

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. JACK R. SMITH, 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

COMPLAINT AND DEMAND FOR JURY TRIAL

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’ recently-implemented overhaul of admissions to its four magnet middle school programs. AFEF alleges that these changes were targeted 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 that have already been affected by the new admissions criteria, while others have children who will be affected in the coming years. The new criteria, implemented after the Board of Education commissioned a report from Metis Associates to study several of its programs, were adopted to produce a particular racial outcome—proportionally fewer Asian-American students at the magnet middle school programs. And so far the criteria have been successful by that measure: while white, Black, and Hispanic students have all benefited from the changes, Asian-Americans have lost seats—more than a fifth of the seats at each program. Overwhelming public evidence exists that the new criteria were adopted with the purpose to disadvantage Asian-American students and reduce Asian-American enrollment at these schools. As such, the changes violate the Equal Protection Clause.

4. The Equal Protection Clause amounts to 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 the one implemented by MCPS fly directly in the face of that promise. Rather than treating 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

5. 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.

6. 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.

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

PARTIES

8. 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.

9. AFEF is a coalition of approximately 62 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 intend to apply for admission

to a magnet middle school program, and therefore will be evaluated under MCPS' discriminatory magnet middle school program admissions criteria.

10. 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.

11. Several AFEF members have children who will soon be subject to the discriminatory admissions practices challenged here. Among these are Chen Lai (child A.Y. is a fourth grader at Bells Mill Elementary School who will seek admission to the Downcounty 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 fourth grader at Cold Spring Elementary School who will seek admission to the magnet programs), Zhou Wang (child A.W. is a fourth grader at Travilah Elementary School who will seek admission to the magnet programs); Jing Wang (child G.Y. is a first grader at Wayside Elementary School who plans to seek admission to the magnet programs); Yinan Liu (child C.Y. is a kindergartener at Wayside Elementary School who plans to seek admission to the magnet programs); and AFEF president Yuxiang Xie (child M.Z. is a kindergartener at Fallsmead Elementary School who plans to seek admission to the magnet programs).

12. Defendant Montgomery County Board of Education (hereinafter “the Board of Education”) operates MCPS, a public school system consisting of 208 public schools in Montgomery County, Maryland.¹ MCPS is Maryland’s largest public school district, the fourteenth largest school district in the country, and one of the best public school districts in the state. As of September 30, 2019, MCPS enrolled 165,267 students across its schools.²

13. 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 challenged in this action.

14. Defendant Dr. Jack R. Smith is the Superintendent of MCPS. In his capacity as Superintendent, Dr. Smith is responsible for implementing the challenged MCPS magnet middle school admissions process. He has supervised the implementation process and led various discussions between MCPS staff and the Board of Education on the implementation of the challenged “field test.” He has also written several memoranda to the Board of Education detailing MCPS’ actions with respect to the magnet middle school admissions process. He is sued in his official capacity.

FACTUAL ALLEGATIONS

Background: MCPS History and Demographics

15. 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*

¹ About MCPS, <https://www.montgomeryschoolsmd.org/about/> (last visited Aug. 31, 2020).

² *See id.*

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).

16. 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.

17. 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.

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

19. 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. As of

³ The Metis Report is available here: <https://www.montgomeryschoolsmd.org/uploadedFiles/info/choice/ChoiceStudyReport-Version2-20160307.pdf> (last visited Aug. 31, 2020).

September 30, 2019, MCPS' student population was 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

20. 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.

21. 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.

22. 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.

23. 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.*

24. 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.*

25. 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.

26. Recent entering classes—prior to the challenged changes—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

⁴ The 2015 data is attached as Exhibit 1. The memorandum including the 2016–18 data is attached as Exhibit 2 (the data appears at Attachment Table B3 through B5—pages 9 through 11 in the exhibit).

The Metis Report

27. 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).

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

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

30. 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.

31. 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.*

32. The Metis Report emphasized that Asian-American students were significantly “overrepresented” compared to MCPS enrollment as a whole, noting that Asian-American students made up more than 45% of enrollment at the magnet middle school programs in 2013–14, while no other racial group was “overrepresented.” *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.*

33. 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.

34. 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 Superintendent Smith Display Clear Racial Motive in Supporting Metis Recommendations

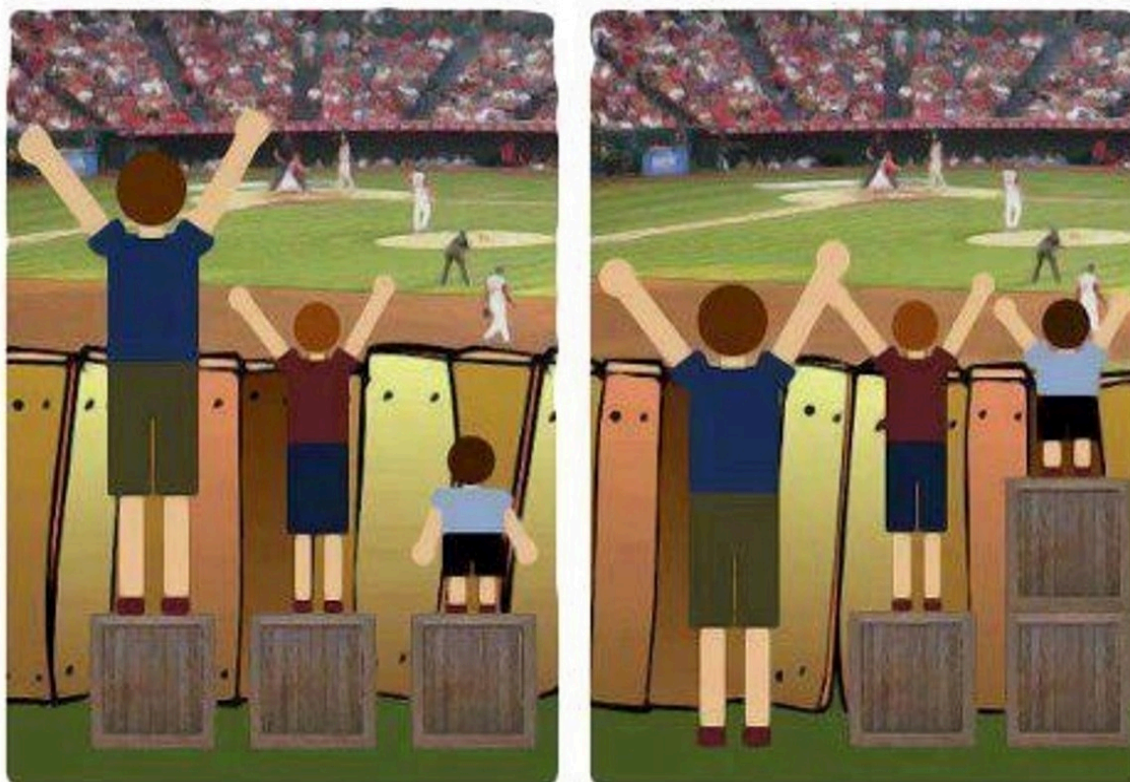
35. On March 8, 2016, Metis presented the Metis Report to the Board of Education. Thereafter, MCPS staff were charged with “addressing Metis’ key recommendation and immediately began engaging the community in conversation about the findings, the recommendations, and a collective vision of choice within MCPS predicated on equity of access and excellence in teaching and learning.”⁵

36. On March 21, 2016, 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,”

⁵ This quote appears in multiple memoranda from 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 Aug. 31, 2020).

O'Neill said. "We're not doing a very good job of bringing in African American and Latino students."⁶

37. 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:



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-racial-disparities-in-its-gifted-programs/2016/03/21/1caacdf6-eb88-11e5-b0fd-073d5930a7b7_story.html (last visited Aug. 31, 2020).

38. 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.

39. 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 discomfoting. 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

40. 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.

⁷ These comments are available here: <https://mcpsmd.new.swagit.com/videos/05102016-598> (last visited Aug. 31, 2020). 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 Aug. 31, 2020).

41. 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 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

42. On September 26, 2016, 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.new.swagit.com/videos/07122016-542> (last visited Aug. 31, 2020). 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 Aug. 31, 2020).

43. 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.

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, Barkley 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.

¹³ These comments are available here: <https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/goto?open&id=AB7M2F557D83#> (last visited Aug. 31, 2020). The relevant comments of Barkley go from 7:45 through 11:52 under "Board/Superintendent Comment – 7:05 p.m."

44. 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. 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 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).

Implementation of Admissions Changes: Initial Field Test

45. On May 9, 2017, the Board of Education held a meeting where 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

46. On September 12, 2017, Superintendent Smith sent a memorandum to the Board of Education explaining that MCPS would be implementing a field test of new admissions procedures

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 Aug. 31, 2020).

¹⁵ 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 Aug. 31, 2020).

for the magnet middle school process.¹⁶ The field test would be used to select the students for the Downcounty programs at Eastern and Takoma Park for the 2018–19 sixth grade year.¹⁷

47. 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.

48. 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

¹⁶ 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 Aug. 31, 2020).

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 Aug. 31, 2020). The field test is described at agenda item 6.2.

¹⁸ An April 24, 2018 memorandum from 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.*

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

50. The field test “[c]onsidered the academic peer group at the home school in relation to the student’s instructional need.”²¹ Superintendent Smith called the “peer group” factor an “important consideration” in admissions.²² MCPS has not explained how the peer group is measured, except to say that it 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

51. The field test greatly increased the number of students screened, while emphasizing MCPS’ ability to reject high-performing students. Asian-American students in Montgomery County are highly clustered, mostly in about 25 of the 135 MCPS elementary schools, whereas students of other races are more 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.

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 Aug. 31, 2020).

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 Aug. 31, 2020).

²⁴ Individual elementary school data is available here:
<https://www.montgomeryschoolsmd.org/schools/> (last visited Aug. 31, 2020).

Results of Downcounty Field Test

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

53. 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.

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.

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.

54. This significant disparate impact might even under-count the actual effect of the 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

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

56. 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

²⁸ See Exhibit 1.

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 Aug. 31, 2020). 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.

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

57. 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 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

58. 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?" 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

59. 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

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 Aug. 31, 2020).

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 Aug. 31, 2020).

³³ The April 24, 2018 Board of Education meeting can be seen here: <https://mcpsmd.new.swagit.com/videos/04242018-1886> (last visited Aug. 31, 2020). 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 Superintendent Smith's response directly follows.

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

60. 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

61. 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

62. 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

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 Aug. 31, 2020).

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 Aug. 31, 2020).

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-gifted-students.html> (last visited Aug. 31, 2020).

admitted to Takoma Park's STEM program had a CogAT quantitative score below the 95th 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.

63. 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.

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

³⁸ See pages 7 through 9:

<https://www.montgomeryschoolsmd.org/departments/sharedaccountability/reports/2019/Enriched%20and%20Accelerated%2028Jan2019%20FINAL.pdf> (last visited Aug. 31, 2020).

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 Aug. 31, 2020).

Field Test Expanded: Upcounty and Local Norming in 2019

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

66. 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.

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

⁴¹ The 2019 field test is explained in a memorandum from 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 Aug. 31, 2020).

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 Aug. 31, 2020).

⁴³ Data from 2018 through 2020 at all four programs is attached as Exhibit 3. 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).

68. 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%).

69. 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 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.

70. 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.

71. 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.

72. Not only does 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 is 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 19.1% 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).

73. 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,

⁴⁴ See Exhibit 1.

⁴⁵ See Exhibit 3.

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.

2020 and Cumulative Admissions Results

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

75. According to MCPS data, the admissions results for the Downcounty magnets 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

76. 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 (39.2% 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 Takoma Park in the three years before the field test was 45.6%. In the three years since implementation, it has been 31.5%. For Eastern, these numbers are 31.4% and 21.8%, respectively. At both programs, therefore, Asian-American

⁴⁶ 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/specialprograms/admissions/applications/CES%20and%20Secondary%20Regional%20Countywide%20Admission%20Memo.pdf> (last visited on Aug. 31, 2020).

⁴⁷ See Exhibit 3.

representation in the admitted pool over the three years since the changes has been 70% of what it was before the changes.

77. 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*.

78. 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 Asian-Americans in the admitted class in the three years before the field test (2016–2018) was 66.0%. In the two years after the field test, the weighted proportion is 50.6% (Asian-American representation is therefore about 77% of what it was before). 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.

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 magnet continued to be housed at Roberto Clemente through 2020.

79. On the other hand, averaging the three years before and after implementation of changes, 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. In the past three years, white students have made up a weighted average of 41.5% of the admitted class there. 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 since. At the Upcounty Humanities program, average white representation in the admitted class nearly doubled, from 18.7% to 34.6%.

80. Black and Hispanic students, too, saw greater representation at the Downcounty programs—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% after, 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 (along with white representation).⁴⁹ The only racial group which saw a decline—consistent through all four programs—was Asian-Americans.

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% after, 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% after.

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

Takoma Park

Race	Proportion of Admitted Students Before Field Test (2015–17)	Proportion of Admitted Students After Field Test (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 After Field Test (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 After Field Test (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 After Field Test (2019–20)
Asian-American	58.2%	30.3%
Black	INCOMPLETE DATA	INCOMPLETE DATA
White	18.7%	34.6%
Hispanic	INCOMPLETE DATA	INCOMPLETE DATA

2021 Admissions Process and Beyond

82. MCPS has not announced the criteria that will be implemented in 2021 and beyond. However, Superintendent Smith and several Board of Education members have indicated that this is a multi-year, multi-step process with each year building off the previous one. As such, any further changes will likely be made to further intentionally alter the racial demographics, bringing them closer to the desired racial balance mirroring MCPS as a whole.

CAUSE OF ACTION

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

83. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1 through 82 as though fully set forth herein.

84. 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.

85. 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. 658, 663 (1978), as is Defendant Superintendent Smith, who is sued in his 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.

86. 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).

87. 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 decisionmakers. *Arlington Heights*, 429 U.S at 266–67.

88. Defendants—the Board of Education and Superintendent Smith—have made no secret of the fact that the changes they have implemented to the magnet middle school program admissions policy are intended to reduce the proportion of Asian-American students enrolled in these programs, because Asian-Americans are “overrepresented” in the programs as compared to MCPS students as a whole. The Metis Report, as well as the public comments and writings of multiple Board of Education members and Superintendent Smith, indicate that the challenged admissions procedures are intended to act as a proxy in order to racially balance the magnet middle school programs, using the racial demographics of MCPS as a baseline.

89. While there is no doubt Defendants may have had other, non-racial motives to implement the challenged changes 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.

90. The Board of Education has effectively delegated⁵⁰ to Superintendent Smith and MCPS staff the task of devising admissions criteria that will result in a group of admitted students

⁵⁰ A memorandum from Craig Howard, MCPS senior legislative analyst, dated February 7, 2019, explains in detail (attaching many of Superintendent Smith’s memoranda) how the Board of Education and Superintendent Smith acted in a supervisory capacity over the MCPS staff who

at the magnet middle school programs that represents the racial composition of MCPS as a whole. This process intentionally harms Asian-American students—indeed, it must do so in order to succeed.

91. The disparate impact of the admissions changes has, over the life of the field test, fallen *only* on Asian-American students. The data cited in this Complaint establishes that the disparate impact has been 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 have not been admitted to any magnet program, while those with lower scores (and primarily those of other races) have been admitted. Plaintiff alleges that the use of three controls—universal screening, peer group consideration, and local norming—work together to allow MCPS to manipulate the admissions results without explicitly considering the race of any student.

92. The history of MCPS, as outlined in the Metis Report and the *Eisenberg* litigation, also demonstrates that Defendants chose the current system 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).

93. The statements of Board of Education members and 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.

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 Aug. 31, 2020).

94. 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).

95. 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.

96. Because Defendants' changes to MCPS' system of admitting students to its four magnet middle school programs was enacted for a racially discriminatory purpose and furthers no compelling government interest, they violate the Equal Protection Clause.

97. Plaintiff is entitled to injunctive and declaratory relief enjoining Defendants from continuing to use the challenged admissions process.

PRAYER FOR RELIEF

1. An entry of judgment declaring that Defendants' changes to MCPS' magnet middle school admissions process violate the Equal Protection Clause.

2. An entry of a permanent injunction against Defendants prohibiting them from continuing to enforce the challenged admissions procedure.

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

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

Dated: September 1, 2020.

Respectfully submitted,

s/ Glenn E. Roper

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