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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1068

ASSOCIATION FOR EDUCATION FAIRNESS,

Plaintiff - Appellant,

v.

MONTGOMERY COUNTY BOARD OF
EDUCATION; DR. MONIQUE FELDER,
Interim Superintendent,

Defendants - Appellees,

and

ASIAN AMERICAN YOUTH LEADERSHIP
EMPOWERMENT AND DEVELOPMENT;
CASA, INC.; MONTGOMERY COUNTY
BRANCH OF THE NAACP; IDENTITY, INC.;
MONTGOMERY COUNTY PROGRESSIVE
ASIAN AMERICAN NETWORK,

Amici Supporting Appellees.

Appeal from the United States District Court for the
District of Maryland, at Greenbelt.
Paula Xinis, District Judge. (8:20-cv-02540-PX)

Submitted:
October 31, 2025

Decided:
February 3, 2026

Before RICHARDSON and HEYTENS, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Joshua P. Thompson, Christopher M. Kieser, Erin E. Wilcox, Sacramento, California, Glenn E. Roper, PACIFIC LEGAL FOUNDATION, Highlands Ranch, Colorado, for Appellant. Jo-Ann Tamila Sagar, Nathaniel A.G. Zelinsky, Washington, D.C., Steven F. Barley, HOGAN LOVELLS US LLP, Baltimore, Maryland, for Appellees.

Leslie E. John, Travis J. Watson, Philadelphia, Pennsylvania, Maraya N. Pratt, Baltimore, Maryland, Steven L. Becton II, BALLARD SPAHR LLP, Wilmington, Delaware; Niyati Shah, Shalaka Phadnis, ASIAN AMERICANS ADVANCING JUSTICE-AAJC, Washington, D.C.; Francisca D. Fajana, LATINOJUSTICE PRLDEF, New York, New York; Michael N. Turnage Young, Jin Hee Lee, Michael Skocpol, Washington, D.C., Allison Scharfstein, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., New York, New York, for Amici Supporting Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

The Association for Education Fairness (AFEF) brought an amended complaint against the Montgomery County Board of Education and its superintendent (collectively, the Board) under 42

U.S.C. §§ 1981, 1983, claiming that the Board’s then-new admissions policy for selecting students for magnet middle schools unconstitutionally discriminated against Asian American students, in violation of the Equal Protection Clause of the Fourteenth Amendment. The Board moved under Fed. R. Civ. P. 12(b)(6) to dismiss the amended complaint, and the district court granted its motion. The court concluded that the amended complaint failed as a matter of law because it did “not aver plausibly that the” challenged policy “disparately impacts Asian American students.” *Ass’n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, 617 F. Supp. 3d 358, 368 (D. Md. 2022). The court also concluded that the amended complaint contained “no facts [that] give rise to the inference that the” challenged policy was implemented with discriminatory intent. *Id.* Following the district court’s dismissal of the amended complaint, AFEF moved under Fed. R. Civ. P. 60(b)(2) for relief from the dismissal judgment. The district court denied this motion, and AFEF appeals both of the district court’s orders.

We review de novo the district court’s Fed. R. Civ. P. 12(b)(6) dismissal of AFEF’s amended complaint, *Guerrero v. Ollie’s Bargain Outlet, Inc.*, 115 F.4th 349, 353 (4th Cir. 2024), and we review for abuse of discretion the district court’s ruling denying the Rule 60(b)(2) motion, *Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011) (en banc).

Upon review of the record and the briefs filed by the parties and the amici, we discern no reversible error in the district court’s rulings. As AFEF concedes, the amended complaint does not plausibly allege that the challenged policy disparately impacts Asian American students under the applicable

standards for assessing disparate impact set forth in *Coal. for TJ vs. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 879-81 (4th Cir. 2023). AFEF suggests that *Coal. for TJ* was wrongly decided on the merits of this issue. But, as AFEF concedes, *Coal. for TJ* binds this panel. See *Warfaa v. Ali*, 811 F.3d 653, 661 (4th Cir. 2016). “[E]ven if we agreed [with AFEF], we ‘cannot overrule a decision issued by another panel.’” *United States v. Green*, 67 F.4th 657, 670 (4th Cir. 2023) (quoting *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc)). Under binding precedent, AFEF’s equal protection claim lacks an “essential element,” *Coal. for TJ*, 68 F.4th at 882, and we therefore conclude no reversible error is present in the district court’s Rule 12(b)(6) dismissal ruling.

Turning to the district court’s ruling denying AFEF’s Rule 60(b)(2) motion,* AFEF argues that the district court abused its discretion because, under the “proper legal standard” for disparate impact, the evidence appended to its motion demonstrated that Asian American students were adversely affected by the challenged policy. AFEF, however, has not developed this argument or presented it in accordance with Fed. R. App. P. 28(a)(8)(A). We therefore conclude AFEF has waived appellate review of the Rule 60(b)(2) denial ruling. See *Misjuns v. City of Lynchburg*, 139 F.4th 378, 386 n.* (4th Cir. 2025); *United States v. Miller*, 41 F.4th 302, 313 (4th Cir. 2022).

* Rule 60(b)(2) permits a district court to relieve a party from a final judgment or order on account of “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under [Fed. R. Civ. P.] 59(b).” Fed. R. Civ. P. 60(b)(2).

Accordingly, we affirm the district court's orders. *Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-cv-02540-PX (D. Md. July 29 & Dec. 16, 2022); *Ass'n for Educ. Fairness*, 617 F. Supp. 3d at 373. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Filed August 4, 2022

**UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND**

CHAMBERS OF	6500 Cherrywood Lane
Paula Xinis	Greenbelt, MD 20770
UNITED STATES	(301) 344-0653
DISTRICT JUDGE	

August 4, 2022

Re: 20-2540, *Association for Education Fairness v.
Montgomery County Board of Education*

MEMORANDUM TO COUNSEL

Counsel,

On July 29, 2022, this Court issued a Memorandum Opinion and Order (ECF Nos. 99 & 100) in the above-captioned case. It has since been brought to the Court's attention that both filings inadvertently omitted Identity Inc. from the list of participating *Amici*. The Court has corrected the Memorandum Opinion and Order accordingly. The Memorandum Opinion and Order are otherwise unchanged.

Sincerely,

/s/

PAULA XINIS

United States District Judge

Filed August 4, 2022

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

ASSOCIATION FOR	*	
EDUCATION	*	
FAIRNESS	*	Civil Action No.
Plaintiff,	*	8:20-cv-02540-PX
v.	*	
MONTGOMERY	*	
COUNTY BOARD OF	*	
EDUCATION, <i>et al.</i> ,	*	
Defendants.	*	

MEMORANDUM OPINION

This case concerns the constitutionality of the admissions criteria for four highly selective and academically rigorous middle school magnet programs offered by Montgomery County Public Schools (“MCPS”). These admissions criteria have prompted robust debate within MCPS about best practices for inclusion and equity in educational access, and in recent years, MCPS has modified the admissions criteria several times.

In September 2020, Plaintiff Association for Education Fairness (“AFEF”), an organization of “concerned Asian-American parents in Montgomery County,” sued the Montgomery County Board of Education (the “Board”) and MCPS’ then-Superintendent, Dr. Jack R. Smith (“Dr. Smith”) (collectively the “County”), alleging that recent changes to the admissions process aimed in part at increasing Black and Hispanic student enrollment

violated the equal protection rights of excluded Asian American students. *See generally* ECF No. 1. The County moved to dismiss the Complaint, which this Court denied. *See* ECF Nos. 21 & 27; *Ass’n for Educ. Fairness v. Montgomery Co. Bd. of Educ.*, 560 F. Supp. 3d 929 (D. Md. 2021) (“*AFEF I*”).

But the criteria challenged earlier in *AFEF I*, known as the “Field Test,” are no longer in effect. Even before this litigation began in earnest, MCPS faced profound educational challenges stemming from the COVID-19 pandemic. *See* ECF No. 51 ¶¶ 4, 83, 86. MCPS’ response to COVID-19 necessitated substantial changes to the magnet admissions process once again. *Id.* ¶¶ 83 & 86. MCPS confirmed it will employ this new process, known as the “Pandemic Plan,” into the foreseeable future. *See* ECF Nos. 41 & 41-1. AFEF responded in kind, filing an Amended Complaint (ECF No. 51) in which it now challenges only the Pandemic Plan as intentionally discriminatory against Asian American students.

The County moves to dismiss the Amended Complaint (ECF No. 87), which AFEF opposes (ECF No. 95). The issues are fully briefed, and the Court finds no hearing necessary to resolve the pending motion. *See* D. Md. Loc. R. 105.6. For the following reasons, the Court GRANTS the motion to dismiss (ECF No. 87). The Court also DENIES as MOOT the motion to intervene (ECF No. 69) filed by *Amici Curiae*.

I. Background

For the last several decades, MCPS has provided middle school magnet programs in the humanities, math, and science for highly capable students. *AFEF I*, 560 F. Supp. 3d at 934-36. The Court has previously

discussed the history of those magnet programs and need not repeat itself here. *See id.* Nonetheless, the current admissions process—the Pandemic Plan—must be placed in proper context, necessitating a brief review.

A. Magnet Middle School Admission Process Before This Lawsuit

The magnet admission process has historically been driven by parents' choice. *See* ECF No. 51 ¶ 48. That is, although all students *could* apply for admission, MCPS considered only those students whose parents *did* apply. *See AFEFI*, 560 F. Supp. 3d at 939 (“[T]he admission process began with the parents of fifth-grade students submitting an application for consideration.”). Those student applicants next had to take the Cognitive Abilities Test (“CogAT”), an in-person written assessment designed to measure students' quantitative, verbal, and nonverbal skills. *Id.*; *see also* ECF No. 51 ¶ 48. MCPS reviewed the applicants' CogAT scores alongside their state assessment scores, report card grades, and teacher recommendations, and it offered the top performing students admission to one of the magnet programs. ECF No. 51 ¶ 48.

Selected students were then placed in one of the two “Upcounty” programs housed at Robert Clemente and Martin Luther King Jr. middle schools, or in one of the “Downcounty” programs at Takoma Park and Eastern middle schools. ECF No. 51 ¶¶ 21 & 22. The magnet programs offer a challenging academic environment which cannot be attained through honors or advanced placement courses in the students' local schools. *See id.* ¶ 23. As a result, the demand for seats in these programs is high.

Over the years, MCPS grew increasingly concerned that the magnet programs and other academic programming did not align with the racial demographics of the larger MCPS student body. *See AFEF I*, 560 F. Supp. 3d at 935-36. For example, in the 2013–2014 school year, Black and Hispanic students represented nearly half of the MCPS student body, yet they accounted for less than 15% of the magnet school seats. ECF No. 51 ¶ 26. Conversely, Asian American students represented just 14.8% of the MCPS student body yet occupied nearly half of the seats. *Id.*

This divergence prompted MCPS to renew its commitment to “educating each and every student so that academic success is not predictable by race, ethnicity, or socioeconomic status.” ECF No. 51 ¶ 28 (emphasis omitted). In 2013, the Board adopted a strategic planning framework for addressing equity of access to MCPS’ “choice” and “special” academic programs. *AFEF I*, 560 F. Supp. 3d at 936. Next, in 2015, the Board commissioned Metis Associates, Inc. to conduct a comprehensive study of MCPS’ choice and special academic programs and discern whether those programs aligned with the school district’s “core value of equity.” MR at 16; *see also* ECF No. 51 ¶ 29. That comprehensive study (the “Metis Report” or “Report”) was released in March 2016.¹ MR at 1.

¹ The Metis Report is expressly incorporated by reference into the Amended Complaint (ECF No. 51), and the County does not question its accuracy or authenticity. The Court accepts the Metis Report as part of the Amended Complaint facts and construes it most favorably to AFEF. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016). The Report is cited as “MR” throughout this decision.

The Metis Report documented “significant racial and socioeconomic disparities” in the programs’ enrollment and acceptance rates. MR at 9 & 176. It specifically identified Hispanic, Black, limited English proficient, special education, and “FARMS”² students as “underrepresented” when compared to districtwide enrollment data. *Id.* at 9-10. The Report synthesized its observations and suggested remedial action in the following recommendation:

Recommendation 3a: Implement modifications to the selection process used for academically competitive programs in MCPS, comprising elementary centers for highly gifted students and secondary magnet programs, to focus these programs on selecting equitably from among those applicants that demonstrate a capacity to thrive in the program, that include use of non-cognitive criteria, group-specific norms that benchmark student performance against school peers with comparable backgrounds, and/or a process that offers automatic admissions to the programs for students in the top 5-10% of sending elementary or middle schools in the district.

MR at 10.

This recommendation sparked much controversy. ECF No. 51 ¶¶ 36-45. Board members publicly lamented the low percentage of Black and Hispanic students enrolled in the magnet programs. *See, e.g., id.* ¶¶ 37, 40, 42. Some Board members questioned whether a “blind and neutral” process would be

² The “FARMS” designation refers to students who are eligible to receive free or reduced-price meals. *See AFEF I*, 560 F. Supp. 3d at 935.

sufficient to produce the “equitable” results desired by MCPS, while parents of Asian American students expressed their opposition to the Report’s findings, characterizing Recommendation 3a as an attempt to “lower” the existing rigorous standards required to gain admittance to the magnet programs. *See id.* ¶ 44; *AFEF I*, 560 F. Supp. 3d at 937-38.

**B. 2018–2019 School Year (Implementing
the Field Test for Downcounty
Programs)**

On September 12, 2017, Dr. Smith announced that as part of MCPS’ commitment to expand opportunity pursuant to the Metis Report, MCPS would implement several changes to the magnet admissions process. *See* ECF No. 51 ¶ 47. For the first year of implementation, changes were applied to the Downcounty programs only. *Id.* Under the newly-developed Field Test, MCPS replaced parent-initiated applications with universal screening of all MCPS fifth graders. *Id.* ¶ 49. MCPS now reviewed all fifth-grade students’ report card grades and standardized test scores, and it invited roughly half of the student body to take the CogAT examination. *See id.* ¶¶ 48-49. The Field Test also eliminated teacher recommendations which had the potential to be “infected with racial bias.” *Id.* ¶ 50.

MCPS next compared a student’s objective performance to the student’s “peer group” at their local school. ECF No. 51 ¶ 51. Although it is not clear exactly how MCPS implemented peer grouping, *AFEF* alleges that Asian American students are “highly clustered in a relatively small number of MCPS’ 135 elementary schools,” and were thus more likely to be adversely affected by peer grouping. *Id.* ¶ 52.

The results of the Field Test further fueled controversy about changing the magnet school admissions process. While the percentage of Asian American students offered admission in the Downcounty programs declined, the Field Test had only a marginal effect on the rate of admission for Black and Hispanic students. *See* ECF No. 51 ¶¶ 53-55, 57-59. In several meetings held to discuss the Field Test results, Board members expressed frustration and concern that the enrollment appeared largely unchanged for Black and Hispanic students. *Id.* ¶¶ 58-60. One Board member questioned the “slight” increase in Black student admissions, while another Board member asked whether “some form of affirmative action, either socio-economic or racial[]” could be implemented. *Id.* ¶¶ 58 & 59. Yet another commented that “MCPS was systematically under-educating Black and Brown children,” underscoring that “[r]hetorical support for progress not matched with effective policies and structures to dismantle the barriers and rapidly improve the material impact of said barriers is an old tool in the cynical American political playbook.” *AFEF I*, 560 F. Supp. 3d at 940-41 (alteration in original) (quoting ECF No. 1 ¶ 60 n.36). Parents of Asian American students expressed disappointment for a different reason: at least a dozen Asian American students who scored in the 99th percentile on state assessments and the CogAT were denied admission to a magnet program despite their impressive academic credentials. ECF No. 51 ¶¶ 57 & 65.

**C. 2019–2020 and 2020–2021 School Years
(Expansion of Field Test to Upcounty
Programs)**

In the face of heated debate, MCPS expanded the Field Test the following year to include the Upcounty magnet programs. *See* ECF No. 51 ¶ 66. It also decided to “locally norm” applicants’ CogAT scores. *Id.* ¶¶ 66 & 67. Specifically, MCPS classified each elementary school as either low-poverty, moderate-poverty, or high-poverty, and next compared students’ CogAT scores to other students within the same “poverty band.” *Id.* ¶ 67. Because of the demographic concentration of Asian American students in low-poverty schools, AFEF alleges that this change was aimed at reducing Asian American representation while increasing representation of Black and Hispanic students, who are more concentrated in mid- to high-poverty schools. *Id.*

Asian American student acceptance as compared to pre-Field Test numbers declined over these school years, and at a few schools substantially so. *See AFEF I*, 560 F. Supp. 3d at 952-53. That said, Asian American student participation in magnet programs under the Field Test always outpaced the percentage representation of Asian Americans in MCPS countywide. *See infra* Part III.A.

**D. 2021–2022 School Year (The Pandemic
Plan)³**

In March of 2020, COVID-19 upended all aspects of life, especially primary and secondary education. *See*,

³ Although MCPS began formulating the Pandemic Plan in the summer of 2020, it did not implement the Plan until the 2021–

e.g., Donna St. George et al., *Maryland Cancels Classes for 900,000 Students Amid Coronavirus Fears*, Wash. Post (Mar. 13, 2020, 12:20 AM), https://www.washingtonpost.com/local/education/loudoun-county-public-schools-cancel-allclasses-through-march-20-due-to-coronavirus-concerns/2020/03/12/6e3eaf38-6457-11ea-845de35b0234b136_story.html; Megan U. Boyanton, *Coronavirus May Be Shutting Classrooms Yet Lunch Period Goes On*, Bloomberg Law (Mar. 9, 2020, 4:53 PM), <https://bit.ly/3P8P7t6>. MCPS accordingly had to convert many of its educational programs to virtual learning in response to the public health crisis facing the schools. See ECF No. 51 ¶¶ 83 & 84. MCPS’ Division of Consortia Choice and Application Program Services (the “Consortia”), a six-person working group that administers the magnet programs and other choice academic offerings, quickly began discussing necessary changes to the middle school magnet admissions process. ECF No. 27-3 ¶¶ 12 & 20.⁴

2022 school year. This is because MCPS administered the CogAT each fall, and so by the time the pandemic hit in March 2020, the admissions process for the 2020–2021 school year using the Field Test was already underway. See ECF No. 27-3 ¶ 12 (“By the spring and early summer of 2020, however, MCPS realized that the COVID-19 pandemic might pose multiple challenges to administering the CogAT that coming fall.”).

⁴ The Amended Complaint expressly incorporates by reference the sworn declaration of Jeannie Franklin, MCPS’ Director of Consortia Choice and Application Program Services, who describes the Consortia’s deliberative process. See, e.g., ECF No. 51 ¶ 84. The County produced the declaration (ECF No. 27-3) and therefore obviously does not contest its authenticity or accuracy. The Court thus accepts the declaration as part of the Amended Complaint facts and construes it most favorably to AFEF. See *Goines*, 822 F.3d at 166.

Beginning in July of 2020, the Consortia first tackled the logistical difficulties that remote learning presented for administering the CogAT, which could not be given to students remotely without compromising test security or equity of access. *See* ECF No. 51 ¶¶ 84 & 86; ECF No. 27-3 ¶¶ 13-18. The Consortia initially considered delaying administration of the test, but uncertainty as to when the pandemic would permit safe, in-person testing rendered this option unworkable. ECF No. 27-3 ¶¶ 12-19, 23. The Consortia ultimately decided to abandon the CogAT altogether. *See* ECF No. 51 ¶ 86; ECF No. 27-3 ¶ 33.

Next, the Consortia considered implementing a lottery selection system akin to that which MCPS was already using for other choice programs. ECF No. 27-3 ¶ 25. The Consortia reasoned that a lottery system has the added advantage of reducing selection bias and subjectivity, minimizing importance of statistically insignificant differences in standardized test scores, increasing program availability, and reducing bureaucratic burdens on the school district. *Id.* ¶ 26. The lottery system also was logistically the simplest option given persistent remote work and instructional challenges arising from the pandemic. *Id.* ¶¶ 29 & 30.

Accordingly, the Consortia, in consultation with MCPS senior leadership, designed and implemented the Pandemic Plan for magnet middle school admissions in the 2021–2022 school year. ECF No. 51 ¶ 84 (citing ECF No. 27-3 ¶ 31). The Plan operates as follows. First, MCPS universally screens all fifth-grade students for placement in an eligibility pool. ECF No. 27-3 ¶ 33. Any student who received an “A” in the relevant subjects, performed above reading

grade level in fourth grade, and received a locally normed⁵ minimum of 85th percentile on the MAP-Reading assessment or MAP-Math assessment is placed in the pool. ECF No. 51 ¶¶ 86 & 87; MCPS, *Regional Middle School Magnet (Criteria-based) Admission Process: Overview & Frequently Asked Questions*, https://docs.google.com/document/d/1l0Zy-bCfG7O8EF64VOnit_54fjOIU_lTR1JyU8SSMg/edit (last visited July 24, 2022) (the “March 2021 FAQ”).⁶ MCPS next employs a lottery to choose from the pool the students to be admitted to the program, in order of lottery number until each magnet class reaches capacity. March 2021 FAQ at 1. The remaining students in the pool receive special enrichment programming at their local schools. *Id.*

E. The Pandemic Plan Replaces the Field Test Indefinitely

On September 30, 2021, MCPS announced it would implement the Pandemic Plan for the foreseeable future. *See* ECF Nos. 41 & 41-1. Also as of this time, MCPS leadership had changed almost completely. Dr. Smith, the superintendent responsible for overseeing the Metis Report and Field Test, retired and Dr. Monifa McKnight took his place. *See* ECF No. 51 ¶ 15;

⁵ As for locally norming the MAP scores, MCPS explains that it applies the same concept of norming used by the Maryland State Department of Education, but it does not explain precisely how local norming is implemented. ECF No. 51 ¶ 87 (“MCPS’ explanation of the 2021 admissions process did not explain how MAP percentiles were locally normed.”).

⁶ The March 2021 FAQ was prepared by MCPS and shared publicly. The Amended Complaint incorporates by reference the March 2021 FAQ (ECF No. 51 at 33 n.50), and so it is accepted as part of the Amended Complaint and construed most favorably to AFEF. *See Goines*, 822 F.3d at 166.

see also Caitlynn Peetz, *McKnight Named Next MCPS Superintendent*, Bethesda Mag. (Feb. 8, 2022), <https://bethesdamagazine.com/bethesda-beat/schools/mcknight-named-next-mcps-superintendent/>. Likewise, the composition of the Board had changed substantially, as only three of the eight members who had participated in the Field Test controversy remained in office. *See* MCPS, Board of Education: Meet the Members, *Citizens Elected to the Montgomery County Board of Education*, <https://www.montgomeryschoolsmd.org/uploadedFiles/boe/members/ElectedBoardMembers.pdf> (last visited July 13, 2022); *see also* ECF No. 87-1 at 15 (“[W]ith one exception, all members of the Board of Education *identified in the Amended Complaint* no longer serve on the Board.”) (emphasis added).

F. The Renewed Motion to Dismiss

After MCPS announced that it would implement the Pandemic Plan indefinitely, the Court granted AFEF leave to amend the Complaint. ECF No. 48. AFEF, in turn, abandoned its challenge of the Field Test and now alleges solely that the Pandemic Plan intentionally discriminates against Asian American students, in violation of the Equal Protection Clause of the Fourteenth Amendment. *See generally* ECF Nos. 51 & 95.

MCPS, in response, renewed its challenges to the sufficiency of AFEF’s claim on nearly identical grounds as before. *See* ECF No. 87. MCPS is joined by a coalition of nonprofit organizations—the Montgomery County Branch of the NAACP; Montgomery County Progressive Asian American Network; Asian American Youth Leadership Empowerment and Development; Identity, Inc.; and

CASA, Inc.—which seek to intervene as defendants in the action. ECF Nos. 55, 69, 88, 97. The Court held that request in abeyance, but it allowed the coalition to be heard as *Amici Curiae* (“*Amici*”) on the motion to dismiss. ECF No. 84. For the reasons discussed below, the Court agrees with MCPS and *Amici* that AFEF’s equal protection challenge to the Pandemic Plan fails as a matter of law.

II. Standard of Review

A motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006). The Court accepts “the well-pled allegations of the complaint as true,” and construes all facts and reasonable inferences most favorably to the plaintiff. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). To survive a motion to dismiss, a complaint’s factual allegations “must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). When ruling on a motion to dismiss, the Court may consider materials attached to the complaint, or incorporated by reference, without transforming the motion into one for summary judgment. *See* Fed. R. Civ. P. 10(c); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The Court may also take judicial notice of facts which are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Kayle v. Penn Nat’l Gaming, Inc.*, 637 F.3d 462, 466 (4th Cir. 2011).

III. Analysis

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying “to any person within its jurisdiction the equal protection of the laws.” *Fisher v. King*, 232 F.3d 391, 399 (4th Cir. 2000) (quoting U.S. Const. amend. XIV, § 1). The clause prohibits a government entity from “purposefully discriminating between individuals on the basis of race.” *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). Intentional discrimination occurs when: “(1) a law or policy explicitly classifies citizens on the basis of race; (2) a facially neutral law or policy is applied differently on the basis of race; or (3) a facially neutral law or policy that is applied evenhandedly is motivated by discriminatory intent and has a racially discriminatory impact.” *Doe ex rel. Doe*, 665 F.3d 524, 543 (3d Cir. 2011) (citations omitted); *see also N.C. State Conf. of NAACP v. McCorry*, 831 F.3d 204, 220 (4th Cir. 2016); *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 819 (4th Cir. 1995).

If the challenged law or policy falls under one of these categories, the next inquiry centers on whether the law or policy satisfies “strict scrutiny.” *See Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). Strict scrutiny requires the government to demonstrate that the law or policy is “‘narrowly tailored’ to achieve a ‘compelling’ government interest.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1.*, 551 U.S. 701, 720 (2007) (quoting *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). However, if the challenged conduct was not motivated by a discriminatory purpose or intent, then the Court applies rational basis review. *See Pers. Adm’r of*

Mass. v. Feeney, 442 U.S. 256, 271-72 (1979); *see also Doe ex rel. Doe*, 665 F.3d at 544. In that circumstance, the government need only establish the conduct or policy is rationally related to a legitimate government purpose.

As before, the parties agree that the Pandemic Plan is a facially neutral admissions process that MCPS has applied evenhandedly. *See* ECF No. 95 at 7 (arguing only “that the challenged admissions criteria were ‘implemented with a discriminatory *purpose*’”) (emphasis added). Further, AFEF does not meaningfully contest that the Pandemic Plan is rationally related to MCPS’ legitimate purposes. *See id.* at 16 n.7 (arguing only that the Pandemic Plan plausibly fails to survive strict scrutiny). Accordingly, AFEF’s claim survives dismissal only if the Amended Complaint facts make plausible that the Pandemic Plan both visited a disparate impact on Asian American students and was motivated by discriminatory intent such that strict scrutiny applies. *See Vill. of Arlington Heights v. Metro. Hous. Develop. Corp.*, 429 U.S. 252, 264-65 (1977) (citing *Washington*, 426 U.S. at 229).

A. Disparate Impact

Although the parties are silent on the question of disparate impact, *Amici* persuasively argue that this Court should revisit the issue with the “benefit of adversarial briefing.” *See* ECF No. 88 at 10; *see also* ECF Nos. 21-1; 22; 24; 34. *Amici* are correct that in *AFEF I*, the Court simply accepted AFEF’s disparate impact analysis, in large part because MCPS had not advanced any real opposition to it. *See AFEF I*, 560 F. Supp. 3d at 952. In particular, the Court concluded that because the Complaint plausibly averred a

decline in Asian American student acceptance after the Field Test's implementation, AFEF had made plausible that the admissions changes had visited a disparate impact on this cohort. *Id.* ("Since the Field Test was implemented, the acceptance rate for Asian American students has dropped at each of the programs.").

Amici now urge that the proper analysis does not rest on a "simple before and after comparison." ECF No. 88 at 12-13 (citing *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 46 (1st Cir. 2021)). *Amici* echo the concerns voiced by Judge Heytens' concurring opinion in *Coalition for TJ v. Fairfax County Public Schools*, No. 22-1280, 2022 WL 986994 (4th Cir. 2022) (unpublished), and so their arguments merit careful discussion.

As here, plaintiffs in *Coalition for TJ* raised an equal protection challenge to new admissions criteria imposed at Thomas Jefferson High School in Fairfax, Virginia. 2022 WL 986994, at *1; *see also Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 21-296, 2022 WL 579809, at *1 (E.D. Va. Feb. 25, 2022). In granting plaintiff's motion to enjoin the school from implementing the challenged criteria, the district court employed the same before-and-after comparison as this Court had in *AFEF I*. Compare *AFEF I*, 560 F. Supp. 3d at 952 with *Coal. for TJ*, 2022 WL 579809, at *6 ("The proper method for determining the 'impact of the official action,' is a simple before-and-after comparison.") (internal citation omitted).

On appeal, the Fourth Circuit reversed, concluding that plaintiff was not likely to succeed on the merits of its equal protection claim, in part because plaintiff could not show the challenged admissions plan visited a disparate impact on Asian American students. *Coal. for TJ*, 2022 WL 986994, at *1. Judge Heytens persuasively explained that the district court’s before-and-after comparison essentially “creates a floor against which all future policies will be judged, a principle that would, if adopted, make it exceedingly difficult for government actors to change existing policies that have a real (albeit unintentional) disparate impact.” *Id.* at *3 (Heytens, J., concurring). Instead, Judge Heytens reasoned, “the more obviously relevant comparator for determining whether this race neutral admissions policy has an outsized impact on a particular racial group is the percentage of applicants versus the percentage of offers,” because that “metric targets more directly the core question for assessing disparate impact: whether members of one group have, proportionally, more difficulty securing admission than others.” *Id.*

AFEF offers no meaningful response to this point. It first urges the Court essentially to stick with its previous analysis even if erroneous. ECF No. 95 at 14 n.6 (“Amici dispute the existence of an adverse impact on Asian Americans But this Court has already rejected Amici’s suggestion that the proper comparator is a group’s overall representation in the MCPS student body.”). AFEF relatedly maintains that to depart from the before-and-after comparison would permit a school to “engage in racial balancing without having to justify its action under strict scrutiny.” *Id.* But this argument puts the cart before the horse. Strict scrutiny is triggered only if AFEF

avers sufficient facts to make plausible that the change in the admission process adversely affected Asian American students such that the inference of intentional racial balancing is permitted.

In short, AFEF gives this Court no reason to doubt the soundness of Judge Heytens’ analysis. What is more, the demographic data incorporated into the Amended Complaint makes his point. Under the Field Test or Pandemic Plan, Asian American students consistently have occupied a proportionally greater share of students admitted into the magnet program as compared to their representation in the applicant pool.⁷

⁷ Because both the Field Test and Pandemic Plan screen all fifth-grade students for eligibility, the demographics of the applicant pool and the fifth-grade student population are the same. *See* ECF No. 51 ¶ 49 (explaining that MCPS now uses “universal screening” of all fifth-grade students).

**Asian American Student Representation
in Middle School Magnet Programs**

	% Asian American Applicants	Field Test 2019-2020	% Asian American Admittees	Field Test 2019-2020	% Asian American Applicants	Expanded Field Test	% Asian American Admittees	Expanded Field Test	% Asian American Applicants	Expanded Field Test	% Asian American Admittees	Pandemic Plan	Pandemic Plan	% Asian American Admittees	Pandemic Plan
Clemente	24.4%		57.1%		21.9%		21.9%		2020-2021		2020-2021		2021-2022	2021-2022	
MLK	24.3%		38.8%		21.9%		21.9%				24.3%		16.5%	32.0%	
Takoma Park	19.2%		28.0%		16.1%		16.1%				35.4%		13.2%	20.8%	
Eastern	19.1%		22.4%		16.1%		16.1%				23.9%		13.2%	22.3%	

ECF No. 1-4 at 9-12; ECF No. 33-1 at 20-23.

Accepting these facts as true and most favorably to AFFEF, the Court cannot see how the Pandemic Plan visited a disproportionate *burden* on Asian American students when the percentage of admitted Asian American students so substantially outpaces the percentage representation among all applicants. Because the Amended Complaint does not aver plausibly that the Pandemic Plan disparately impacts Asian American students, the claim fails on this basis alone.

B. Discriminatory Intent

Alternatively, even if the Court concluded otherwise, no facts give rise to the inference that the Pandemic Plan was implemented with discriminatory intent. As before, the Court must conduct a “sensitive inquiry” into the “circumstantial and direct evidence of intent.” *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016) (quoting *Arlington Heights*, 429 U.S. at 266). In this regard, AFFEF need not aver “that the challenged action rested solely on racially discriminatory purposes . . . or even that a particular purpose was the ‘dominant’ or ‘primary’ one.” *Arlington Heights*, 429 U.S. at 265. However, the complaint facts still must give rise to the inference that the Pandemic Plan was enacted “‘because of,’ and not ‘in spite of,’ its discriminatory effect. *McCrory*, 831 F.3d at 220 (citing *Feeney*, 442 U.S. at 279).

Five non-exhaustive factors, first articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, guide this analysis: (1) the historical background of the Pandemic Plan, (2) the specific sequence of events leading to the Plan, (3) the Plan’s “legislative history,” (4) whether MCPS

departed or varied from its normal procedures in enacting the Plan, and (5) whether the Plan “bears more heavily on one race than another.” 429 U.S. at 265-69; *see also N. Carolina State Conf. of NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020); *Bos. Parent*, 996 F.3d at 45 (citing *Anderson ex rel. Dowd v. City of Bos.*, 375 F.3d 71, 83 (1st Cir. 2004)).

Turning to the events culminating in the Pandemic Plan, it is undisputed that the Pandemic Plan bears little resemblance to the Field Test. *See* ECF No. 51 ¶ 86 (“The admissions process used during the 2021 cycle . . . *was different in many respects from the challenged field test.*”) (emphasis added). The Pandemic Plan uses a wholly new screening and selection process fueled by the impracticalities of the COVID-19 pandemic. *See id.* ¶¶ 86-90; *see also* ECF No. 95 at 6. And it was created and adopted by the Consortia under the leadership of a new superintendent. *See supra* Part I.D-E.

In response, AFEF essentially recognizes the weakness of its claim. It presses that “discovery” is necessary to explore the “private” motivations of the Consortia. *See* ECF No. 95 at 7-12 & nn. 2-3. But absent any facts which make plausible that the Consortia—explicitly or implicitly—intentionally aimed to rebalance the racial composition of the magnet programs, the Court cannot conclude that such a motivation is *plausible* as pleaded. *See Hughes v. LaSalle Bank, N.A.*, No. 02-6384-MBMHBP, 2004 WL 414828, at *1 (S.D.N.Y. Mar. 4, 2004) (“The purpose of discovery is to find out additional facts about a well-pleaded claim, not to find out whether such a claim exists.”).

Nor does the Pandemic Plan itself give rise to such an inference. The Consortia expressly considered that the Pandemic Plan provided for the most inclusive yet rigorous screening process to establish a pool of eligible candidates. Final selection, however, is now left wholly to chance. *See* ECF No. 27-3 ¶¶ 26 & 34. As the Consortia reasoned, admission by lottery scrubbed the final selection of any value-based decisions, all of which could be far more vulnerable to implicit and explicit biases. *See id.* ¶ 26. AFEF pleads no facts to upset the logic of this admissions plan. Thus, when viewing the Amended Complaint most favorably to AFEF, the chain of events leading to the Pandemic Plan are devoid of discriminatory purpose.

Next, as to the history leading to the Pandemic Plan, the parties hotly dispute “how much [of] the past matter[s].” *See Raymond*, 981 F.3d at 298. AFEF maintains, essentially, that because this Court had previously concluded that the Complaint had plausibly stated an equal protection challenge to the Field Test, then the same inferential benefit of the doubt should carry the claim here. *See* ECF No. 95 at 8. This is especially so, says AFEF, because at this stage, it need only “make it plausible” that the current plan is motivated by racial animus. *See id.* at 12.

MCPS rightly responds that the Court may not accord the Field Test history an outsized impact because “past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.” ECF No. 96 at 8 (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)). The challenge for this Court is to decide what weight to accord any averred discriminatory intent behind the Field Test in evaluating the Pandemic Plan.

In this respect, *Abbott v. Perez* is instructive. There, the Supreme Court of the United States was called to pass on the constitutionality of a 2013 redistricting plan enacted by the Texas legislature. *Abbott*, 138 S. Ct. at 2313. The 2013 plan was passed after the Supreme Court found an earlier redistricting plan unconstitutional and ordered the state to remedy the defects. *Id.* (citing *Perry v. Perez*, 565 U.S. 388 (2012) (per curiam)). Now reviewing the 2013 plan, the district court declared that it, too, was unconstitutional because the legislature had not demonstrated that it had adequately “purged” the “discriminatory intent” animating the earlier plan. *Id.* at 2318.

The Supreme Court squarely rejected this analysis. *Abbott*, 138 S. Ct. at 2325. Although the Court acknowledged that the “historical background” of legislation “is one evidentiary source relevant to the question of [discriminatory] intent,” it explained that this factor cannot be accorded such weight that it effectively shifts the burden to the defendant to demonstrate it has “cured” its historically impermissible motives. *Id.* at 2324-25. Rather, the Supreme Court emphasized that the new legislation should be accorded the presumption of good faith, and that the plaintiff must demonstrate the 2013 Legislature “acted with invidious intent.” *Id.* at 2325.

After *Abbott*, the Fourth Circuit faced a similar question in *North Carolina State Conference of the NAACP v. Raymond*. There, the plaintiffs challenged a 2018 state voter identification law passed after a previous voter identification law had been enjoined as racially discriminatory. *Raymond*, 981 F.3d at 299-300. The Fourth Circuit faulted the district court for placing great weight on the fact that a substantially

identical legislative body passed the 2018 legislation without making any apparent attempt to “cleanse” the legislation of the “old” discriminatory intent. *Id.* at 304. In so doing, the Fourth Circuit cleaved closely to *Abbott*, setting forth the proper analytical framework for assessing the historic background of challenged legislation. The Court explained:

[T]he Challengers bear the burden of showing that racial discrimination was a “substantial’ or ‘motivating’ factor behind enactment of the law.” Satisfying that burden requires looking at the four factors from the Supreme Court’s *Arlington Heights* decision[.]

* * *

And in doing so, the district court *must* afford the state legislature a “presumption” of good faith. *Abbott*, 138 S. Ct. at 2324. For “a finding of past discrimination” neither shifts the “allocation of the burden of proof” nor removes the “presumption of legislative good faith.” *Id.*; *see also City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (“[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.”); *McCrary*, 831 F.3d at 241 (finding that we cannot “freeze North Carolina election law in place” as it existed before the 2013 Omnibus Law).

Id. (emphasis in original).

Accordingly, the Fourth Circuit made clear that the historical background of a challenged law is “one evidentiary source” that is certainly relevant but not dispositive. *Raymond*, 981 F.3d at 305 (quoting *Abbott*, 138 S. Ct. at 2325). Most critically, and contrary to AFEF’s position, *Raymond* underscores

the importance of according the challenged policy and its decisionmakers the presumption of good faith. To do otherwise would erroneously shift the burden of proof to require the County *disprove* discriminatory intent, rather than place the onus on AFEF to aver facts from which such intent may be inferred. *Id.* at 303-05.

Turning to this case, the Court fully embraces its prior decision regarding the magnet program's legislative history, as had the courts in *Abbott* and *Raymond*. See *AFFI I*, 560 F. Supp. 3d at 954 (“[T]he Complaint allows the reasonable inference that the County wished to engage in a form of racial balancing; and that, as pleaded, makes plausible the field test was implemented with a discriminatory purpose.”); *Raymond*, 981 F.3d at 305 (“None of this suggests that the 2013 General Assembly’s discriminatory intent in enacting the 2013 Omnibus Law is irrelevant.”); *Abbott*, 138 S. Ct. at 2325 (explaining that historical background is “relevant to the question of intent” though not dispositive). That said, when viewing the Amended Complaint facts as true and most favorably to AFEF, the Consortia enacted a wholly new admissions process that bears little resemblance to the Field Test. See ECF No. 51 ¶ 86. Further, this Court cannot ignore that, according to the Amended Complaint itself (ECF No. 51 ¶¶ 83 & 86), the Pandemic Plan came about because of COVID-19. *Cf.* *Raymond*, 981 F.3d at 306 (noting the “intervening event” of constitutional amendment breaks the inferential chain linking the challenged legislation to intentional discrimination). This intervening event alone breaks any inference that the same impetus giving rise to the Field Test also animated the Pandemic Plan. *Id.*

Moreover, and unlike *Abbott* and *Raymond*, different decisionmakers created and implemented the Pandemic Plan. The Consortia developed and executed the Pandemic Plan under new leadership and with many new Board members. *See supra* Part I.E. Where few of the decisionmakers remain the same, the Court is hard pressed to find it plausible that the same intentions fueling the Field Test can be imported to the Pandemic Plan. Thus, even giving full credence to the Metis Report and the former Board members' stated impetus to change the racial demographics of MCPS' magnet programs, that history alone does not make plausible that the Pandemic Plan is the product of discriminatory animus.

The Court next asks whether MCPS made "[s]ubstantive departures" from the "factors usually considered important" in decisions of this kind. *See Arlington Heights*, 429 U.S. at 267. AFEF maintains that such a departure is apparent, given that the Field Test and the Pandemic Plan were adopted and implemented in vastly different ways. Whereas the Field Test followed from highly public exchanges between the Board and the community, AFEF argues that the Pandemic Plan had been hatched in "clandestine" fashion. *See* ECF No. 95 at 10-11. AFEF's spin in this regard is not plausible.

According to the facts incorporated in the Amended Complaint, the Consortia has always been tasked with evaluating, administering, and altering admissions processes for special programs, including the magnet middle school programs. ECF No. 27-3 ¶ 20 ("Every year, a group of MCPS officials carefully collects and evaluates the data MCPS has gathered based on the prior year's magnet program selection

process, identifies any changes that might be necessary . . . and recommends modifications to MCPS's senior leadership."). By contrast, nothing in the Amended Complaint supports the inference that MCPS created the Pandemic Plan (or the Consortia, for that matter) under cover of darkness. Rather, the Consortia did what it always does: create a plan, announce the plan, and implement the plan. *See generally* ECF No. 27-3.

Further, to extent there were any departures from the ordinary course of business, it must all be assessed in the context of COVID-19. The Amended Complaint makes plain that the aptly-named Pandemic Plan emerged as a solution to the obstacles presented by COVID-19. *See, e.g.*, ECF No. 51 ¶ 84 (incorporating by reference the Franklin Declaration); *id.* ¶ 86 ("Due to COVID-19 restrictions, MCPS did not administer the CogAT."); ECF No. 23 at 2 ("As you know, the pandemic has reshaped how Montgomery County Public Schools (MCPS) delivers services to students and families in a virtual setting, and it has impacted established annual admission processes for the criteria-based middle school magnet programs for 2021-2022."); March 2021 FAQ at 1 ("As part of the Pandemic Plan, the Cognitive Abilities Test (CogAT) will not be administered this year due to limitations of in-person administration and test security.") (emphasis omitted). COVID-19 clearly necessitated new and innovative responses in every facet of public education. It thus makes little sense to attribute the COVID-19 inspired changes to the magnet program as somehow nefarious when the entire world needed to pivot quickly, and in all respects, to cope with the pandemic.

Lastly, the Court asks whether the Pandemic Plan “bears more heavily on one race than another.” *McCrory*, 831 F.3d at 230 (quoting *Arlington Heights*, 429 U.S. at 266). For this factor, the Court considers whether “a clear pattern, unexplainable on grounds other than race” has emerged from the Pandemic Plan. *See Arlington Heights*, 429 U.S. at 266 (citing cases). When viewing the Amended Complaint facts most favorably to AFEF, the answer is no. Asian American students continue to maintain strong representation in the magnet programs relative to their composition in the applicant pool. *See supra* Part III.A. From this, the Court cannot view as plausible that Asian Americans have been systematically excluded from the magnet schools for no apparent reason. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960) (finding it facially evident that legislation was designed to exclude Black voters where all but “four or five” of the city’s Black residents were drawn out of the city limits during legislative redistricting); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding that the San Francisco Board of Supervisors held “hostility to the race and nationality to which the petitioners belong[ed]” where all Chinese American laundry owners were denied certain permits required to operate their businesses).

AFEF likewise has not plausibly demonstrated that any particular component of the Pandemic Plan visits an outsized effect on Asian American students. Although the Amended Complaint broadly asserts that “local norming makes it harder for Asian-American students to enter the lottery pool” (ECF No. 51 ¶ 89), no facts support this contention. Indeed, the local norming that is part of the Plan involves the MAP-Reading and MAP-Math assessments; yet the

Amended Complaint refers to a different statewide assessment—the Maryland Comprehensive Assessment Program (“MCAP”) which is not even used in the magnet admissions process. *Compare* ECF No. 51 ¶ 87 *with id.* ¶ 89.

In fairness to AFEF, the Amended Complaint contends that given 35% of Asian American students countywide achieved the “highest level” on the MCAP, yet only 24% of Asian American students were placed in the magnet programs, the disparity “suggests that local norming makes it harder for Asian American students to enter the lottery pool.” ECF No. 51 ¶ 87. But AFEF provides no other detail as to why this attenuated explanation is plausible. Given that the final selection for magnet admissions is wholly randomized, it is just as possible that the disparity is due to chance as it is to local norming or some other change to the admissions process. Nor does the Amended Complaint make plausible that the MCAP phenomenon is unique to Asian American students. Put simply, the MCAP variance by itself does not make plausible that the Pandemic Plan burdens Asian American students, let alone that it burdens Asian American students more than any other cohort.

To summarize, having considered the *Arlington Heights* factors, the Amended Complaint fails to make plausible that the Pandemic Plan was the product of intentional discrimination. The Pandemic Plan emerged in response to COVID-19, not to address racial disparities of the magnet middle school student body. Moreover, because the Field Test had been implemented with different aims, and under the auspices of different leadership, no facts permit this Court to import those earlier objectives to the Pandemic Plan. And even when considering the

Pandemic Plan on its own merits, nothing suggests that the process adopted by the Consortia had been designed to favor one racial group over another. Thus, based on the foregoing, the County's motion to dismiss the Amended Complaint (ECF No. 87) must be granted.

IV. Conclusion

The Amended Complaint fails to make plausible that the Pandemic Plan disparately impacts Asian American students or had been implemented with discriminatory intent. The single equal protection claim, consequently, fails as a matter of law. The County's motion to dismiss (ECF No. 87) is GRANTED; *Amici's* motion to intervene (ECF No. 69) is DENIED as MOOT; the Amended Complaint (ECF No. 51) is DISMISSED; and the Clerk is DIRECTED to CLOSE this case.

A separate Order follows.

July 29, 2022

Date

/s/

Paula Xinis

United States District Judge

Filed August 4, 2022

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

ASSOCIATION FOR	*	
EDUCATION	*	
FAIRNESS	*	Civil Action No.
Plaintiff,	*	8:20-cv-02540-PX
v.	*	
MONTGOMERY	*	
COUNTY BOARD OF	*	
EDUCATION, <i>et al.</i> ,	*	
Defendants.	*	

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 29th day of July, 2022, by the United States District Court for the District of Maryland, ORDERED that:

1. The Motion to Dismiss (ECF No. 87) filed by Defendants Montgomery County Board of Education and Dr. Monifa B. McKnight is GRANTED;
2. The Amended Complaint (ECF No. 51) is DISMISSED without prejudice;
3. The Motion to Intervene (ECF No. 69) jointly filed by the Montgomery County Branch of the NAACP; Montgomery County Progressive Asian American Network; Asian American Youth Leadership Empowerment and Development; Identity, Inc.; and CASA, Inc. (“*Amici*”) is DENIED as MOOT;

4. The Clerk is DIRECTED to TRANSMIT copies of this Memorandum Opinion and Order to the parties and *Amici*; and
5. The Clerk is DIRECTED to CLOSE this case.

July 29, 2022

Date

/s/

Paula Xinis

United States District Judge

Filed December 20, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ASSOCIATION FOR
EDUCATION FAIRNESS

11830 Charles Road
Silver Spring, MD 20906
Montgomery County, Maryland

Plaintiff,

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION

Montgomery County Public
Schools

Carver Educational Services
Center

850 Hungerford Drive,
Room 123

Rockville, MD 20850

Montgomery County, Maryland

DR. MONIFA B. McKNIGHT, as
Superintendent of Montgomery
County Board of Education
Montgomery County Public
Schools

Carver Educational Services
Center

850 Hungerford Drive,
Room 122

Rockville, MD 20850

Montgomery County, Maryland

Defendants.

Civil Action No.
8:20-cv-2540

FIRST AMENDED COMPLAINT

INTRODUCTION

1. Plaintiff Association for Education Fairness (AFEF) brings this civil rights lawsuit for declaratory and injunctive relief to vindicate the rights of Asian-American public school children in Montgomery County, Maryland, to compete on equal footing for admission to the County's prestigious magnet middle school programs without regard to their race.

2. Montgomery County Public Schools (MCPS), one of the nation's largest school districts, operates several enrichment programs for gifted and high-ability students at the elementary, middle, and high school levels. This action concerns MCPS' recent overhauls of the admissions process for its four magnet middle school programs. AFEF alleges that MCPS has intentionally designed the admissions process in such a way that Asian-American students cannot compete on an equal footing for magnet program seats. AFEF further alleges that successive changes to the admissions process were at least in part intended to reduce the percentage of Asian-American students who enroll in the magnet middle school programs, with the ultimate goal of racially balancing these schools according to the racial demographics of Montgomery County.

3. AFEF members are concerned Asian-American parents in Montgomery County. Many have children who have recently gone through the magnet program admissions process, while others have children who will be affected by the discriminatory process in future years. Changes were first implemented after the Board of Education commissioned a report from Metis Associates to study the demographic composition of

several of its programs. Overwhelming publicly-available evidence demonstrates that the initial changes were adopted to produce a particular racial outcome—proportionally fewer Asian-American students at the magnet middle school programs. And by that measure, the changes were successful: while white, Black, and Hispanic students all benefited from the initial changes, Asian Americans lost more than a fifth of their representation at each program.

4. MCPS tweaked the admissions process in response to the ongoing COVID-19 pandemic, but the new process still forces Asian-American students to compete on an unequal playing field. Data shows that this new process—which will be used for the 2022 application year and beyond—disadvantages Asian-American students, too.

5. The Equal Protection Clause is a promise that the government at every level will treat every American as an individual, not simply as a member of his or her racial group. Policies such as those implemented by MCPS fly directly in the face of that promise. Rather than evaluating each child on his or her own merits for admission to the magnet programs, MCPS has tweaked the system in hopes of achieving a desired racial outcome—fewer “overrepresented” Asian Americans. Equal protection demands that government decisionmaking be free from the taint of racial balancing.

JURISDICTION AND VENUE

6. This action arises under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §§ 1981 and 1983. The Court has jurisdiction over these federal claims under 28 U.S.C. §§ 1331 (federal question) and 1343(a) (redress for deprivation

of civil rights). Declaratory relief is authorized by the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

7. Venue is proper in this district under 28 U.S.C. § 1391(b)(1)-(2). Defendant resides within this district and a substantial part of the events giving rise to this claim have occurred or will occur in the District of Maryland.

8. The challenged policy remains in effect. A live controversy exists between the parties.

PARTIES

9. Plaintiff AFEF is an organization of Asian-American parents formed in part to ensure transparency, integrity, and consistency in the selection process for MCPS' magnet middle school programs and other forms of enriched and accelerated instruction. More specifically, AFEF focuses on ensuring that racial bias does not infect the magnet middle school program selection process in any way and that the instructional needs of all gifted students are met, regardless of race.

10. AFEF is a non-profit organization registered with the Internal Revenue Service and qualifies as tax exempt under Internal Revenue Code Section 501(c)(3). It is also registered as a non-profit corporation with the State of Maryland. AFEF has more than 80 members, mostly in Montgomery County, many of whom have children enrolled in public schools in Montgomery County. Members include several parents of MCPS elementary school students—these children will be considered for admission to the magnet middle school programs in the coming years, and therefore will be evaluated

under MCPS' discriminatory magnet middle school program admissions criteria.

11. Without this Court's intervention, AFEF members' children will be denied the opportunity to compete for admission to MCPS' magnet middle school programs on an equal footing with other applicants because of their race. Thus, members of AFEF "are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 342 (1977) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). The prospective relief Plaintiff seeks, if granted, will "inure to the benefit of those members of the association actually injured," and so the individual participation of each injured AFEF member is not required. *Warth*, 422 U.S. at 511, 515.

12. Several AFEF members have children who will soon be subject to the challenged admissions process. Among these are Chen Lai (child A.Y. is a fifth grader at Bells Mill Elementary School who will seek admission to the magnet programs, and child L.Y. is a kindergartener at Bells Mill Elementary School who plans to seek admission to the magnet programs), George Yan (child G.Y. is a fifth grader at Cold Spring Elementary School who will seek admission to the magnet programs), Zhou Wang (child A.W. is a fifth grader at Travilah Elementary School who will seek admission to the magnet programs); Lihui Liang (child O.Q. is a fourth grader at Fallsmead Elementary School); Jack Wang (child J.W. is a third grader at Diamond Elementary School); Suping Wang (child K.W. is a second grader at Wayside Elementary School); Jing Wang (child G.Y. is a second grader at

Wayside Elementary School who plans to seek admission to the magnet programs); Peijun Li (child F.T. is a second grader at Wayside Elementary School); Yinan Liu (child C.Y. is a first grader at Wayside Elementary School who plans to seek admission to the magnet programs); AFEF president Yuxiang Xie (child M.Z. is a first grader at Fallsmead Elementary School who plans to seek admission to the magnet programs); and Haishan Li (child S.L. is a kindergartner at Travilah Elementary School).

13. Defendant Montgomery County Board of Education (hereinafter “the Board of Education”) operates MCPS, a public school system consisting of 209 public schools in Montgomery County, Maryland.¹ MCPS is the largest and one of the best public school districts in Maryland. As of the fall of 2020, MCPS enrolled 160,564 students across its schools.²

14. In 2015, Defendant Board of Education commissioned a study of equitable access to special academic programs. That resulted in a report completed by Metis Associates in 2016 (the “Metis Report”), after which MCPS announced the first implementation of changes to the middle school magnet program admissions criteria and process.

15. Defendant Monifa B. McKnight is the Interim Superintendent of MCPS. In her capacity as Superintendent, Dr. McKnight is responsible for implementing the admissions process for MCPS’ magnet middle school programs. She is sued in her official capacity. The caption has been amended to

¹ About MCPS, <https://www.montgomeryschoolsmd.org/about/> (last visited Dec. 16, 2021).

² *See id.*

add her name to replace previous Superintendent Dr. Jack R. Smith. *See* ECF No. 37.

FACTUAL ALLEGATIONS

Background: MCPS History and Demographics

16. MCPS has never been subject to court-ordered desegregation. Instead, it voluntarily desegregated its schools shortly after the Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* Metis Report at 15;³ *Eisenberg ex rel. Eisenberg v. Montgomery Cty. Public Schs.*, 197 F.3d 123, 125 (4th Cir. 1999).

17. Until relatively recently, MCPS was a majority white school system. During the 1970s, the enrollment of minority students doubled from 11.3% in 1974–75 to 21.7% 1980–81. Metis Report at 16. Even so, by 1999, MCPS was over 53% white. *Eisenberg*, 197 F.3d at 127.

18. As MCPS’ demographics changed, the system adopted race-conscious transfer restrictions on magnet elementary school students. The restrictions were designed to further MCPS’ alleged interests “in avoiding the creation of segregative enrollment by racial isolation” and “promoting a diverse student population.” *Eisenberg*, 197 F.3d at 129. Transfers were denied on the sole ground that a student moving from one school to another would have a negative “impact on diversity.” *Id.* at 127.

19. The Fourth Circuit invalidated MCPS’ race-based transfer policy in 1999, declaring that

³ The Metis Report is available here: <https://www.montgomeryschoolsmd.org/uploadedFiles/info/choice/ChoiceStudyReport-Version2-20160307.pdf> (last visited Dec. 16, 2021).

“Montgomery County employs a race-conscious nonremedial transfer policy which amounts to racial balancing.” *Id.* at 128. Even assuming that MCPS had a compelling interest in racial diversity at its elementary schools, the court found that the policy was not narrowly tailored to further that interest, and instead was “mere racial balancing.” *Id.* at 131. After the *Eisenberg* litigation, MCPS ceased using explicitly race-based transfer policies.

20. Demographic change has continued since the *Eisenberg* decision. By 2010–11, MCPS was 37.2% white, 23.4% Black, 23.4% Hispanic, and 15.7% Asian American. The latest available data shows that MCPS’ student population is 32.4% Hispanic, 26.9% white, 21.4% Black, and 14.1% Asian American. See About MCPS, *supra* note 1.

MCPS’ Magnet Middle School Programs

21. The current magnet middle school program began in 1984 with the creation of the magnet program in math, science, and computer science (STEM) at Takoma Park Middle School (Takoma Park). The other Downcounty magnet middle school program, in humanities and communications at Eastern Middle School (Eastern), began in 1986. Metis Report at 19. These schools originally served the entire County.

22. After the turn of the 21st century, the magnet program was expanded to include one Upcounty school, Roberto Clemente Middle School (Clemente). The Upcounty Center Program for the Highly Gifted at Clemente originally offered both the Humanities and STEM magnet programs. In 2018, the Upcounty Humanities magnet was moved to Martin Luther

King Jr. Middle School (MLK), while the Upcounty STEM magnet remained at Clemente.

23. The magnet middle school program is universally regarded to provide “unique academic experiences that are not readily available in home schools.” *Id.* at 91. Students from all over the County travel to these four sites to take part in the program.

24. Like the magnet elementary school program, the magnet middle school program was prompted by demographic changes, specifically MCPS’ effort to “maintain racial diversity in the southeastern areas of the district.” *Id.* at 19. But unlike the elementary school program, the magnet middle school program utilized selective admissions criteria; the programs at Takoma Park and Eastern—and later at Clemente—were designed to be “rigorous instruction programs.” *Id.*

25. By 2005, concerns were being raised that the magnet middle school program admissions process favored white students. That year, a group of parents organized as African American Parents of Magnet School Applicants released a study of three years of admissions data and “questioned the lack of racial and ethnic diversity in the programs.” *Id.* at 30-31. The parents requested that MCPS suspend the admissions process. MCPS rejected that proposal, but “recognized the need to increase the number of non-White students applying to the programs.” *Id.* at 31. MCPS instead implemented a number of initiatives designed to raise awareness of the magnet middle school programs, including “parent workshops, offering students practice tests for the magnet entrance exams, and by providing transportation on the day of the magnet entrance exams.” *Id.*

26. By the 2010s, Asian-American students had overtaken white students as the most represented racial group at the magnet middle school programs. In the 2013–14 school year, 45.5% of all magnet middle school students were Asian American. *Id.* at 86. White students made up 32.8% of the magnet students, while Black students made up 7.9% and Hispanic students 5.6%. *Id.* At that time, MCPS as a whole was 32.9% white, 26.0% Hispanic, 21.4% Black, and 14.8% Asian American. *Id.* at 13.

27. More recent entering classes had similar racial breakdowns. In the 2015 admissions process, 38.8% of offers given to attend the two Downcounty magnet middle school programs went to Asian-American students. In 2016, it was 44.1%. The Upcounty programs were even more heavily Asian American: in 2016, offerees for the two Upcounty programs at Clemente were 67.3% Asian American.⁴

The Metis Report

28. In June 2013, the Board of Education approved a new “Strategic Planning Framework,” which emphasized a “commitment to the core value of equity by *‘educating each and every student so that academic success is not predictable by race, ethnicity, or socioeconomic status.’*” Metis Report at 2 (quoting the Strategic Planning Framework).

29. In 2014, the Board of Education resolved to “*initiate a comprehensive study*” of MCPS’ choice and special academic programs for consistency with the

⁴ The 2015 data is attached as Exhibit 1 (see ECF No. 1-2). The memorandum including the 2016–18 data is attached as Exhibit 2 (see ECF No. 1-3) (the data appears at Attachment Table B3 through B5—pages 9 through 11 in the exhibit).

Strategic Planning Framework. *Id.* In October of that year, the Board issued a request for proposals, seeking a firm to perform the study. One of the four objectives of the study was: “Assessing whether all students have equitable access to these programs, especially in light of the continuing growth of MCPS student enrollment and the changing demographics of the region, both countywide and at the neighborhood level[.]” *Id.*

30. In January 2015, the Board of Education awarded Metis Associates the contract to perform the study, which became the Metis Report.

31. In March 2016, the Metis Report was released to the public. One of the Report’s key findings was as follows: “There are significant racial and socioeconomic disparities in the enrollment and acceptance rates to academically selective programs, which suggest a need to revise the criteria and process used to select students for these programs to eliminate barriers to access for highly able students of all backgrounds.” *Id.* at v. The Report notes that Black and Hispanic students are “underrepresented in academically selective programs when compared with districtwide enrollment data.” *Id.* at vi.

32. The Metis Report further notes that MCPS has made active efforts to increase the representation of Black and Hispanic students at selective magnet programs, but failed to change the racial demographics of these programs. *Id.* Metis hypothesized that “the lack of diversity and underrepresentation of some student subgroups in these programs suggests that the process may rely too heavily on one or more indicators or may need to consider additional measures of student ability.” *Id.*

The Metis Report's key recommendation (Recommendation 3a) was for MCPS to "[i]mplement modifications to the selection process used for academically competitive programs . . . to focus these programs on selecting equitably from among those applicants that demonstrate a capacity to thrive in the program[.]" Suggested changes to admissions policies included "broadening the definition of gifted to include non-cognitive measures such as motivation and persistence, using group-specific norms that benchmark student performance against school peers with comparable backgrounds, [and] offering automatic admissions for students in the top 5-10% of sending elementary or middle schools in the district." *Id.*

33. The Metis Report emphasized that there were proportionally fewer Black and Hispanic students at the magnet middle school programs than in MCPS as a whole. *Id.* at 85-86. The following charts in the Metis Report showed that Asian Americans were the only racial group more represented at the magnet middle school programs than in MCPS as a whole—Asian Americans were more than 45% of the magnet middle school program enrollment, compared to just over 14 percent districtwide. *Id.* at 86. White students made up almost the exact same percentage of magnet program students (32.8%) as MCPS students districtwide (32.9%). *Id.*

34. The Report further criticized MCPS' selective magnet programs, noting that while they have "strong academic outcomes," this is "largely due to the fact that they only accept high achieving applicants." *Id.* at 107. Non-selective magnet programs, on the other hand, "have a stronger impact on promoting diversity and supporting desegregation goals." *Id.* Using the

example of Stuyvesant, New York City's most selective specialized high school, the Report concluded that "selective magnet schools that do not yield racially diverse student enrollment can negatively affect student outcomes." *Id.* Stuyvesant's student body is over 70% Asian American, and more than 40% of its students qualify for free or reduced priced lunch. It is also one of the best public schools in the country and counts four Nobel laureates among its alumni.

35. The Metis Report also criticized purported "over-reliance" on standardized testing. It lamented that the racial imbalance in admissions could be "ameliorated with the use of race-conscious admissions processes established as part of court-ordered desegregation plans or local efforts," but now such efforts are "limited by decisions of the U.S. Supreme Court." *Id.* at 108. The Report recognized that since districts like MCPS have not been able to explicitly use race as a factor in admissions, they have relied more on standardized tests, to the detriment of racial diversity.

Board of Education Members and Then-Superintendent Smith Display Clear Racial Motive in Supporting Metis Recommendations

36. On March 8, 2016, Metis presented the Metis Report to the Board of Education. Thereafter, MCPS staff were charged with "addressing Metis' key recommendation and immediately began engaging the community in conversation about the findings, the recommendations, and a collective vision of choice

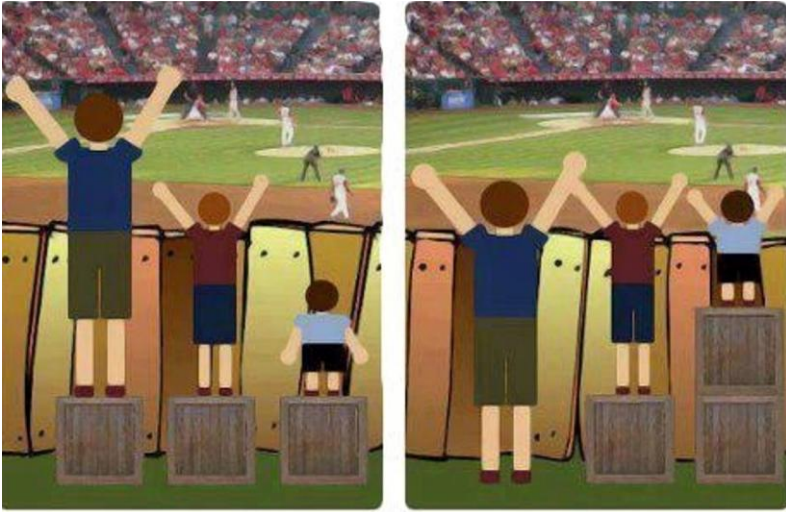
within MCPS predicated on equity of access and excellence in teaching and learning.”⁵

37. On March 21, 2016, then-Board of Education member Patricia O’Neill was quoted in the *Washington Post* saying that school officials should look at changing the criteria for admission to magnet programs. “I do believe we seriously need to step up to the plate and tackle this issue,” O’Neill said. “We’re not doing a very good job of bringing in African American and Latino students.”⁶

38. On April 6, 2016, MCPS officials held a community dialogue regarding the Metis Report at Gaithersburg High School. Many Asian-American parents attended to voice their opposition to the Metis Report’s Recommendation 3a—that the magnet program admission criteria be changed to address racial imbalance. MCPS officials discussed the use of non-cognitive criteria for admission and showed the following graphic to demonstrate their view of “equitable” admissions, indicating that the criteria must be altered to achieve greater racial balance:

⁵ This quote appears in multiple memoranda from then-Superintendent Smith to the Board of Education. A January 10, 2017, memorandum is available here: [https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AHAJX54E2F0B/\\$file/Dual%20Lang%20Programs%20World%20Lang%20ES.pdf](https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AHAJX54E2F0B/$file/Dual%20Lang%20Programs%20World%20Lang%20ES.pdf) (last visited Dec. 16, 2021).

⁶ Donna St. George, *Maryland School District Examines Racial Disparities in Its Gifted Programs*, Wash. Post., Mar. 21, 2016, available at https://www.washingtonpost.com/local/education/maryland-school-district-examines-racialdisparities-in-its-gifted-programs/2016/03/21/1caacdf6-eb88-11e5-b0fd-073d5930a7b7_story.html (last visited Dec. 16, 2021).



39. Further community dialogues were held on April 18, 2016, at John F. Kennedy High School, and May 5, 2016, at Walter Johnson High School. More than 800 community members participated in these events.

40. On May 10, 2016, the Board of Education held a meeting. Several Asian-American parents spoke in opposition to the Metis Report finding that MCPS should change admissions criteria for magnet schools to achieve greater racial balance. Then-Board of Education member Jill Ortman-Fouse commented: “The implication that we will be lowering our standards though for other races I find very discomforting. Your pursuit of the American Dream is not necessarily everyone’s pursuit of the American Dream. And in our country, we have experienced decades of horrors and atrocities against our African American families. And that population has worked

just as hard.”⁷ Board of Education member Judith Docca said: “And it looks like it’s because they are Latino or African American because they are not in the programs unless we’re saying they are just not as intelligent. . . . We need to do something about why some of our kids are not getting into the program when we know that they are bright.”⁸

41. On June 1, 2016, the *Washington Post* published a report on the controversy caused by the Metis Report.⁹ The article detailed Asian-American parents’ strong opposition to changes to magnet school admissions criteria.

42. On July 12, 2016, the Board of Education held a meeting. Many students and parents spoke in opposition to the Metis Report recommendation to change admissions criteria to magnet schools. Board of Education member Judith Docca specifically addressed the racial purpose inherent in the proposed changes; she stated that

When we look at the population of our students, we shouldn’t have 43% of one group in academically excellent courses or challenging courses or IB, and I think it is 23% of another

⁷ These comments are available here: <https://mcpsmd.newswagit.com/videos/05102016-598> (last visited Dec. 16, 2021). The comments of Ortman-Fouse are within the first minute of “Board/Superintendent Comments – 11:00 a.m.”

⁸ These comments are available at the same link, between 5:20 and 6:10 of “Board/Superintendent Comments – 11:00 a.m.”

⁹ Donna St. George, *Report on Racial Disparities in Gifted and Magnet Programs Gets Strong Reaction*, Wash. Post, June 1, 2016, https://www.washingtonpost.com/local/education/report-on-racial-disparities-in-gifted-and-magnet-programs-gets-strong-reaction/2016/06/01/2d249e0a-1dc4-11e6-9c81-4be1c14fb8c8_story.html (last visited Dec. 16, 2021).

group. And then you have 23% African American and 27% Latino, and the African Americans comprise about 4% of these challenging courses, and Latinos about 3 or 4% also. We just can't let this happen¹⁰

Docca appears to have been referencing the demographics at Richard Montgomery High School's International Baccalaureate (IB) program, which in 2015 was 48.0% Asian American, 33.5% white, 6.3% Black and 7.0% Hispanic. She also said it was "very distressful" to her that some parents argued that "pursuing diversity will lessen MCPS' excellence."¹¹

43. On September 26, 2016, then-Superintendent Smith sent a memorandum to the members of the Board of Education regarding MCPS' action on the Metis Report recommendations to that point.¹² He acknowledged that the Metis Report's recommendation that magnet school admission criteria be changed to address racial imbalance was "the subject of passionate public comment and there is a significant level of interest in the system's response to these recommendations." *Id.* at 4. He noted that MCPS staff was working to model potential changes, which would likely be implemented for the 2017–18 school year.

¹⁰ These comments are available here: <https://mcpsmd.newswagit.com/videos/07122016-542> (last visited Dec. 16, 2021). The comments of Docca are between 6:00 and 6:40 of "Board/Superintendent Comments – 10:50 a.m."

¹¹ These comments are at 5:00 to 5:30 in the same section as the previous comment.

¹² The memorandum is available here: [https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AE3SXS74DB97/\\$file/Choice%20Study%20Update.pdf](https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AE3SXS74DB97/$file/Choice%20Study%20Update.pdf) (last visited Dec. 16, 2021).

44. On October 24, 2016, the Board of Education held a meeting. Then-Board of Education member Christopher Barclay laid out his vision of how admissions reforms would lead to a racially balanced student body at competitive magnets.¹³ He first noted:

To understand choice not simply as a matter of creating opportunity and having that be blind and neutral but in fact ensuring there were *controls so that in fact those choices could reflect the community that we live in* and to address some of the disparities that exist. And I do think that we as a board and as a community need to think very carefully about how in fact we may define those controls so that in fact we do address the disparities that exist.

He added that he didn't think simply identifying more talented Black and Hispanic children would "get us over the hump," but rather urged that:

We have to be as explicit as we possibly can in addressing what do we want, alright, because I think that we have kind of been tacit as a system and as a district and say here is this great program, here are the parameters for what it takes to get in this great program and kind of on the one hand left it at that and then years later, decades later we are now saying, oh, *but we haven't been able to fill the slots the way we want to* but it's under our control.

¹³ These comments are available here: <https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/goto?open&id=AB7M2F557D83#> (last visited Dec. 16, 2021). The relevant comments of Barclay go from 7:45 through 11:52 under "Board/Superintendent Comment – 7:05 p.m."

He warned that:

If we expand blindly we are going to end up in the same place ten years from now, fifteen years from now, or whatever, because privilege is not going to go away *but our ability to create those controls is what is going to help us to define what we want those programs to look like.*

As for what the “controls” might be, Barclay cited remarks given by Professor John Brittain of the University of the District of Columbia David A. Clarke School of Law, at a meeting of the NAACP Parents Council in Montgomery County. Barclay quite clearly supported changes to the admissions policy that would allow MCPS to shape the competitive magnet programs to conform to the racial demographics of the County.

45. In February 2017, the National Coalition on School Diversity published a report entitled “Reclaiming the Potential for Equity and Diversity in Montgomery County’s Schools of Choice,”¹⁴ which asserted that Latino and Black students had “been largely excluded” from the magnet programs, but noted that district leaders were pushing to change that. *Id.* at 1. Then-Board of Education member Patricia O’Neill was observed to have recognized the “substantial underrepresentation of students of color” in the magnet programs and quoted as saying: “We have a moral obligation to meet the needs of all students and to make changes. Our school system has changed over the many years that these programs

¹⁴ The report is available here: https://d3n8a8pro7vhmx.cloudfront.net/patoneill/pages/14/attachments/original/1504385252/The_National_Coalition_on_School_Diversity_Field_Report_Feb_2017.pdf?1504385252 (last visited Dec. 16, 2021).

have been in existence and they should be reflective of our community, our diverse community.” *Id.* at 2. She further said that she hoped “that programs will become more diverse and *be more reflective of our student population* and continue the success that our students have had in the programs.” *Id.* at 8 (emphasis added).

First Implementation of Admissions Changes: Initial Field Test (2017)

46. On May 9, 2017, the Board of Education held a meeting where then-Superintendent Smith informed the Board members that a field test of new admissions procedure for the magnet middle schools had not yet been finalized, but that he expected one would be implemented during the 2017–18 school year selection process.¹⁵

47. On September 12, 2017, then-Superintendent Smith sent a memorandum to the Board of Education explaining that MCPS would be implementing a field test of new admissions procedures for the magnet middle school process.¹⁶ The field test would be used to select the students for the Downcounty programs at

¹⁵ Then-Superintendent Smith’s memorandum to the Board of Education regarding this update is available here: [https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/ALXLAU4F2C1A/\\$file/Choice%20Study%20Update.pdf](https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/ALXLAU4F2C1A/$file/Choice%20Study%20Update.pdf) (last visited Dec. 16, 2021).

¹⁶ Then-Superintendent Smith’s memorandum to the Board of Education is available here: [https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AQWQUQ633AF1/\\$file/Choice%20Study%20Recruit%20Select%20Field%20Test%20MS.pdf](https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AQWQUQ633AF1/$file/Choice%20Study%20Recruit%20Select%20Field%20Test%20MS.pdf) (last visited Dec. 16, 2021).

Eastern and Takoma Park for the 2018–19 sixth grade year.¹⁷

48. Prior to the field test, the process to apply for the magnet middle school program at either Eastern or Takoma Park was parent-initiated. In a typical year, between 700 and 800 of the around 8,000 students in the Downcounty zone applied for admission.¹⁸ Students were given the Cognitive Abilities Test (CogAT) and assessed based on the results of that test as well as their performance on various state assessments, their elementary school grades, and teacher recommendations.

49. The field test instituted universal screening, replacing the parent-initiated application process with district-initiated review. MCPS screened the academic records of each student in the Downcounty zone and offered about half of them the opportunity to sit for the CogAT. Therefore, in the first year of the field test (for 2018–19 admissions to Eastern and Takoma Park), 4,057 students were considered.¹⁹

¹⁷ The explanation of the field test for the Downcounty schools, presented at the Board of Education meeting, is available here: <https://mcpsmd.new.swagit.com/videos/09122017-1798> (last visited Dec. 16, 2021). The field test is described at agenda item 6.2.

¹⁸ An April 24, 2018, memorandum from then-Superintendent Smith to the Board of Education notes that “prior practice” was that “approximately 700 to 800 students applied” to the magnet programs at Eastern and Takoma Park Middle Schools. The memorandum is available at page 5 here: https://www.montgomerycountymd.gov/council/Resources/Files/agenda/cm/2019/20190211/20190211_EC3.pdf.

¹⁹ *See id.*

50. The field test also removed the alleged “overreliance” on teacher recommendations, which were said to be infected with racial bias.²⁰

51. The field test “[c]onsidered the academic peer group at the home school in relation to the student’s instructional need.”²¹ Then-Superintendent Smith called the “peer group” factor an “important consideration” in admissions.²² MCPS did not explain how the peer group was measured, except to say that a peer group exists when there is a cohort of 20 or more students in the same middle school with a comparable academic range. MCPS’ Frequently Asked Questions document noted that “[s]tudents who are high performing may or may not be invited to the program based on the availability of a peer group at their middle school.”²³

52. The field test greatly increased the number of students screened. It also preserved MCPS’ ability to reject high-performing students. Asian-American students in Montgomery County are highly clustered in a relatively small number of MCPS’ 135 elementary schools, whereas students of other races are more

²⁰ “Overreliance” is used in the Powerpoint shown at 56:47 in the following presentation to a committee of the Montgomery County Council: https://www.youtube.com/watch?v=7tcFk9E_Hfg&feature=youtu.be (last visited Dec. 16, 2021).

²¹ *Id.*

²² *See supra* note 18.

²³ The 2018 FAQ document is available here: [https://www.montgomeryschoolsmd.org/uploadedFiles/curriculum/specialprograms/middle/Frequently%20Asked%20Questions%20Eastern%20and%20Takoma%20Park%20Magnet%20ProgramsFINAL\(1\).pdf](https://www.montgomeryschoolsmd.org/uploadedFiles/curriculum/specialprograms/middle/Frequently%20Asked%20Questions%20Eastern%20and%20Takoma%20Park%20Magnet%20ProgramsFINAL(1).pdf) (last visited Dec. 16, 2021).

evenly spread throughout the County.²⁴ As such, the emphasis on limiting magnet admission for students with academic peer groups at their sending middle schools was designed to—and did—affect Asian Americans disproportionately.

Results of Downcounty Field Test (2018)

53. The Downcounty field test, which phased in MCPS' version of universal screening as well as heavy consideration of academic peer groups and de-emphasis on teacher recommendations, produced a significant racial effect. In 2017—the year before the field test was implemented—Takoma Park's STEM magnet program invited 135 students, 53 of whom were Asian American (39.2%), 48 white (35.6%), 15 Hispanic (11.1%), and 10 Black (7.4%).²⁵ Implementing the field test in 2018, Takoma Park invited 137 students, 43 of whom were Asian American (31.4%), 53 white (38.7%), 12 Hispanic (8.8%) and 19 Black (13.9%). Despite Takoma Park having invited two more people in 2018, Asian-American students proportionally received 20% fewer offers than they had in 2017. White students saw an increase and outnumbered Asian Americans,

²⁴ Individual elementary school data is available here: <https://www.montgomeryschoolsmd.org/schools/> (last visited Dec. 16, 2021).

²⁵ While the data in Exhibit 2 does not include numbers of students 10 and below due to the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, the 2015–17 data included in Exhibit 1 does have this data for the Downcounty programs.

something that hadn't happened for considerable time at Takoma Park.²⁶

54. It was much the same for Asian Americans at Eastern's Humanities program.²⁷ In 2017—before the field test—Eastern invited 129 students, 34 of whom were Asian American (26.3%), 58 white (45.0%), 9 Hispanic (7.0%), and 16 Black (12.4%). After implementing the field test in 2018, Eastern invited 13 more students (142), but eight fewer (26) of them were Asian-American (18.3%), 56 white (39.4%), 23 Hispanic (16.2%), and 21 Black (14.8%). At Eastern, too, Asian Americans were the most significantly harmed racial group—Asian-American children lost nearly a quarter of the seats they had earned in 2017.

55. This significant disparate impact might even under-count the actual effect of the initial field test changes: Asian Americans represented 60 of the 132 students invited to Takoma Park's STEM program in 2015 (45.5%) and 67 of 128 in 2016 (52.3%). At Eastern's Humanities program, Asian Americans received 42 of the 131 invitations in 2015 (32.1%) and 46 of the 128 invitations in 2016 (35.9%), so the 2017 numbers were already on the low end for expected Asian-American share of the magnet program seats.²⁸

56. At the Upcounty schools, where the field test was not implemented in 2018, Asian-Americans

²⁶ Plaintiff possesses exact data going back to 2015 (three cycles before the field test). Asian-American students received more admissions offers to Takoma Park in all three years: 60 to 46 in 2015 and 67 to 37 in 2016, as well as the above-cited 53 to 48 in 2017. The 2015–17 data is attached as Exhibit 1, while the 2016–18 data is available in Exhibit 2.

²⁷ See Exhibits 1 and 2.

²⁸ See Exhibit 1.

actually earned a *higher share of the seats*.²⁹ At Clemente's Upcounty STEM magnet program, Asian-American students received 50 of the 81 invitations in 2017 (61.7%), compared to 55 of the 86 invitations in 2018 (64.0%). And at the Humanities magnet, moved to MLK in 2018, Asian-American students received 50 of the 93 invitations in 2017 (53.8%) compared to 56 of 95 in 2018 (58.9%).

Reaction to Downcounty Field Test Results

57. After the Downcounty results were released in 2018, at least one Asian-American student told the Board of Education that he had received relevant test scores in the 99th percentile and still had not achieved admission to one of the magnet schools.³⁰ Another expressed frustration that the peer group emphasis was operating in a discriminatory fashion.³¹ Former AFEF president Alex Zhong expressed his disappointment in the process' lack of transparency.³²

58. On April 24, 2018, the Board of Education met to discuss the field test results. Board of Education Member Judith Docca asked Jeannie Franklin, MCPS

²⁹ The Upcounty data is also available in Exhibit 2.

³⁰ The testimony of Eric Shen is located here: [https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AWDKAF4EBF69/\\$file/Eric%20Shen.pdf](https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AWDKAF4EBF69/$file/Eric%20Shen.pdf) (last visited Dec. 16, 2021). Shen told the Board of Education that he and several of his friends had earned top scores on assessments and were disappointed to have not been accepted into a magnet program.

³¹ The testimony of Adam Tang is located here: [https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AWKQS76979E3/\\$file/Adam%20Tang.pdf](https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AWKQS76979E3/$file/Adam%20Tang.pdf) (last visited Dec. 16, 2021).

³² The testimony of Alex Zhong is located here: [https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AY5SFF72324E/\\$file/Alex%20Zhong.pdf](https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AY5SFF72324E/$file/Alex%20Zhong.pdf) (last visited Dec. 16, 2021).

Director of Consortia Choice and Application Program Services, why there was only a “slight” increase in the percentage of Black students invited. Franklin replied that she too had expected a larger increase because the pool of considered students had grown significantly.³³

59. Also at the April 24, 2018, Board of Education meeting, the student Board of Education member asked whether the process should be “race-blind.” He expanded: “Are there any legal barriers to us implementing some form of affirmative action, either socio-economic or racially? Why don’t we do something like that?” Then-Superintendent Smith replied that MCPS was legally prohibited from considering race, but could consider poverty. The Superintendent noted that MCPS was making incremental changes to the admissions process and that poverty weighting could be used in the future.³⁴

60. On May 8, 2018, the Board of Education met again. This time, multiple Asian-American parents expressed misgivings. One noted concern over students scoring in the 99th percentile and still not getting in, while also stating that the Asian-American community was seriously troubled because of the 20% drop in Asian-American acceptances to the magnet middle school programs.³⁵

³³ The April 24, 2018, Board of Education meeting can be seen here: <https://mcpsmd.new.swagit.com/videos/04242018-1886> (last visited Dec. 16, 2021). Docca’s question is at around 42:20 of item 9.1, and Franklin’s answer begins at 43:40.

³⁴ *Id.* The student board member’s question is at 50:50, and then-Superintendent Smith’s response directly follows.

³⁵ The testimony of Tao Chen is located here: [https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AYKSRG704C4C/\\$file/Tao%20Chen.pdf](https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AYKSRG704C4C/$file/Tao%20Chen.pdf) (last visited Dec. 16, 2021).

61. On May 21, 2018, the Board of Education met again, and former Board member Christopher Barclay—who had been a strong proponent of changing the criteria for admission to the magnet programs to achieve racial balance—gave public comments excoriating MCPS for failing to educate Black and Hispanic children. He urged MCPS to do more than the current changes.³⁶

62. In May 2018, MCPS responded to a public records request by a member of AFEF seeking an explanation for the drop in Asian-American students admitted to the Downcounty magnet programs. MCPS attributed the drop to the universal screening process. An MCPS spokesman was similarly quoted in the *New York Times* in September 2018, stating that “[t]he changes for Asian students were ‘expected,’ . . . because universal screening brought the demographics of admitted students closer in line to the overall demographics of the county.”³⁷

63. In January 2019, MCPS released the score distributions of invited students for 2018. The data showed that almost a quarter of the students admitted to Eastern’s Humanities program had a CogAT verbal score below the 95th percentile, while almost a fifth of students admitted to Takoma Park’s STEM program had a CogAT quantitative score below the 95th

³⁶ The testimony of Christopher Barclay is here: [https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AYZ34Q723934/\\$file/Christopher%20Barclay.pdf](https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/AYZ34Q723934/$file/Christopher%20Barclay.pdf) (last visited Dec. 16, 2021).

³⁷ Dana Goldstein, *Rethinking What Gifted Education Means, and Whom it Should Serve*, N.Y. Times, Sept. 13, 2018, available at <https://www.nytimes.com/2018/09/13/us/education-giftedstudents.html> (last visited Dec. 16, 2021).

percentile.³⁸ Additionally, just 71.5% of the students admitted to Takoma Park's STEM program achieved the top Level 5 score on the math PARCC³⁹ assessment, while just 67.6% of Eastern Humanities admits scored at Level 5 on the PARCC English language arts assessment.

64. MCPS also released the number of highly able students in each home middle school, as identified through the Measure of Academic Progress (MAP) and CogAT testing results.⁴⁰ The three home middle schools with the highest percentage of Asian-American students in the Downcounty zone—Frost, Hoover, and Cabin John Middle Schools—were among the highest in terms of number of highly able students identified. MCPS did not release any definition of an academic peer group, but this suggests that Asian-American students were hurt significantly by consideration of an academic peer group at one's home middle school.

65. The field test resulted in several Asian-American students with CogAT scores well above the 95th percentile and top scores on the MAP and PARCC assessments being excluded from the Downcounty magnet middle school programs and replaced by lower-scoring children of other races. At Cold Spring Elementary School alone, there were a

³⁸ See pages 7 through 9: <https://www.montgomeryschoolsmd.org/departments/sharedaccountability/reports/2019/Enriched%20and%20Accelerated%2028Jan2019%20FINAL.pdf> (last visited Dec. 16, 2021).

³⁹ PARCC are assessments devised by the Partnership for Assessment of Readiness for College and Careers.

⁴⁰ See <https://www.montgomeryschoolsmd.org/uploadedFiles/schools/msmagnet/about/MS%20Magnet%20Field%20Test%20Data%20by%20Sending%20MS.pdf> (last visited Dec. 16, 2021).

dozen Asian-American students, including children of AFFEF members, who scored in the 99th percentile on the CogAT and were not admitted to a magnet program.

Field Test Expanded: Upcounty and Local Norming (2019)

66. MCPS expanded the 2018 field test to the Upcounty magnet programs in 2019, including the universal screening and peer group controls.⁴¹

67. MCPS also began “local norming” of students’ CogAT scores. The local norming divided the students’ elementary schools into three bands: low-poverty, moderate-poverty, and high-poverty schools, and compared students coming from each band of elementary school only against each other, not against students from the other bands.⁴² Like the peer group measure, Asian-American students are more highly clustered in elementary schools likely to be rated low-poverty, while white students are more evenly spread across poverty bands, and Black and Hispanic students are more likely to be in moderate-to-high poverty elementary schools.

68. MCPS also expanded the number of invitations allocated to three of the four magnet programs in

⁴¹ The 2019 field test is explained in a memorandum from then-Superintendent Smith to the Board of Education here: <https://www.montgomeryschoolsmd.org/uploadedFiles/departments/schoolchoice/CES%20Sec%20Magnet%20Programs%20Memo%20July%202019.pdf> (last visited Dec. 16, 2021).

⁴² This is explained more fully in MCPS’ 2020 FAQ document here: <https://www.montgomeryschoolsmd.org/uploadedFiles/curriculum/specialprograms/middle/FAQs%202020.pdf> (last visited Dec. 16, 2021).

2019.⁴³ The Downcounty programs both saw large increases: the number of invitations extended to Eastern's Humanities program increased from 142 to 170, while Takoma Park's STEM program invitations increased from 137 to 157. The number of invitations increased by just one total at the Upcounty programs: Martin Luther King's Upcounty Humanities program went from 95 to 98, while Roberto Clemente's Upcounty STEM program saw invitations decrease from 86 to 84.

69. Adding the effect of local norming, the disparate impact observed above at the Downcounty programs continued in 2019. At Takoma Park, Asian-American applicants received just one of the additional 20 invitations offered. Asian Americans as a whole received 44 of the 157 invitations to Takoma Park (28.0%), lower than 2018 and significantly lower than the years before the field test was implemented. White applicants received 16 of the additional 20 invitations, 69 in total (43.9%), significantly higher than their usual proportion before the field test was implemented. Black and Hispanic admissions numbers barely budged from 2018: Black students received 22 offers (14.0%), while Hispanic students received 11 offers (7.0%).

70. At Eastern, Asian-American applicants did receive 12 of the additional 28 invitations issued, but their overall proportion of the admitted student pool (22.4%) still lagged behind 2017's numbers. Once again, white students picked up most of the additional

⁴³ Data from 2018 through 2020 at all four programs is attached as Exhibit 3 (*see* ECF No. 1-4). The data is located at pages 2 through 5 of the attachment to the memorandum (which correspond to pages 8 through 11 of the exhibit).

invitations; they received 82 invitations, compared to 56 in 2018, and made up 48.2% of the admitted student pool. Black and Hispanic students both saw decreases from 2018: Black students received 20 offers (11.8%) while Hispanic students received 18 (10.6%). Only white students were significantly more represented in Eastern's admitted student pool in 2019 than in 2017.

71. Upcounty, both programs saw significant declines in Asian-American offers as the field test went into effect for the first time. At Clemente's STEM program, Asian Americans lost seven invitations (more than 10% of their 2018 representation) compared to 2018, while white students gained seven—the smaller nature of the admitted pool makes percent comparisons more difficult, especially because MCPS did not report the exact number of Black or Hispanic students who received offers to Clemente.

72. At MLK's Humanities program, Asian Americans lost 18 invitations—more than 30% of their 2018 representation—even while three additional invitations were issued. The Asian-American proportion of the admitted pool dropped from 58.9% to 38.8%. Again, white students were the primary beneficiary, gaining 14 offers while their share of the admitted pool jumped from 16.8% to 30.6%. Black students earned 14 offers in 2019, but MCPS did not report the exact number of Black or Hispanic students who received offers in 2018, so comparison is impossible—other than to know that at least four more Black students received offers in 2019.

73. Not only did the data indicate a significant disparate impact on Asian-American students at both

Upcounty and Downcounty magnet middle school programs, it also suggests that universal screening was not the predominant reason for the change. For example, in 2017 (when applications were parent-initiated), the applicant pool for Takoma Park was 31.7% Asian American, 23.0% Black, 8.0% Hispanic, and 30.6% white.⁴⁴ In 2019, following the implementation of universal screening, the pool was 19.2% Asian American, 19.3% Black, 22.7% Hispanic, and 33.1% white.⁴⁵ The percentage of Black students considered under universal screening actually *declined*, while only the percentage of Hispanic students considered went up significantly. But *fewer* Hispanic students got into Takoma Park in 2019 than 2017, while twice as many Black students got in despite proportionally fewer Black students being considered. The Upcounty data also casts doubt on the universal screening explanation: while the Asian-American portion of the considered pool did drop significantly, Hispanic offers did not rise over 10 at either school even as the considered pool became significantly more Hispanic (from 9.5% in 2018 to 25.2% in 2019 at Clemente).

74. Rather than simply increase the pool of students for consideration, the data suggests that the universal screening process worked in tandem with the peer group control to allow MCPS, even without looking at the race or school of any particular student, to pass over high-scoring Asian-American students and instead offer seats to lower-scoring students of other races.

⁴⁴ See Exhibit 1.

⁴⁵ See Exhibit 3.

2020 and Cumulative Field Test Admissions Results

75. MCPS documents indicate that the admissions criteria did not change from 2019 to 2020.⁴⁶

76. According to MCPS data, the admissions results for the Downcounty magnets in 2020 were as follows: Takoma Park admitted 147 students, of whom 52 (35.4%) were Asian American, 18 (12.2%) were Black, 16 (10.9%) were Hispanic, and 61 (41.5%) were white. Eastern admitted 188 students, of whom 45 (23.9%) were Asian-American, 21 (11.2%) were Black, 15 (8.0%) were Hispanic, and 89 (47.3%) were white.⁴⁷

77. While Asian-Americans made up a larger portion of the admitted students at the Downcounty magnet programs in 2020 than in the previous year, the proportion still lagged behind the pre-field test numbers (39.3% at Takoma Park and 26.4% at Eastern) and even further behind the average Asian-American proportion in the three years before the field test was implemented (Takoma Park's admitted students were 45.5% Asian-American in 2015 and 52.3% Asian-American in 2016, while Eastern's were 32.1% and 35.9%, respectively). The weighted Asian-American proportion of the admitted students at

⁴⁶ Then-Superintendent Smith's memorandum on August 5, 2020, indicated that the same criteria were used for admission in 2020 (including universal screening, peer groups, and local norming). The memorandum is available here (with the admissions process comments on page 3): <https://www.montgomeryschoolsmd.org/uploadedFiles/curriculum/specialprogram/s/admissions/applications/CES%20and%20Secondary%20Regional%20Countywide%20Admission%20Memo.pdf> (last visited on Dec. 16, 2021).

⁴⁷ See Exhibit 3.

Takoma Park in the three years before the field test was 45.6%. In the three years under the field test criteria, it was 31.5%. For Eastern, these numbers are 31.4% and 21.8%, respectively. At both programs, therefore, Asian-American representation in the admitted pool over the three years since the changes was about 70% of the pre-field test numbers.

78. In the second year of the field test at the Upcounty magnet programs, the Asian-American proportion of the class continued its stark decline. Clemente in 2020 admitted 90 students, of whom 40 (44.4%) were Asian-American, 13 (14.4%) were Black, 10 (11.1%) were Hispanic, and 19 (21.1%) were white. MLK admitted 136 students, of whom 33 (24.3%) were Asian-American, 17 (12.5%) were Black, 20 (14.7%) were Hispanic, and 51 (37.5%) were white. The proportion of Asian-Americans at both schools plummeted even from 2019, when Asian-American students made up 57.1% of the admitted students at Roberto Clemente and 38.8% at Martin Luther King. But compared with the pre-field test (2018) numbers, the differences were extremely stark: 15 fewer Asian-American students gained admittance to Clemente in 2020 than in 2018, despite four additional offers extended overall, while 23 fewer Asian-American students received offers to attend MLK even though *41 more total offers were made in 2020*.

79. The weighted proportions pre-and-post field test tell a similar story at the Upcounty schools. For the STEM program,⁴⁸ the weighted proportion of

⁴⁸ Since the Upcounty Humanities magnet moved from Roberto Clemente to Martin Luther King in 2018, STEM and Humanities are used here for the sake of comparison. The STEM

Asian-Americans in the admitted class in the three years before the field test (2016–2018) was 66.0%. In the two years under the field test criteria, the weighted proportion was 50.6% (Asian-American representation in those years was therefore about 77% of what it was in the three prior years). For the Humanities program, those numbers are 58.2% and 30.3%, meaning that the proportion of Asian-Americans receiving offers to the Upcounty Humanities magnet program dropped by nearly half after the field test was implemented.

80. On the other hand, averaging the three years before and after the field test criteria were implemented, the proportion of white students among the admitted students class increased at all four programs. White students made up a weighted average of 33.2% of the admitted students at Takoma Park in the three years before the field test was implemented, but 41.5% in the three years under the field test criteria. At Eastern, white representation in the admitted class increased from 44.3% to 45.4%. At the Upcounty programs, the changes were even more dramatic. White students were 14.2% of the admitted class at the Upcounty STEM program in the three years before implementation of the field test, but 21.8% in the two years under the field test criteria. At the Upcounty Humanities program, average white representation in the admitted class nearly doubled after the field test criteria were implemented, from 18.7% to 34.6%.

81. Black and Hispanic students, too, saw greater representation at the Downcounty programs under

magnet continued to be housed at Roberto Clemente through 2020.

the field test criteria—and, although the data is incomplete, in all likelihood at the Upcounty programs too. Black students accounted for 8.1% of those admitted to Takoma Park from 2015–17, but 13.4% from 2018–20. Hispanic representation increased from 6.1% to 8.8% at the same time. At Eastern, Black students made up 9.5% of admitted students before the field test compared to 12.4% in the three years under the field test criteria, while Hispanic representation nearly doubled from 6.4% to 11.2%. The incomplete Upcounty data—due to MCPS’ failure to report numbers 10 and under on account of FERPA—also suggest that Black and Hispanic representation at the Upcounty magnet programs increased significantly under the field test criteria (along with white representation).⁴⁹ The only racial group which saw a decline—consistent through all four programs—was Asian-Americans.

82. The following tables summarize the before-and-after weighted average data explained in the previous five paragraphs:

⁴⁹ The combined white and Asian-American portion of the admitted classes at the Upcounty STEM program were 80.2% before the field test and 72.4% under the field test criteria, suggesting an increase in the Black and Hispanic proportion of the admitted students. The same is true at the Upcounty Humanities program; admitted students were 76.9% white and Asian-American before the field test compared to 64.9% under the field test criteria.

Takoma Park

Race	Proportion of Admitted Students Before Field Test (2015–17)	Proportion of Admitted Students Under Field Test Criteria (2018–20)
Asian- American	45.6%	31.5%
Black	8.1%	13.4%
White	33.2%	41.5%
Hispanic	6.1%	8.8%

Eastern

Race	Proportion of Admitted Students Before Field Test (2015–17)	Proportion of Admitted Students Under Field Test Criteria (2018–20)
Asian- American	31.4%	21.8%
Black	9.5%	12.4%
White	44.3%	45.4%
Hispanic	6.4%	11.2%

Upcounty STEM/Clemente

Race	Proportion of Admitted Students Before Field Test (2016–18)	Proportion of Admitted Students Under Field Test Criteria (2019–20)
Asian- American	66.0%	50.6%
Black	INCOMPLETE DATA	INCOMPLETE DATA
White	14.2%	21.8%
Hispanic	INCOMPLETE DATA	INCOMPLETE DATA

Upcounty Humanities/MLK

Race	Proportion of Admitted Students Before Field Test (2016–18)	Proportion of Admitted Students Under Field Test Criteria (2019–20)
Asian- American	58.2%	30.3%
Black	INCOMPLETE DATA	INCOMPLETE DATA
White	18.7%	34.6%
Hispanic	INCOMPLETE DATA	INCOMPLETE DATA

COVID-19 Leads to Tweaks in the Process (Lottery and Local Norming)

83. On September 1, 2020, Plaintiff filed this lawsuit against the Board and Dr. Smith challenging the admissions process MCPS implemented under the field test. ECF No. 1. Defendants moved to dismiss on October 23, 2020, and Plaintiff filed its opposition on November 23. ECF Nos. 21-22. On December 4, Defendants filed a notice informing the Court that the admissions process would be changed for the 2021 cycle due to the ongoing COVID-19 pandemic. ECF No. 23. Defendants then filed a second motion to dismiss on the grounds of mootness and ripeness. ECF No. 27. The Court ultimately denied both motions. ECF Nos. 35-36.

84. Along with its second motion, MCPS submitted the declaration of Jeannie Franklin, Director of Consortia Choice and Application Program Services for MCPS. ECF No. 27-3, ¶ 1. Franklin testified that a working group met throughout 2020 to consider potential modifications to the selection process for the magnet middle school programs. *Id.* ¶ 20. According to Franklin, the working group was considering several proposals by July 2020. *Id.* ¶¶ 21, 23-24. After meeting several times from July 2020 onward, it eventually proposed a new admissions process, which MCPS senior leadership approved. *Id.* ¶ 31. It is this process that was announced on December 4, 2020. *Id.*

85. The working group meetings were not public. The working group's deliberations and the various proposals it considered were not available to the public. There were no public discussions in front of the Board of Education regarding any potential changes to the magnet middle school program

admissions process. MCPS did not publicly announce that it was considering changes to the magnet middle school program admissions process until December 4, 2020.

86. The admissions process used during the 2021 cycle—what MCPS referred to as the “Pandemic Plan”—was different in many respects from the challenged field test. Due to COVID-19 restrictions, MCPS did not administer the CogAT. Instead, students were evaluated using fourth and fifth grade report card grades; percentile scores on the MAP-Reading (for the Humanities magnet programs) and MAP-Mathematics (for the STEM magnet programs); instructional reading level; and student services received, which include individual factors like eligibility for reduced-price meals and special education services. That evaluation determined which students were placed into a lottery for admission to each program. For the Humanities magnet programs, students receiving an A in reading and writing, an indication of above reading grade level in fourth grade, and a locally-normed minimum of 85th percentile score on the MAP-Reading were eligible for the lottery. The same criteria, but for math and science, were used to place students in the lottery for the STEM magnet programs.⁵⁰

87. The 2021 admissions process retained the use of local norming. The process used locally-normed MAP scores to determine eligibility for the admissions lottery. Local norming ensures that students are not evaluated against all other students considered for a

⁵⁰ MCPS described this process in an FAQ document located here: https://docs.google.com/document/d/1l0Zy-bCfG7O8EF64VOnit_54fjOIU_ITR1JyU8SSMg/edit (last visited Dec. 16, 2021).

specific program, but against a subgroup of all students. As this Court recognized, “[w]ith local norming, high-performing students, including Asian Americans, who score in the highest percentiles nationally will, in all likelihood, rank lower if only compared to their local peers.” ECF No. 35 at 35. MCPS’ explanation of the 2021 admissions process did not explain how MAP percentiles were locally normed.

88. MCPS released the admissions results for 2021 on August 18, 2021. *See* ECF Nos. 33 & 33-1. At the Takoma Park and Clemente STEM programs, Asian-American students received substantially fewer offers than they had even under the field test—both in raw numbers and proportionally. *See id.* At the Eastern and MLK Humanities programs, Asian-American students still earned fewer seats than they had before the field test was implemented. *See id.*

89. Asian-American students comprise 14.3% of MCPS middle school students,⁵¹ but 36.9% of Asian-American fifth-grade students achieved Performance Level 5 in mathematics according to the 2019 Maryland Comprehensive Assessment Program (MCAP) data.⁵² Although Asian-American students comprise about 35% of those who achieved at the highest level in the MCAP assessment in 2019,⁵³

⁵¹ *See* <https://ww2.montgomeryschoolsmd.org/departments/regulatoryaccountability/glance/currentyear/schools/middle.pdf> (last visited Dec. 16, 2021).

⁵² *See* <https://reportcard.msde.maryland.gov/Graphs/#!/Assessments/MathPerformance/2MA/5/9/3/1/15/XXXX/2019> (last visited Dec. 16, 2021).

⁵³ This can be calculated because we also know—based on the data in the prior footnote—that 14.7% of all MCPS fifth graders achieved Performance Level 5 in mathematics. If 36.9% of Asian-

Asian-American students only earned 48 of the 200 seats (24%) to the STEM magnet programs in 2021: 26 of 125 at Takoma Park and 22 of 75 at Clemente. This suggests that local norming makes it harder for Asian-American students to enter the lottery pool.

90. MCPS will continue to use the 2021 admissions criteria and process—developed in private by the working group—to place students during the 2022 admissions cycle.⁵⁴ ECF No. 41. The criteria includes local-norming of MAP percentiles used to determine eligibility for the admissions lottery.

CAUSE OF ACTION

(Violation of the Equal Protection Clause of the Fourteenth Amendment, through 42 U.S.C. § 1983)

91. Plaintiff hereby re-alleges each and every allegation contained in Paragraphs 1 through 90 as though fully set forth herein.

92. The Fourteenth Amendment to the United States Constitution provides in relevant part: “No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV § 1.

93. Defendant Montgomery County Board of Education is a “person” within the meaning of 42 U.S.C. § 1983, *Monell v. Dep’t of Soc. Servs.*, 436 U.S.

American students achieve Performance Level 5, then approximately 35% of all MCPS students who achieved Performance Level 5 in mathematics were Asian-American.

⁵⁴ MCPS’ explanation of the 2022 admissions process is available here: <https://docs.google.com/document/d/1in8H2GM2fAV3knp5ijlWT2mcbxdvbs9U19NCA1HgwE/edit> (last visited Dec. 19, 2021).

658, 663 (1978), as is Defendant Superintendent McKnight, who is sued in her official capacity for declaratory and injunctive relief, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989). Defendants have acted and are acting “under color of state law” within the meaning of Section 1983.

94. The Supreme Court has held that facially neutral state action violates the Equal Protection Clause when it is enacted with a racially discriminatory purpose. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). A racially discriminatory purpose does not imply that the decision-maker had any particular animus towards a racial group. *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016). Nor does it require a showing that race was the predominant consideration of the decisionmakers. *Arlington Heights*, 429 U.S. at 265. It merely implies that the decision-makers acted “at least in part ‘because of,’ not merely ‘in spite of,’ [the challenged policy’s] adverse effects upon an identifiable group.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

95. Under *Arlington Heights*, four factors are particularly relevant in determining whether a facially-neutral policy was enacted for a racially discriminatory purpose: any disparate impact of the policy on a particular racial group; the historical background of the policy; irregularities in the passage of legislation; and legislative and administrative history, including statements made by decision-makers. *Arlington Heights*, 429 U.S. at 266-67.

96. Members of the Board of Education and former Superintendent Smith have made no secret of the fact that they sought to change the racial composition of the magnet middle school programs to align them with the racial demographics of MCPS as a whole. The Metis Report, as well as the public comments and writings of multiple Board of Education members and then-Superintendent Smith, indicate that the field test implemented from 2018–20 had components that were intended to act as proxies in order to racially balance the magnet middle school programs, using the racial demographics of MCPS as a baseline.

97. While the Board members and then-Superintendent Smith may have had other, nonracial motives to implement the field test beginning in 2018—such as increasing geographic representation or the representation of economically disadvantaged students at the magnet programs—race was indeed the predominant point of discussion among members of the Board of Education and in the Metis Report. “[R]acial discrimination is not just another competing consideration.” *Id.* at 265.

98. After the Metis Report was released, the Board of Education effectively delegated⁵⁵ to then-

⁵⁵ A memorandum from Craig Howard, MCPS senior legislative analyst, dated February 7, 2019, explains in detail (attaching many of then-Superintendent Smith’s memoranda) how the Board of Education and then-Superintendent Smith acted in a supervisory capacity over the MCPS staff who designed the admissions criteria, which were designed to satisfy the Metis Report’s key recommendation that the magnet program criteria be changed to achieve racial diversity. The memorandum is available here: https://www.montgomerycountymd.gov/council/Resources/Files/agenda/cm/2019/20190211/20190211_EC3.pdf (last visited Dec. 16, 2021).

Superintendent Smith and MCPS staff the task of devising admissions criteria that would result in a group of admitted students at the magnet middle school programs that represents the racial composition of MCPS as a whole. This process intentionally harmed Asian-American students—that is the only way it could have achieved anything close to racial balance.

99. Over the three-year life of the field test, the disparate impact fell *only* on Asian-American students. The data cited in this Complaint establishes that the disparate impact was significant at all four programs. Further, anecdotal evidence abounds that Asian-American students who scored in the 99th percentile on the CogAT and had top level scores on other assessments were not admitted to any magnet program, while those with lower scores (and primarily those of other races) were admitted. Plaintiff alleges that the use of three controls—universal screening, peer group consideration, and local norming—worked together to allow MCPS to manipulate the admissions results without explicitly considering the race of any student.

100. The history of MCPS, as outlined in the Metis Report and the *Eisenberg* litigation, also demonstrates that Defendants implemented the field test in an attempt to approximate the effect of a purely race-based preference system, which would demand strict scrutiny under the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

101. The statements of Board of Education members and then-Superintendent Smith also establish that changing the racial balance at the

magnet middle school programs, to the detriment of Asian-American students, was the primary purpose of MCPS' response to the Metis Report.

102. MCPS' further tweaks to the process beginning in 2021—made in private without any public input—removed the objective CogAT assessment and retained local norming of the MAP assessments to determine eligibility for the lottery. The disparate impact caused by the field test has continued—and in some cases, worsened. Although the current policy no longer includes peer-grouping, it is still designed in such a way as to make it more difficult for Asian-American children to access the magnet programs.

103. Facially neutral policies enacted with discriminatory intent are subject to strict scrutiny. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). Such policies are invalid unless the enacting government can prove that they are narrowly tailored to further a compelling government interest. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

104. The Supreme Court has recognized only two government interests compelling enough to sustain a racially-discriminatory program: as a remedy for past discrimination for which the government is responsible, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989); and in order to obtain the benefits that flow from diversity in higher education, *Grutter v. Bollinger*, 539 U.S. 306, 328-33 (2003). The Court has held that *Grutter's* rationale is inapplicable to secondary schools. *Parents Involved*, 551 U.S. 701 at 724-25.

105. Since the Metis Report was released, Defendants have pursued racial balance in MCPS' competitive admission programs, including the middle school magnet programs. Because MCPS' system of admitting students to its four magnet middle school programs was implemented for a racially discriminatory purpose and furthers no compelling government interest, it violates the Equal Protection Clause.

106. Plaintiff is entitled to injunctive and declaratory relief prohibiting Defendants and their agents from continuing to implement the challenged admissions process—and from using any admissions controls designed to act as a proxy for race.

PRAYER FOR RELIEF

1. An entry of judgment declaring that MCPS' current admissions process for its magnet middle school programs was chosen for a racially discriminatory purpose, is not narrowly tailored to further a compelling government interest, and therefore violates the Equal Protection Clause.

2. An entry of a permanent injunction prohibiting Defendants and their agents from continuing to implement the current admissions process.

3. An entry of a permanent injunction prohibiting Defendants and their agents from utilizing as a factor in magnet middle school program admissions any control designed to affect the racial composition of the students eligible for or admitted to the magnet middle school program.

4. An award of attorneys' fees and costs in this action pursuant to 42 U.S.C. § 1988.

5. An award of any further legal or equitable relief this Court may deem just and proper.

Dated: December 20, 2021.

Respectfully submitted,

s/ Glenn E. Roper

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