at 295). Plaintiff has failed to come forward with evidence showing there is a genuine dispute of material fact as to whether Defendant provided an additional theater tech allotment to any other school or teacher. And Plaintiff has failed to come forward with evidence showing that Caucasian comparators were given extra-duty pay when he was not. Summary judgment should be granted "unless a reasonable jury could return a verdict for the nonmoving party on the evidence presented." McLean, 332 F.3d at 719 (citing Liberty Lobby, 477 U.S. at 247-48). A reasonable jury could not return a verdict of Plaintiff on this record.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment, (Doc. 38), is **GRANTED.**

IT IS FURTHER ORDERED that this case is **DISMISSED WITH PREJUDICE.**

A judgment reflecting this Memorandum Opinion and Order will be entered contemporaneously herewith.

This the 28th day of September, 2020.

/s/_____

United States District Judge