IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO TEACHERS UNION, LOCAL 1, et al. Plaintiffs, v. BOARD OF EDUCATION OF THE CITY OF CHICAGO, a body politic and corporate, Defendant.	)	Case No. 12 C 10311, 15 C 8149 Judge Sara L. Ellis Magistrate Judge Young Kim

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Robin Potter, Esq.
Patrick Cowlin, Esq.
Potter Bolanos LLC
111 East Wacker Drive, Suite 2600
Chicago, Illinois 60601
(312) 861-1800
robin@potterlaw.org
patrick@potterlaw.org

Counsel to the Plaintiffs

Randall D. Schmidt, Esq.
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 S. University Ave.
Chicago, IL 60637
(773) 702-9611
r-schmidt@uchicago.edu

Counsel to the Individual Plaintiffs

Table of Contents

Table of Authorities

Cases

Statutes

INTRODUCTION

The Board continues to misunderstand and distort this case. Plaintiffs have met the requirements to establish their disparate impact claims based on the Board's selection criteria for Turnaround schools. Plaintiffs have identified specific steps in the Board's selection process that caused a statistical disparity in layoffs based on race: the use of probation status and performance points in the first stage of selecting candidate schools for turnarounds. The Board does not dispute Plaintiffs' argument that Turnaround related layoffs had an adverse impact on African American teachers and paraprofessionals and school-related personnel ("PSRPs"). However, the Board incorrectly contends that Plaintiffs must also control for academic performance, even though academic performance itself is representative of racial disparities. Contrary to the law, the Board claims that academic performance is a neutral motivation "too important" to exclude from a disparate impact analysis. However, the presence or absence of neutral motivations has no bearing on whether there was a disparate impact, and tellingly, the Board's authorities on this point are, in fact, disparate treatment cases.

Further, Plaintiffs have demonstrated that the Board cannot show that the turnaround selection process was both job-related and justified by business necessity. Job-relatedness and business necessity are statutory requirements under Title VII, and cannot be conflated into a single "reasonableness" standard as the Board attempts to do. The Board cannot show that the layoffs following Turnarounds were job-related, because it does not dispute that layoffs were based on school-level performance metrics that did not evaluate individual teachers' and PSRPs' job performance. Moreover, under any standard, it was not "reasonable" to improve struggling schools by removing their strongest element: teachers, who, according to the undisputed facts, were generally highly rated.

Finally, the Board misconstrues Plaintiffs' argument by prematurely arguing waiver on the issue of equally effective, available, and less discriminatory alternatives. The Plaintiffs did not move for summary judgment the alternatives issue because it is unnecessary when, as here, Plaintiffs have established an adverse impact and the Board has not established its turnaround policy and practice was job-related and consistent with business necessity. There is no waiver and whether Plaintiffs' less discriminatory alternatives meet the standard for Title VII liability should be evaluated by a jury if the Board carries its burden to establish turnarounds were job-related and consistent with business necessity. *See* Dkt. 310 (Plaintiffs' Response to the Board's Motion for Summary Judgment).

In addition, Plaintiffs have presented sufficient evidence to be granted summary judgment based on the Board's pattern or practice of discrimination. In addition to statistical evidence of a racial disparity caused by the Board's turnaround selection process, Plaintiffs have supplied undisputed anecdotal evidence of discrimination, including examples of similarly situated majority white schools that were not selected for turnarounds. Taken together, Plaintiffs have shown that the Board, through turnarounds, had a "standard operating procedure" of discrimination under a pattern-or-practice theory.

Contrary to the Board's argument that some majority Black schools were not selected for turnaround, it is not necessary to show that every member of the protected class was treated worse than every member of the majority group to make a successful pattern or practice disparate treatment claim—only that similarly situated white individuals were treated better. Similarly, direct evidence of discriminatory intent or racial animus is not necessary to show a "standard operating procedure" of discrimination. The undisputed facts favor Plaintiffs as a matter of law. Therefore, this Court should grant Plaintiffs' Motion for Summary Judgment.

ARGUMENT

I. Plaintiffs are Entitled to Summary Judgment on Their Disparate Impact Claim

As set forth herein and in their Motion for Summary Judgment (Dkt. 305), the undisputed facts in the record demonstrate that the Board's turnarounds had an adverse impact on African American teachers and PSRPs and that the Board failed to meet its burden of showing that layoffs resulting from turnarounds were job-related and consistent with business necessity as a matter of law. Plaintiffs' motion for summary judgment should therefore be granted on their disparate impact claims.

A. Plaintiffs have isolated and identified specific employment practices that adversely impacted African American teachers and PSRPs.

To establish a prima facie case of disparate impact, plaintiffs must first "isolat[e] and identify[ ] the specific employment[ ] practices that are allegedly responsible for any observed statistical disparities." *Puffer v. Allstate Ins.*, 675 F.3d 709, 717 (7th Cir. 2012) (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994 (1988)). Plaintiffs have identified the Board's use of probation status and performance points to determine which schools to turn around as the specific employment practices that had a racially disparate effect. The Board used performance points[1] to measure schools' academic performance and whether they would be on probation. Only schools on probation were eligible for turnaround. The Board then winnowed down the eligible schools principally by assessing schools' performance points and factors like standardized test scores, attendance rates, and academic progress. Dkt. 305 at 3–4. While there

[1] From the 2007-2008 to 2012-2013 school years, the Board used an "Academic Performance Policy" to judge each school. JSOF ¶ 26–27. Each school received a percentage of available performance points, which were a quantitative measure that included standardized test scores, school attendance rate, and a "value add metric." *Id.* Starting with the 2013-2014 school year, the Board replaced the performance points nomenclature with the "School Quality Rating Policy," which also included standardized test scores (NWEA-MAP tests instead of ISAT tests) and was similar to performance points. JSOF ¶ 69.

was an adverse impact at each step of the turnaround process, Plaintiffs need to prove only that any one step had such an effect. Even a single discriminatory step taints the entire process, regardless of the end result. *Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chi.*, 797 F.3d 426, 435 (7th Cir. 2015) (citing *Connecticut v. Teal*, 457 U.S. 440 (1982)).

The Board's accusation that Plaintiffs are "run[ning] from the turnaround policy" to "escape" an unfavorable result is without merit and rings hollow. Dkt. 309 at 3. The use of probation and performance points are practices integral to the Turnaround process (*see* JSOF ¶¶ 25–27) and plaintiffs have challenged them since the very beginning of this litigation. *See* Dkt. 297-29, Ex. AA at 17; *Chi. Teachers Union*, 797 F.3d at 430–31 (recognizing that Turnaround is limited to schools that have "been on probation for at least one year," and that further narrowing was based in significant part on each school's "performance points score").

i. Plaintiffs have isolated probation and performance points in their statistical analyses and were not required to control for academic performance.

A plaintiff can introduce a statistical analysis tying the identified practices to a racial disparity, which must "take into account . . . the major factors potentially responsible for any disparity." *Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1045 (7th Cir. 1991). The Board argues that individual schools' "academic performance" is one such major factor, and plaintiffs must "correct[] for academic performance in their statistical proof." Dkt. 309 at 6. But Plaintiffs are not required, as the Board demands, to control for the very facially neutral policy and selection method they are challenging. To do so would undermine the utility of the regression while proving nothing.

As previously discussed, Plaintiffs have established the "specific employment practices that are [ ] responsible for [the] observed statistical disparities," namely probation status and

performance points. *Watson*, 487 U.S. at 994. Both are the Board's measurements of schools' academic performance – the Board determined probation status based on its "Academic Performance Policy," which included each "school's performance" on standardized tests. JSOF ¶ 26. Further, "academic performance was measured by the school's percentage of available performance points, which are a quantitative measure that includes standardized test scores" and other inputs. *Id.* ¶ 27. The Board, therefore, essentially asks Plaintiffs to measure the effects of a facially neutral policy, while controlling for the same policy at the same time.

Federal courts have addressed this problem before and have not required plaintiffs to unnecessarily undermine their own statistical analyses. In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 397 F. Supp. 3d 126 (D. Mass. 2019), the District of Massachusetts recognized that "models can be affected by biases that are inherent in the control variables that they use." *Id.* at 166. Therefore, "variables that are themselves impacted by the independent variable of primary interest," which in that case was race, "should generally be excluded from regression models." *Id.*; *see also Reed Constr. Data Inc. v. McGraw-Hill Cos.*, 49 F. Supp. 3d 385, 404 (S.D.N.Y. 2014) ("Multicollinearity problems typically arise when the independent variable is correlated with one of the control variables. If the control variables move together with the independent variable, it becomes impossible to isolate the effect of the independent variable on the dependent variable."), *aff'd*, 638 F. App'x 43 (2d Cir. 2016).[2]

The Board's suggested control variable raises precisely this type of multicollinearity problem since it is closely correlated with both independent variables: performance points and probation

[2] *Reed Construction* is a trade secret case, but regression analyses work the same way. The court expressly acknowledged that "[t]he employment discrimination cases provide guidance on which control variables are necessary for a regression analysis to be admissible." *Reed Constr.*, 49 F. Supp. 3d at 400.

status. Unsurprisingly, controlling for schoolwide academic performance in this case eliminates the significance of teachers' race. JSOF ¶ 97. Excluding academic performance as a control variable from Plaintiffs' analyses does not undermine their admissibility or probative value, and is in fact necessary to accurately evaluate whether the Board's turnaround selection process had an adverse impact on African Americans.

The Board cites *Mozee* for the proposition that Plaintiff's regression must include "the major factors potentially responsible for any disparity." Dkt. 309 at 4 (quoting *Mozee*, 940 F.2d at 1045). The Board's reliance on *Mozee* is not on point in this case. As Plaintiffs have explained, the defendant in *Mozee*, unlike the Board here, criticized plaintiffs' analysis for failing to control for variables *other than* the practice resulting in an alleged disparate impact. Dkt. 310 at 9–10. Here, however, the Board demands Plaintiffs control for factors substantively identical to the challenged practices. Unlike in *Mozee*, the "major factors" suggested by the Board here raise the multicollinearity problems addressed in *Students for Fair Admissions* and *Reed Construction*.

Other cases cited by the Board are similarly not on point. *See* Dkt. 310 at 11–13. Many concern disparate treatment cases, where showing a discriminatory *motivation* is central to the claim. *See Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 253–54 (1981) (explaining the purpose of the disparate-treatment balancing test); *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 940 (7th Cir. 1997) (recognizing the case to be about "discriminatory motivation"); *Coates v. Johnson & Johnson*, 756 F.2d 524, 530 n.4 (7th Cir. 1985) ("[T]his case is susceptible to a disparate treatment, and not a disparate impact, theory."). The Board also cites to *E.E.O.C. v. Chi. Mini. Lamp Works*, 947 F.2d 292, 301 (7th Cir. 1991) for the principle that some variables are "too important to be ignored." Dkt. 309 at 6, 8. However, that language comes from the court's analysis of a disparate treatment claim. The disparate impact claim was dismissed in that

case for reasons unrelated to this portion of the disparate impact analysis. *See id.* at 304–05. There is no real dispute that the Board's use of performance points and probation status were responsible for adverse impacts on African American teachers and PSRPs laid off from turnaround schools.

ii. Plaintiffs have established the cause of the adverse impact by showing large racial disparities.

Plaintiffs can establish the cause of the adverse impact with "statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities." *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979). Plaintiffs have done so. The Board is correct that correlation and causation are distinct concepts, and that a correlation does not necessarily indicate causation in the statistics field. Dkt. 309 at 6–7. But a strong, statistically significant correlation between the facially-neutral selection criteria and the adverse racial impact is how plaintiffs establish that such criteria "caused" the adverse impact. According to the Supreme Court, a "plaintiff [can] offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused" an adverse impact and those "statistical disparities [can] be sufficiently substantial that they raise such an inference of causation." *Watson*, 487 U.S. at 994–95.

The disparities here are substantial and necessarily establish that the turnaround selection policy and process were the cause of the adverse racial impact that disfavored African American teachers and PSRPs, and caused them to be laid off at disproportionate and discriminatory rates. Every turnaround at issue in this litigation had a large and statistically significant adverse impact on African American teachers and PSRPs relative to Caucasian teachers. *See* JSOF ¶¶ 86–96, 98–107. Plaintiffs have directly linked these racialized impacts to the challenged policies. During the 2008 turnarounds, for example, there was a statistically significant correlation between a

school's years on probation and performance points, and both the percentage and absolute number of African American CTU members represented at that school. JSOF ¶¶ 89–90. During the 2012 turnaround decisions, performance points were highly correlated with racial disparities. JSOF ¶¶ 98. Finally, throughout the relevant time period, "whether schools were on probation and the racial composition of the workforce" at those schools were closely correlated, to the disadvantage of African American teachers and PSRPs. JSOF ¶ 93. This overwhelming and consistent evidence of highly significant racial disparities establishes causation for purposes of Plaintiffs' disparate impact claims.

The Board's arguments to the contrary come up short. The Board relies heavily on *Morgan v. United Parcel Serv. of Am., Inc.*, 380 F.3d 459 (8th Cir. 2004), in which the Eighth Circuit dismissed a Title VII lawsuit because those plaintiffs did not include a relevant explanatory variable, past pay. Dkt. 309 at 8. However, the language and reasoning the Board cites is from the Court's decision on disparate treatment, not disparate impact. Indeed, the *Morgan* court dismissed the plaintiffs' argument not because past pay was not correlated with race, but because plaintiffs presented no "evidence that past pay experience was tainted by discrimination." 380 F.3d at 470–71. The Board also argues that it "has offered undisputed evidence that schools were selected for turnaround due to chronic academic failure, *not* race." Dkt. 309 at 5 (emphasis original). But even if true, such a claim cannot defeat causation in the disparate-impact context. For the purposes of their disparate-impact claim, Plaintiffs *agree* that schools were selected for turnaround due to poor academic performance as measured by the Board. Plaintiffs instead claim, and have shown, that the Board's facially neutral selection process caused an adverse impact on African American teachers and PSRPs. The burden of proof, therefore, shifts to the

Board to establish that its turnarounds were job-related and consistent with business necessity. *Ernst v. City of Chi.*, 837 F.3d 788, 796 (7th Cir. 2016).

B. The Board cannot meet its burden to show that its Turnaround selection process was job-related and consistent with business necessity.

Under Title VII and Supreme Court and Seventh Circuit precedent, when a specific policy is shown to have a statistically significant adverse impact on a protected class, as has been shown here, the defendant must show that the employment practice at hand is job-related and consistent with business necessity. *Id.* In absence of such a showing, plaintiffs prevail on their disparate impact claim. *Id.* This is a statutory requirement: Title VII requires employers to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). "If an employment practice which operates to exclude [members of protected classes] cannot be shown to be related to job performance, the practice is prohibited." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

A practice is "job-related if it measures traits that are significantly related to the applicant's ability to perform the job." *Gillespie v. State of Wis.*, 771 F.2d 1035, 1040 (7th Cir. 1985) (citing *Griggs*, 401 U.S. at 436). "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 432.

While the Board accuses Plaintiffs of engaging in a "mechanical application" of the job-related and business necessity elements, Plaintiffs are simply applying the law of Title VII to the facts of this case. Dkt. 309 at 10. Furthermore, while the Board criticizes Plaintiffs for citing cases that analyze hiring practices, Title VII does not set out different standards for hiring and firing. Rather, for all "employment practices," which include "discharge," the relevant question is whether the respondent can demonstrate that the practice is job-related and consistent with

business necessity. 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2 (k)(1)(A)(i). For the reasons set out below and in Plaintiffs' Motion for Summary Judgment (Dkt. 305), the Board cannot meet this burden.

i. The criteria used to select Turnaround schools were not job-related.

First and foremost, the Board admits that the criteria used to select schools for Turnaround, including Performance Points, did not measure or incorporate individual teachers' and PSRPs' job performance. JSOF ¶¶ 26, 27, 116. Instead, Performance Points are largely reflective of "students' race and socioeconomic status." JSOF ¶ 111. Further, the Academic Performance Policy does not isolate employee effectiveness and it is undisputed that the ISAT "was not designed to test for individual teacher or PSRP effectiveness." JSOF ¶¶ 111, 113. Additionally, the Board concedes that its process for selecting schools for Turnarounds involved evaluating schools as entities, rather than evaluating teachers or PSRPs. JSOF ¶ 116. The process was simply not tailored to assess individual teacher or PSRP performance in such a way as to allow the Board to justify the ensuing layoffs as job-related.

Second, school-level performance metrics do not measure teacher and PSRP performance. Students may not perform well in schools for many reasons, including lack of support at home or disinvestment by the district. In fact, the Board's own employee evaluations show that majority of teachers in Turnaround schools were performing at a high level, with ratings of "Excellent" or "Superior." JSOF ¶ 120. Thus, while the Board claims that it employed a "comprehensive" process when making Turnaround decisions (Dkt. 309 at 11), the decision to lay off all teachers and PSRPs at turnaround schools was entirely removed from the job performance of those individuals. The Turnaround process and the ensuing adverse employment actions were therefore not job-related and the practice is prohibited under Title VII's disparate impact framework.

ii. The decision to lay off all teachers and PSRPs at Turnaround schools was not consistent with business necessity.

The Board dedicates numerous pages to their argument that turnarounds improved schools. However, the Board does not, and cannot, cite to any reliable scientific or statistical evidence showing that its turnarounds were the cause of any improvement in students' standardized test scores or other related academic performance measurements. In addition, the Board does not make any actual, demonstrated connection between the challenged employment practice (laying off all teachers and PSRPs at turnaround schools) and any improvement in academic performance of students at those schools.

More specifically, the Board's argument that turnarounds improved academic performance fails for three reasons. First, uncontested evidence does not support the claim that turnarounds caused improvements in the school performance. While some Turnaround schools saw an increase on some academic performance measures, others performed worse after Turnarounds. JSOF ¶ 68. Still other schools that were not selected for Turnaround improved on academic performance measures dramatically between 2012 and 2017. JSOF ¶¶ 71–73. Only two Turnaround schools increased student attendance and zero Turnaround schools scored above the district average ISAT score the following year. JSOF ¶ 68. The Board's Appendix to its Response (Dkt. 309-1), which summarizes changes in reading, math, and/or science standardized test scores between 2011 and 2018, like its original Exhibit EEEE, does not demonstrate why any scores changed and represents arbitrarily selected components of the Board's own Academic Performance Policy. The Board's exhibits and argument also omit the aforementioned information about schools similar to Turnaround schools that also improved without having been subjected to Turnaround. *See also* "Plaintiffs' Reply Exhibit 1," attached hereto (providing examples of non-Turnaround schools from JSOF ¶¶ 71-73 (i.e. schools with demographics and

low academic performance similar to the Turnaround schools) that had similar or better improvements in the percentage of students who met or exceeded the national average on standardized test scores through 2018).[3] The Board's Appendix and related exhibits should be disregarded because they are disputed and/or provide no probative value towards the Board's business justification burden.

Additionally, Plaintiffs' expert, Dr. Trujillo, has explained that the totality of the research and literature studying school interventions has conclude that turnarounds are not an effective school improvement policy, as there is no rigorous empirical support for the idea that they can lead to "significant improvements in student achievement" nor that terminating all teachers and PSRPs will be beneficial to students. Dkt. 297, Exhibit L at 7.

Second, the Board has failed to show that laying off all teachers and PSRPs at the Turnaround schools is linked to any post-Turnaround improvements in academic performance. Nor could it, given that any isolated academic progress could have been due to many factors separate from the layoffs, including the additional financial investments and building improvements the Board made in Turnaround schools. JSOF ¶¶ 66, 129. The Board has not even attempted to isolate teacher and PSRP layoffs as the reason for academic improvement, so it cannot use the isolated improvement of *some* turned-around schools in *some* performance measures to justify laying off a disparate number of African American teachers and PSRPs.

Relatedly, the Board criticizes Plaintiffs' evidence of success at other schools that did not undergo turnarounds as if it is Plaintiffs' burden to affirmatively demonstrate that turnarounds

[3] The Board also stated that some schools improved their test scores by 80%. This is misleading because the information in Exhibit EEEE summarized in the Board's Appendix reported percent-change in a measurement already reduced to a percentage (the percentage of students meeting or exceeding the national average for the standardized test). It is not clear that the underlying test scores at the schools also improved by the same order of magnitude and the Board's exhibits and discussion do not report on what the percentage change in raw scores were at the school.

are *not* job-related and consistent with business necessity. *See* Dkt. 309 at 14-15. But it is the Board's burden to establish this element; and the Board's lack of evidence connecting turnarounds generally or, importantly, the removal of all teachers and PSRPs, to any improvement is fatal to its argument that turnarounds are consistent with business necessity.

Third, laying off teachers and PSRPs, the majority of whom were rated "Excellent" or "Superior," without considering individual performance is an objectively unreasonable approach to improving schools. The Board engaged in an employment practice disconnected to evaluations of employee performance even though Turnarounds are not supported by rigorous empirical evidence. Dkt. 297, Exhibit L at 7. The Board argues that a 2012 report by the Chicago Consortium on School Research (CCSR) provided evidence that earlier Turnarounds in Chicago were at least moderately successful, but this report made empirical conclusions based on deeply flawed methodology. Dkt. 309 at 13. Namely, the report drew conclusions about Turnarounds without isolating the policy from multiple other "reforms" the Board implemented simultaneously. Dkt. 297-136, Ex. YYYYY at 98–99. Thus, the Board's reliance on this CCSR report is unreasonable, just as it is unreasonable to attempt to improve schools by laying off highly-rated teachers and PSRPs without empirical evidence to support such a strategy.

C. The Board's definition of job-relatedness and business necessity is contrary to the law.

In its Response, the Board stated that "[a]n employer's challenged practice may be justified if it serves an important public interest goal." Dkt. 309 at 9 (citing *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys.*, 576 U.S. 519, 520 (2015) and *Chi. Teachers Union, Local 1 v. Bd. of Educ. of City of Chi.,* 419 F. Supp. 3d 1038, 1050–51 (N.D. Ill. 2020) (Layoff Case)). Further, the Board contends that "[t]he relevant inquiry, therefore, is whether the Board's school-level decisions were reasonable and served an important public policy goal." Dkt. 309 at 10 (citing

Inclusive Cmtys, 576 U.S. at 533). This is simply not the appropriate standard under Title VII, nor is it a fair representation of the *Inclusive Communities* case.

First, *Inclusive Communities* examined whether disparate impact claims related to housing decisions are cognizable under the Fair Housing Act. 576 U.S. at 525. The court in that case did not analyze employment practices under Title VII. In fact, the court clearly articulated that "the Title VII framework may not transfer exactly to the fair-housing context." *Id.* at 541. Moreover, the language in *Inclusive Communities* upon which the Board relies for its so-called public interest standard relates specifically to the Fair Housing Act context. *Id.* For employment cases, the court reiterated that the appropriate standard is that an employer is liable for disparate impact under Title VII if it cannot show that the challenged practice is "job related and consistent with business necessity." *Id.* at 541 (citing *Ricci v. DeStefano,* 557 U.S. 557, 587 (2009).

Second, the Board suggests that the District Court in the parties' separate Layoff Case found that the Board's layoff decisions in that case satisfied the job-relatedness and business necessity prongs by showing that the layoffs in allegedly under-enrolled schools met a public interest goal. The court in the Layoff Case did no such thing. Rather, the court noted the following:

> [T]o determine whether defendant's enrollment-based layoff practice is 'job related and consistent with business necessity,' this Court considers whether the practice bears a manifest relationship to the employment in question, whether it is necessary to safe and efficient job performance or essential to safe and efficient conduct of the employer's business, and whether it is consistent with genuine business needs.

419 F. Supp. 3d at 1050. The Board, therefore, was incorrect when it suggested that the District Court in the Layoff Case determined that the challenged practice survived a disparate impact case because it reasonably served an important public interest goal.

Third, the Board's reiteration of "reasonableness" as the relevant standard merely distracts from the statutory requirements of a Title VII disparate impact case. While the Seventh Circuit

has included something of a "reasonableness requirement," it is merely included as part of the job relatedness and business necessity analysis, as required by Title VII. *Aguilera v. Cook Cnty. Police and Corr. Merit Bd.*, 760 F.2d 844, 847 (7th Cir. 1985). In *Aguilera*, the Seventh Circuit assessed the reasonableness of a particular job requirement in light of job-relatedness and the business needs of the respondent. *Id.* at 847–49. The Board cannot make a similar showing because the criteria used to make the employment decisions at hand bore no connection to job performance and the practice of laying off all teachers and PSRPs without consideration of their individual performance cannot be consistent with business necessity.

D. Plaintiffs have not waived the issue of valid, equally effective, and less discriminatory alternatives.

Finally, the Board again misstated the law and Plaintiffs' theory of the case when it claimed that, since Plaintiffs' motion for summary judgment does not address less discriminatory alternatives, Plaintiffs did not meet their burden under *Allen v. City of Chi.*, 351 F.3d 306, 312 (7th Cir. 2003). Dkt. 309 at 18-19. Plaintiffs did not move for summary judgment on the issue of whether the Board had less discriminatory alternatives to turnarounds available as set forth in *Allen*. Under the burden-shifting framework articulated in *Allen*, once Plaintiffs prevail on the issues of adverse impact and the absence of job-relatedness or business necessity, the disparate impact inquiry is resolved in Plaintiffs' favor and there is no need to address less discriminatory alternatives. 351 F.3d 306, 311–12.

However, if Plaintiffs are not granted summary judgment on the first two elements of the disparate impact analysis, Plaintiffs have not waived the argument that the Board had less discriminatory alternatives available. The Plaintiffs presented numerous alternatives that would have rehabilitated schools without causing a disparate impact, including the following:

> (1) expanding the district's overall turnaround framework (which includes systems for rating school quality) to use multiple measures to evaluate school effectiveness;

> (2) implementing a district-wide desegregation plan that is grounded in rigorous research evidence about academic and social benefits of students attending diverse, racially and socioeconomically integrated schools;
> (3) reducing class size, based on the large body of rigorous research that confirms that reductions in class size are associated with increased learning gains and more effective teaching;
> (4) investing in early childhood education programs, based on the large body of rigorous research that confirms positive impacts of high quality preschool on lasting learning gains;
> and (5) implementing full service community school reforms that address students' and communities' lack of opportunity for and access to high quality teaching and learning, including "out of school factors." JSOF ¶ 126.

While the issue of alternatives need not be addressed if adverse impact and the absence of job-relatedness and business necessity are established, the question of whether these proposed alternatives were equally effective, less discriminatory, and available to the Board is an issue of material fact for a jury to assess. *Adams v. City of Chi.*, 469 F.3d 609, 613-14 (7th Cir. 2006).

Plaintiffs addressed the less discriminatory alternatives issue in depth in their response to the Board's Motion for Summary Judgment. Dkt. 310. The Court need not reach this issue, however, because as set forth herein and in Plaintiffs' Motion for Summary Judgment (Dkt. 305), Plaintiffs have prevailed as a matter of law on their disparate impact discrimination claims by establishing that turnarounds caused an adverse impact and that the Board failed to meet its burden of showing turnarounds were job-related and consistent with business necessity.

II. Plaintiffs are Entitled to Summary Judgment on Their Pattern or Practice of Discrimination Claims

A pattern or practice of discrimination occurs when "discrimination was [a] company's standard operating procedure—the regular rather than the unusual practice." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1976). Plaintiffs can show a pattern or practice via "strong statistical evidence of disparate impact," which plaintiffs often supplement with

"anecdotal evidence of the employer's intent to treat the protected class unequally." *Mozee v. Am. Com. Marine Serv. Co.*, 940 F.2d 1036, 1051 (7th Cir. 1991).

This Court should grant Plaintiff's Motion for Summary Judgment on its pattern or practice claim. In its Response to summary judgment, the Board made the same analytical mistakes as it did with regard to Plaintiffs' disparate impact statistics. Plaintiffs do not need to control for the discriminatory factor they identify. In addition, the Board attempts to confuse Plaintiffs' presentation of similarly-situated majority-white schools that were not turned around by proffering *unrelated* examples of majority African American schools that were also not turned around. The Board also makes spurious distinctions between Plaintiffs' comparators and the turnaround schools. The Board cannot escape the plain facts: it has continually, predictably, and intentionally selected underinvested African American schools on the South and West Sides for turnarounds.

A. Statistical evidence on the selection of schools for turnaround shows that African American teachers and PSRPs were more likely to be laid off due to Turnarounds.

Evidence of a statistical disparity alone can justify a finding of a pattern or practice of discrimination. *See Teamsters*, 431 U.S. at 339; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 358 n. 9 (2011). The statistical evidence that supports Plaintiffs' claims has been discussed extensively in the briefs before the court. "Plaintiffs' experts have shown that for the 2008, 2009, 2010, 2012, 2013, and 2014 Turnarounds, African American teachers and PSRPs were disproportionately affected by selection of schools for turnaround and that it [was] extremely unlikely that these statistical disparities occurred by chance." Dkt. 305 at 27; *see* JSOF ¶¶ 86, 95–96, 102–03, 106. "Even the Board's expert acknowledged a statistically significant

correlation between a CTU member being African American and the probability that he or she worked at [a] Turnaround school." Dkt. 305 at 28.

The Board argues that plaintiffs must control for academic performance for their statistics to be relevant. Dkt. 309 at 20-22. This is false. The same set of statistical evidence can support both a pattern-or-practice claim and a disparate impact claim. *Mozee*, 940 F.2d at 1051; *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 297 (1991). For the reasons discussed in the disparate impact context, it is unnecessary for plaintiffs to control for the very factor they identify as having a disparate impact. In fact, the correlation between race of employees and academic performance means that controlling for academic performance would "mask" the racial disparity. JSOF ¶ 109.

In their Motion for Summary Judgment, Plaintiffs explained that a "multivariate regression analysis of more explanatory variables is not necessary" when, as in this case, the employer's discriminatory selection criteria is already known. Dkt. 305 at 29; *Allen v. Seidman*, 881 F.2d 375, 380 (7th Cir. 1989). The Board claims that *Allen v. Seidman* is inapposite because the schools that are selected in the turnaround process are non-homogenous and that *Allen* would only apply when "the pool taking the challenged test is reasonably homogeneous in terms of qualifications and the racial disparity in results is very large." Dkt. 309 at 21 (quoting *Allen v. Seidman*, 881 F.2d 375, 380 (7th Cir. 1989)). But the *Allen* court found that controlling for more variables was unnecessary because the test was unlikely to distinguish class members' qualifications, as their qualifications were homogenous. Similarly here, the turnaround selection process treated teachers and PSRPs as homogenous in that it did not, and could not have, distinguished between qualified and nonqualified teachers because the turnarounds affected all teachers and PSRPs at the selected schools regardless of their teaching ability or performance.

See supra; JSOF ¶ 116. Plaintiffs did not need to control for more variables for their statistics to be probative of the hugely significant statistical disparities in turnaround-related layoffs that adversely affected African American teachers and PSRPs.

A pattern or practice means that "racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. Indeed, the Board used the same three-step winnowing process in each year of turnarounds. Dkt. 305 at 3; JSOF ¶¶ 21, 25. Year after year, the Board selected turnaround schools that had more African American staff. JSOF ¶¶ 42, 85, 86, 96, 99. The Board's pattern of discriminatory conduct over years of turnarounds cannot be rebutted and the Board's attempts to do so should be rejected.

B. Plaintiffs provided anecdotal evidence of a pattern or practice through similarly-situated majority white schools that were not turned around, the Board's pattern of investment decisions, and its knowledge of the disparity.

As anecdotal evidence of a pattern or practice of discrimination, Plaintiffs provided examples of similarly-situated majority white schools the Board did not selected for turnaround, giving rise to an inference of unlawful discrimination. Dkt. 305 at 30-32. In its response, the Board pointed out that Piccolo and Casals (selected for turnaround in 2012) did not have majority African American CTU members. Dkt. 309 at 23; JSOF ¶ 42. This is true, but Piccolo had a higher percentage of African American CTU members than white. And regardless, selection of one or two schools with somewhat fewer African Americans does not negate the overwhelming pattern of selecting schools with predominately African American students and CTU members for turnaround over a period of at least eight years.

In addition, the Board responded to Plaintiffs' anecdotal evidence by noting that a few schools had greater percentages of African American employees than turned-around schools but were not selected for Turnaround. Dkt. 309 at 24-25. Again, this point is not significant and does

not negate Plaintiffs' evidence. Absence of discriminatory conduct towards some of the Board's African American employees does not excuse its discrimination towards others. In any case, anecdotal evidence is useful, but not even always required for plaintiffs in pattern-or-practice cases. *EEOC v. Sears, Roebuck, & Co.*, 839 F.2d 302, 311 (7th Cir. 1988).

In its Response, the Board also came up with spurious reasons for why Plaintiffs' comparator schools are not apt comparisons—they were on probation for fewer years, they did not suffer the same degree of academic failure, and elementary schools were compared to high schools. Dkt. 309 at 24. Again, the Board's *post hoc* critiques do not carry much, if any, weight. All schools on probation for at least one year were eligible for turnaround and the Board used performance points as the primary way of evaluating whether a school was succeeding academically. Indeed, the Board itself explained that "the leading factor" used to recommend schools for turnaround "was standardized test scores," a major component of performance points. *See* JSOF ¶ 25. Plaintiffs' use of those metrics to compare schools, therefore, is fair by the Board's own admission.

The Board also claims that African American and Caucasian CTU members were rehired somewhere at the Board after turnarounds at the same rate, and that fact, if true, would negate the fact that school staffs became "whiter" after turnarounds. Dkt. 309 at 25-26; JSOF ¶ 140. It does not. More African American teachers were selected for layoffs in the first place, so even if they were rehired at the same rate, a greater proportion of African American teachers remained laid-off. *See also* JSOF ¶ 83 (percentage of all CPS teachers who were African American fell from 33% in 2006 to 21% in 2017). In addition, contrary to the Board's conclusory argument that the fact that more investments were made in majority-white schools "has no probative value as anecdotal evidence" (Dkt. 309 at 26-27), the Board's discriminatory investment decisions are

further evidence of preferential treatment towards white employees over African Americans. By investing disproportionately in majority-white schools without subjecting them to layoffs, the Board gave those students and staff a better chance at academic success without adverse employment actions, and in addition, those teachers and PSRPs a better chance at teaching at schools that would not be turned around. The Board's disproportionate investment decisions are further evidence of its pattern or practice of discriminatory decision-making.

The Board's knowledge of the racial disparity in their turnaround selection process is also evidence of intentional discrimination. The Board was aware of the correlation between the race of students and staffs at schools, and the disproportionate impact of its turnaround policies on African American staff members. Dkt. 305 at 32. The Board claims that knowledge of a disparity is insufficient evidence of intentional discrimination. Dkt. 309 at 27. Yet the Board itself notes that "awareness of a disparity, without more, does not amount to intentional discrimination." *Id.* Plaintiffs provided "more." The Board's knowledge, in combination with the uncontested statistical evidence of years-long racial disparities and anecdotal evidence of similarly-situated majority white schools the Board treated better, is all probative evidence of a pattern or practice of discrimination. The Board has not provided convincing contrary facts or reasons why Plaintiffs' uncontested evidence of discrimination should not result in summary judgment against the Board on liability for its pattern or practice of discrimination.

C. Individual discrimination claims are not waived.

In a footnote, the Board incorrectly claims that plaintiffs have waived individual discrimination claims by failing to address them. Dkt. 309 at 19 n. 4. Once again, the Board misunderstands the nature of a pattern-or-practice suit. In the liability phase of a pattern-or-practice case, plaintiffs "establish a prima facie case that such a policy existed." *Teamsters*, 431

U.S. at 360. "Then, in the 'remedial' phase, victims may obtain individualized damages; the prima facie showing establishes a presumption of illegal discrimination, but the employer can 'demonstrate that [an] individual . . . was denied an employment opportunity for lawful reasons.'" Dkt. 310 at 22 (quoting *Teamsters*, 431 U.S. at 362). Here, Plaintiffs have asked for summary judgment on liability for the Board under a pattern-or-practice theory of discrimination. This would establish a presumption that the Board discriminated against the individual named plaintiffs and other teachers and PSRPs affected by the pattern or practice, which the Board will have the opportunity to rebut for purposes of damages at future proceedings. *See Dukes*, 564 U.S. at 366-67 (explaining that proceedings for individual relief are often necessary after a plaintiff establishes a pattern or practice of discrimination). Establishing a pattern or practice of discrimination is the very theory on which the claims of individual intentional discrimination are predicated. Arguing for summary judgment on employer liability cannot waive those claims.

III. The Board's Remaining Arguments Should Be Rejected by The Court

The Board's remaining non-substantive arguments against summary judgment must also be rejected as follows. *See also* Dkt. 310 at 26-30.

A. Plaintiffs have appropriately exhausted administrative remedies for the 2014 turnarounds.

The Board erroneously argues that Plaintiffs should not be granted summary judgment with respect to the 2014 turnarounds because Plaintiffs did not file a discrimination charge with the EEOC for the 2014 turnarounds. The Board's position overlooks the fact that all claims that "could reasonably be expected to grow from the original complaint" fall within the scope of an EEOC charge. *Ajayi v. Aramark Bus. Servs., Inc.*, 336 F.3d 520, 527 (7th Cir. 2003). To meet this standard, there must be a factual relationship between claims, "mean[ing] that the EEOC

charge and the complaint must, at minimum, describe the same conduct and implicate the *same individuals*." *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 689 (7th Cir. 2001).

The relationship between the 2014 and 2013 turnarounds easily meets the standard articulated in *Haugerud* and *Ajayi*. The 2014 turnaround claim is based on the same theory of discrimination, the same conduct, and involves the same parties as the 2013 claim. Plaintiffs have established the Board's identical conduct and method to select schools for turnaround in all of the turnarounds, including 2014. *See* Dkt. 305 at 3. In each year there were turnarounds, this conduct had a disparate impact on African American employees and was pursuant to a pattern or practice of discrimination—the same theory of discrimination as the 2013 turnarounds. Finally, each turnaround was planned and carried out by the same parties, the Board through its high-level executives. *See* JSOF ¶¶ 33–34, 53.

In addition, the EEOC charge filed after the 2013 Turnarounds indicated that the violation was ongoing and therefore included the 2014 turnarounds as well. Accordingly, the 2014 turnarounds are properly exhausted as part of a "continuing violation." *Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 395–96 (7th Cir. 1999). In the alternative, if the Court does not find that the 2014 Turnarounds were exhausted, the Turnarounds in 2014 would still be admissible as additional evidence of the Board's pattern or practice of discrimination.

B. Plaintiffs have shown that the Board's turnaround policy is a discriminatory pattern-or-practice under § 1981.

The Board incorrectly claims that the Plaintiffs waived their § 1981 claim by not developing it in their motion for Summary Judgment. First, establishing a discriminatory pattern-or-practice under Title VII will also satisfy the standard for recovery in a § 1981 claim. *See Naficy v. Ill. Dep't of Human Servs.*, 697 F.3d 504, n.3 (7th Cir. 2012) (a plaintiff can succeed in a § 1981 suit by "show[ing] a pattern or practice of discrimination by" defendant government agency).

"Although there are some differences between the two statutes, ... 'the methods of proof and elements of a § 1981 case are essentially identical to those in a Title VII case.'" *Porter v. Pipefitters Ass'n Local Union 597,* 2018 U.S. Dist. LEXIS 124637 (N.D. Ill. Jul. 25, 2018), at *20. By establishing an argument in favor of summary judgment on the Board's pattern-or-practice of intentional discrimination, Plaintiffs have also established an argument for their § 1981 claim, as argued in their Motion for Summary Judgment. Dkt. 305 at 25.

Relatedly, Plaintiffs have not waived their § 1983 claim as the Board claims. Section 1983 is not a stand-alone claim, but rather the vehicle through which Plaintiffs bring their § 1981 claim against the Board as a governmental entity. *Campbell v. Forest Pres. Dist. of Cook Cty., Ill.*, 752 F.3d 665, 671 (7th Cir. 2014). Plaintiffs can establish a § 1981 claim (enforced under § 1983) against a government body under the same framework as Title VII and/or by showing that the "body's official policy or custom was discriminatory." *Smith v. Chi. Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1148 (7th Cir. 1999). The undisputed facts show that the Board's official policy and custom (i.e. pattern or practice) of selecting schools for turnaround was discriminatory. *See supra.* The Board also admits that selection of schools for Turnarounds were executed pursuant to official Board policy and that decisions regarding the Turnarounds were made by high-level executives with authority to set Board policy. *See* JSOF ¶¶ 17, 22, 24–34, 53, 64. Accordingly, Plaintiffs satisfy the standard under *Smith* to bring a § 1981 claim, via § 1983, against the Board. *Monell v. New York Dept. of Social Servs.*, 436 U.S. 658, 690 (1978) (describing the standard for liability under § 1983 as when the government body "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"); *see also* Dkt. 310 at 32. Therefore, Plaintiffs are entitled to summary judgment on their § 1981 claim as enforced through § 1983.

CONCLUSION

Plaintiffs have established all required elements of their disparate impact claim. They have shown that the Board's selection criteria for its Turnaround policy caused Plaintiffs to suffer a statistically significant adverse impact in 2012, 2013, and 2014. Next, they have demonstrated that the Board failed to meet its burden to prove that the turnaround selection criteria were job related and consistent with business necessity. Those elements alone render Plaintiffs successful on their disparate impact claims.

Plaintiffs are also entitled to summary judgment on their pattern-or-practice claims because they have combined convincing statistical evidence of a discriminatory pattern ranging from at least 2008-2014 with anecdotal evidence showing similarly situated white schools not selected for turnaround, the Board's pattern of investment decisions favoring majority white schools, and the Board's knowledge of the racial disparity in its workforce.

WHEREFORE, for all of the reasons set forth herein, this Court should grant Plaintiffs' Motion for Summary Judgment and/or deny the Board's Motion for Summary Judgment.

Respectfully submitted,

/s/ Patrick Cowlin
Counsel for the Plaintiffs

Robin Potter, Esq.
Patrick Cowlin, Esq.
Potter Bolanos LLC
111 East Wacker Drive, Suite 2600
Chicago, Illinois 60601
(312) 861-1800
robin@potterlaw.org
patrick@potterlaw.org

Randall D. Schmidt, Esq.
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 S. University Ave.
Chicago, IL 60637
(773) 702-9611
r-schmidt@uchicago.edu

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I electronically filed the foregoing **PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system. All counsel of record for Defendants are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Patrick Cowlin
Patrick Cowlin