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

CHICAGO TEACHERS UNION, LOCAL 1, et al. Plaintiff, 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' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Table of Contents

Table of Authorities

Cases

Statutes

Rules

INTRODUCTION

Plaintiffs, on behalf of themselves and a class of all similarly situated persons, are entitled to summary judgment on their disparate impact and disparate treatment claims under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. § 1981. Their claims arise from the Chicago Board of Education's ("CBOE" or the "Board") discriminatory Turnaround Policy, which is still in effect, and its decision to turn around ten schools in 2012, five schools in 2013, and three schools in 2014. The Board also utilized the same policy to turn around 34 other schools prior to 2012, including sixteen schools between 2006 and 2010. JSOF ¶ 85. The Board's selection of schools for turnaround disparately impacted African American teachers and staff because two of its key selection criteria – performance points and schools on probation – were discriminatory. The Board also engaged in a "pattern or practice" of discrimination by intentionally selecting schools with majority African American staff for turnaround even though turnarounds did not improve students' academic performance. In addition, there were numerous schools with majority white students and employees with comparable academic achievement metrics and that were eligible for turnaround, but were not selected.

The Board's 2012, 2013 and 2014 Turnarounds and its turnaround policy imposed statistically significant adverse impacts on African American teachers and staff and the Board has failed to establish that the turnarounds were job related. Additionally, the Board was aware of the racial segregation in Chicago Public Schools ("CPS") and the disproportionate impact of turnarounds on African American teachers and staff. Nevertheless, the Board singled out schools with a majority population of African American staff and students for turnaround despite the presence of comparable turnaround-eligible schools that were majority Caucasian.

The Board has ignored the definition of the certified class and the employees the CTU represents as an associational plaintiff—all African American teachers and Paraprofessional and School-Related Personnel ("PSRPs") affected by the 2012, 2013 and 2014 turnarounds—and the central issues in the case by arguing that some teachers were able to find new positions after they were terminated due to turnarounds. The Board's position ignores the harm and uncertainty caused by the Board's turnaround policy and related displacement, and is not supported by controlling precedent on adverse employment actions in the layoff context. Additionally, the Board attempts to rebut Plaintiffs' statistical evidence of disparate impact via an alternative statistical analysis that controls for both race and academic performance metrics. The Board's alternative analysis is both legally superfluous and statistically erroneous. Plaintiffs need not control for academic performance to demonstrate disparate impact caused by the Board's facially discriminatory selection criteria. Moreover, academic performance is an inappropriate explanatory variable for determining disparate impact because it is the Board's stated facially neutral selector for Turnarounds and is itself highly correlated with race.

Because the uncontested facts favor Plaintiffs as a matter of law, this Court should grant Plaintiffs' Motion for Summary Judgment on their disparate impact and "pattern-or-practice" disparate treatment claims and deny the Board's Motion for Summary Judgment.

STATEMENT OF FACTS

Discrimination in the Turnaround Process

"Turnaround" (also known as a "reconstitution") is the term the Board used to describe the removal and replacement of all administrators, faculty, and staff from a selected school. Parties' Joint 56.1 Statement of Material Facts. Dkt. 297 ("JSOF") ¶ 17. The Illinois School Code authorizes, but does not require or mandate, a turnaround for schools that have been on probation

for at least one year and have failed to make adequate progress in correcting deficiencies, as defined by the Board. JSOF ¶ 17. The Code adequately provides for many other options. Plaintiffs' expert Dr. Trujillo also detailed other equally effective and less discriminatory options to avoid turnarounds. JSOF ¶¶ 8, 126. Plaintiffs had no decision-making power over whether schools were turned around or not, or which teachers or PSRPs were terminated or rehired. JSOF ¶ 18. These decisions were made solely by the Board. JSOF ¶ 18. Board employees displaced from their positions in connection with a Turnaround, including Plaintiffs, had to apply for open positions if they wished to continue working for the Board after a Turnaround: such employees were not guaranteed a job, even if vacancies existed for which they were qualified and could have easily filled. JSOF ¶ 19.

From 2008 to 2014, the Board generally used a three-step process to select schools for turnaround. JSOF ¶¶ 21, 25; *see* JSOF ¶ 52, 55, 57, 62-63. In total, the Board turned around 32 schools during that period. JSOF ¶¶ 42-43, 60, 65, 85 First, the Board identified all schools that had been on probation for least one year and were therefore eligible for turnaround under the School Code. JSOF ¶¶ 25, 52. Second, the Board winnowed that group down to a consideration set by removing schools that outperformed certain academic performance metrics set by the Board, such as Illinois Interscholastic Achievement Test ("ISAT") scores and graduation rates. JSOF ¶¶ 25, 37. Finally, the Board determined which schools to ultimately recommend for turnaround. JSOF ¶ 25; *see also* JSOF ¶¶ 35-36, 38, 55, 57, 62-63.

In the final step, the leading factor the Board used to decide which schools to turn around was standardized test scores, but it also used other factors. JSOF ¶ 25. While some factors considered in a school's candidacy for turnaround were subjective, others, like the Board's use of performance points, were entirely quantitative. JSOF ¶ 27. *See also* JSOF ¶¶ 46–47 (showing the

use of subjective criteria in the 2012 turnaround process). Performance points were an alleged facially neutral factor used by the Board from 2006 to 2013 to determine which schools to select for turnaround. Performance points were calculated pursuant to the Board's Academic Performance Policy by considering, among other factors, standardized test scores and school attendance rates. JSOF ¶ 27. For elementary schools, the performance point calculation also included academic progress and improvement over time in comparison with other schools in the same geographic network; and for high schools, it also included the dropout rate and success in advanced placement programs. JSOF ¶¶ 26–27. In 2013, the Board replaced the performance points metric with the School Quality Rating Policy ("SQRP"). JSOF ¶ 69. The SQRP rating also included standardized test scores and was similar to performance points. JSOF ¶ 69. The Plaintiffs' expert, Dr. Bruce Baker, found that the Board's use of performance points to select teachers and PSRPs for removal was not job related because the metrics included in the Board's performance points calculation do not reflect teachers' effectiveness, but rather the students' race and socioeconomic status. JSOF ¶ 111.

Negative Effects on African American Teachers and PSRPs

The data shows that the Board's selection of schools for Turnaround generated an adverse impact on the African American Plaintiffs and the class between 2008 and 2014. In 2008, 2009 and 2010, African American teachers and PSRPs were significantly more likely to have been employed in a school selected for turnaround and these disparities were statistically significant. JSOF ¶¶ 85–86. Similarly, when analyzing the 2012 Turnarounds, African American employees were, to a statistically significant degree, more likely to be employed by a school selected for turnaround. JSOF ¶¶ 91, 95–96. This pattern of disparate effect on African Americans continued into the 2013 and 2014 Turnaround selections. Because CPS schools are segregated by race,

there was a large and statistically significant disparity between the African American employment percentage at schools selected for turnaround in 2013 and 2014 versus systemwide. JSOF ¶¶ 81, 99–101, 104. Schools selected for turnaround had African American employment rates of 72% in 2013 and 2014, compared to systemwide African American employment rates of 27% and 26%. JSOF ¶¶ 99–101, 104.

The difference between the rate at which the Board removed African American teachers and PSRPs through Turnarounds versus the affected Caucasian teachers and PSRPs, as well as the likelihood of an individual school being selected for the 2013 and 2014 Turnarounds, indicated a statistically significant impact on African Americans. JSOF ¶¶ 99–101, 104, 105, 107. The Board and its expert, Dr. Blanchflower, do not dispute that the initial selection criteria for potential turnaround schools (having been on probation for at least one year) had a disparate impact on African American teachers as analyzed for the 2008-2010 and 2012-2014 Turnarounds. JSOF ¶¶ 89–90, 92–93. The Seventh Circuit has confirmed that even one discriminatory step in a multi-step process can taint the entire process. *Chi. Teachers Union* v. *Bd. of Educ. of the City of Chi.*, 797 F.3d 426, 435 (7th Cir. 2015) (citing *Connecticut v. Teal*, 457 U.S. 440 (1982)). Additionally, the Board and Dr. Blanchflower do not dispute that African American teachers were disproportionately impacted by *every single cut* in the selection process for the 2012 Turnarounds, to a statistically significant degree. JSOF ¶¶ 92, 96.

The turnarounds' adverse impact on African Americans is at least partially explained by the relationship between a school's percentage of African American teachers and staff and the school's academic performance metrics. In the time period between 2008 and 2014, there were statistically significant correlations between schools' percentages and absolute number of

African American employees, and performance on various academic performance metrics used by the Board.

For example, in 2008, 2009 and 2010, there were statistically significant correlations between a school's percentage and absolute number of African American employees, and academic performance metrics such as years of probation, standardized test scores, and performance points (for 2009 and 2010). JSOF ¶¶ 89–90. Regarding the 2012 Turnarounds, there was a positive, statistically significant correlation between African American workforce representation and the likelihood of a school being on probation. JSOF ¶ 93. There was also a negative, statistically significant correlation between African American workforce representation and schools' performance points. JSOF ¶ 98. Similarly, there was a positive, statistically significant correlation between Caucasian workforce representation and schools' percentage of possible performance points in the same time period. JSOF ¶ 98. Moreover, when analyzing the 2013 and 2014 Turnarounds, the Plaintiffs' expert Dr. Jonathan Walker again found a statistically significant correlation between the percent of African Americans employed in a school and the Board's academic performance metrics. JSOF ¶ 109. Finally, after the turnarounds were conducted from 2009-2010 and 2012-2014, there were more Caucasian and less African American teachers and PSRPs than before the turnaround. JSOF ¶ 140. The same reduction in African-American teachers and PSRPs also occured in nine out of eleven turnaround schools AUSL managed post-turnaround from 2007-2011. *Id.* AUSL (Academy for Urban School Leadership) is an outside (private) management company with whom the Board entered into management contracts for turnaround schools. JSOF ¶¶ 56, 67. Each AUSL management contract is valued at $300,000 per year, in addition to a $420 fee per pupil per year. JSOF ¶¶ 56, 67.

The relationship between the race of the teachers and staff at a school and the school's academic achievement is explained by race and the broader systemwide demographics and segregation. *See* JSOF ¶ 81. From at least 2009 to 2015, the race of the students at a CPS school was highly correlated to the race of the teachers and staff at the same school, and the Board was generally aware of this fact. JSOF ¶ 130. In addition to being correlated with the racial demographics of teachers and staff at the school, the percentage of African American students at a school was also correlated with lower performance metrics evaluated in turnaround consideration, such as ISAT scores, performance points attained, and probation status. JSOF ¶¶ 130–32; *see also* JSOF ¶¶ 122–23 (the relationship between student race and academic performance metrics is related to student poverty).

It is not disputed that the Board's use of performance points did not consider individual teachers and PSRPs' ability to perform their jobs, just the alleged "effectiveness" of the overall school. JSOF ¶¶ 115–16. It is undisputed that individual teachers and PSRPs were displaced from their positions regardless of their ratings, years of service, and the performance of students in their specific classrooms. JSOF ¶ 110. Indeed, Plaintiffs' nationally renowned expert, Dr. Baker, found that the Board's Academic Performance Policy made no attempt to isolate employees' effectiveness and that the Board's measures instead largely reflected students' race and socioeconomic status. JSOF ¶¶ 7, 111. Moreover, the ISAT standardized tests administered to CPS students were not designed to test for individual teacher or PSRP effectiveness. JSOF ¶ 113.

Finally, the evidence does not show that the Board's turnarounds were effective at improving school-level performance. Of the six schools turned around in 2012 and subsequently managed by AUSL, indicia of academic performance following the turnaround were mixed. JSOF ¶ 68.

While some of these schools did improve on academic performance measures such as performance points earned, some also performed worse following the turnaround. JSOF ¶ 68. Additionally, only two schools experienced increases in student attendance and none scored at or above the district average ISAT score the following year. JSOF ¶ 68.

In contrast, several schools with similar academic performance metrics and demographics to turned-around schools as of the 2012-2013 school year dramatically improved by 2017, without having experienced a turnaround. JSOF ¶¶ 71–72. Further, the Board does not dispute that there are numerous examples of schools serving low-income communities that were not selected for turnaround that experienced similar or greater gains in standardized test scores in the years following turnarounds, as compared to turnaround schools. JSOF ¶ 121. These results are consistent with academic literature concluding that the effectiveness of turnarounds is questionable at best: Plaintiff's expert Dr. Tina Trujillo assessed that, the empirical research and evidence does not show consistent improvements following school turnarounds or layoff-driven reforms more generally. JSOF ¶ 125. These undisputed facts prove that Plaintiffs are entitled to summary judgment as a matter of law on its adverse impact claims, as they have established the statistical harm and that the Turnarounds were not job-related.

The Board Repeatedly Selected Predominantly African American Schools for Turnaround and Not Similarly Situated Predominantly Caucasian Schools

In addition to the Board's general knowledge that student and teacher racial demographics are correlated, the undisputed evidence also shows that the Board did not select certain majority Caucasian schools for turnaround despite those schools' comparable academic performance metrics to the selected schools. In 2012, 2013 and 2014, it is undisputed that the Board selected schools with higher percentages of African Americans and did not select majority Caucasian schools for turnaround even though they had lower performance points or SQRP points.

For example, Tilden High School, located on the south side of Chicago, was improving and was **not** in the Level 3 lowest stratum. Tilden received 46.8% of all possible performance points in the 2010-2011 school year; however, there were other majority Caucasian schools in the North-Northwest High School network that earned a lower percentage of performance points than Tilden and were not selected for turnaround in that period. JSOF ¶¶ 133-34. Additionally, Chalmers and Carter were selected for turnaround in 2013 after receiving 40.5% and 38.1% of possible performance points respectively in 2012-2013. JSOF ¶¶ 137-38. (Chalmers and Carter's percentage of African American teachers and staff were 70% and 81% respectively.) JSOF ¶¶ 137–38. However, other schools with more than 40% Caucasian faculty, such as McAuliffe, Everett, Holden, Hay, Hearst, Kilmer, Pilsen and Brentano, received similar or fewer performance points than Chalmers or Carter, but were not selected for turnaround in 2013. JSOF ¶¶ 137–38. In 2014, the Board selected McNair, Dvorak and Gresham for turnaround. JSOF ¶ 139. McNair's staff was 58% African American, and the school had earned 26.2% of possible performance points. JSOF ¶ 139. In comparison, Ames, McAuliffe and Thurgood Marshall each had staff that was 40% or more Caucasian, earned between 19% and 31% of possible performance points, and were not selected for turnaround. JSOF ¶ 139; *see also* JSOF ¶ 135 (Chicago Vocation Career Academy was turned around even though there was at least one lower performing majority Caucasian school, which was not turned around).

Finally, the Board was generally aware that schools with majority African American students had majority African American staff, that there was a net reduction of African American teachers in several schools selected for turnaround in 2012, and that turnarounds (among other Board actions) disproportionately affected African American employees. JSOF ¶¶ 130, 140–142. Plaintiffs have presented statistical evidence of disparate impact along with anecdotal evidence

of an intent to treat African Americans less favorably: Plaintiffs are thus entitled to summary judgment on their "pattern-or-practice" claim for intentional discrimination.

ARGUMENT

I. Legal Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, the court must construe all facts and draw all reasonable inferences in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A genuine issue of material fact arises when a reasonable jury could find, based on the evidence of record, in favor of the non-movant. *Id.* at 248. When ruling on a motion for summary judgment, the court considers the "record as a whole." *Morgan v. Harris Trust & Sav. Bank of Chicago*, 867 F.2d 1023, 1026 (7th Cir. 1989).

"The ordinary standards for summary judgment remain unchanged on cross-motions for summary judgment . . . ." *Blow v. Bijora, Inc.*, 855 F.3d 793, 797 (7th Cir. 2017) (citing *Calumet River Fleeting, Inc. v. Int'l Union of Operating Eng'rs, Local 150*, 824 F.3d 645, 647–48 (7th Cir. 2016)). The court must separately apply the procedural requirements of Rule 56 to each cross motion for summary judgment. *See id.*; *Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund*, 778 F.3d 593, 603 (7th Cir. 2015). Each movant and non-movant "must individually satisfy the requirements of Rule 56." *United Transp. Union v. Ill. Cent. R.R. Co.*, 998 F. Supp. 874, 880 (N.D. Ill. 1998) (citing *Proviso Ass'n of Retarded Citizens v. Vill. of Westchester*, 914 F. Supp. 1555, 1560 (N.D. Ill. 1996); *Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Kelly*, No. 95 C 501, 1996 U.S. Dist. LEXIS 12901, 1996 WL 507258, *3 (N.D. Ill. Sept. 4, 1996)).

Regarding the material factual contentions, the court adopts "a dual, 'Janus-like' perspective" on cross motions aimed at the same claim or defense." *Hotel 71*, 778 F.3d at 603 (citing *Shiner v. Turnoy*, 29 F. Supp. 3d 1156, 1160 (N.D. Ill. 2014)). On one motion, the court views the facts and inferences in the light most favorable to the non-movant. *Id*. However, if summary judgment is not warranted, the court changes tack on the cross motion and gives the unsuccessful movant "all of the favorable factual inferences that it has just given to the movant's opponent." *Id*. (citing *R.J. Corman Derailment Servs., LLC v. Int'l Union of Operating Engrs., Local Union 150*, 335 F.3d 643, 647–48 (7th Cir. 2003)). Which party has the burden of proof at trial determines which party must "go beyond the pleadings and affirmatively . . . establish a genuine issue of material fact." *Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

II. Plaintiffs are Entitled to Summary Judgment on Their Disparate Impact Claims

Plaintiffs request that summary judgment be granted in their favor on their disparate impact claims, which consist of three distinct issues, all of which favor Plaintiffs as a matter of law. First, Plaintiffs have identified specific employment practices that adversely impacted African American teachers and PSRPs. Second, Plaintiffs have suffered an adverse employment action—layoffs due to the turnarounds. Third, it is undisputed that the Board's use of performance-point scores to evaluate schools for turnaround and choose which employees to lay off does not satisfy the Board's burden of showing its criteria were consistent with business necessity and were job-related.

"Title VII prohibits employment practices that have a disproportionately adverse impact on employees with protected characteristics, even if the impact is unintended." *Ernst v. City of Chicago*, 837 F.3d 788, 794 (7th Cir. 2016) (citing *Ricci v. DeStefano*, 557 U.S. 557, 577

(2009)). Once a plaintiff has "ma[de] out a prima facie case" of disparate impact stemming from a challenged employment policy, the defendant "must then demonstrate that its method is job-related and consistent with business necessity." *Price v. City of Chicago*, 251 F.3d 656, 659 (7th Cir. 2001).

In order to establish their prima facie case, plaintiffs must (1) "isolat[e] and identify[ ] the specific employment[ ] practices that are allegedly responsible for any observed statistical disparities" and (2) "establish causation by offer[ing] statistical evidence of a kind and degree sufficient to show that the practice in question has caused" them to be harmed "because of their membership in a protected group." *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)). *See also Porter v. Pipefitters Ass'n Local Union 597*, No. 12 C 9844, 2018 WL 3574757, at *1 (N.D. Ill. July 25, 2018). Plaintiffs have satisfied these requirements.

Once plaintiffs have "show[n] that a particular employment practice causes a disparate impact on the basis of race[,] . . . the defendant must demonstrate that the practice is 'job related' **and** 'consistent with business necessity.'" *Allen v. City of Chicago*, 351 F.3d 306, 311 (7th Cir. 2003) (emphasis added); *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("[I]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited"); 42 U.S.C. § 2000e-2(k)(1)(A)(i) (To establish a disparate impact claim "a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."). If an employer meets the burden of proving that its challenged employment practice is "job related and consistent with

business necessity," the complaining party may show "the existence of a substantially equally valid, less discriminatory alternative employment practice" that "the defendant refuses to adopt." *Allen*, 351 F.3d, at 311–12.

Because Plaintiffs have shown the turnarounds adversely impacted the certified 2012 class and all other affected African American teachers and PSRPs and the Board has not met its burden to show that the turnarounds were job related and consistent with business necessity, Plaintiffs are entitled to summary judgment on their disparate impact claims.

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

It is undisputed that the named Plaintiffs and class members in this case are African American, and therefore members of a protected group. Dkt. 173; JSOF ¶¶ 3–5. Two specific features of the Board's turnaround policy and its system for selecting schools for turnaround appear to be facially neutral policies but generate a disparate impact on African American teachers and PSRPs. Those two features are (1) the use of probation, as defined by the Board, as the first phase for selecting schools to be considered for potential turnaround and (2) the use of performance points to further narrow the schools selected for consideration for turnaround. *See* JSOF ¶¶ 17, 25–28, 40–44, 52–56, 60–65.

Demonstrating causation does not require that a plaintiff satisfy "any rigid mathematical formula," but rather only "that statistical disparities must be sufficiently substantial that they raise such an inference of causation." *Watson*, 487 U.S. at 997. *See also Council 31, Am. Fed'n of State v. Ward*, 978 F.2d 373,379 (7th Cir. 1992) ("[N]o particular mathematical formula can be adopted for disparate impact claims. Cases must be evaluated on their own terms"). Plaintiffs are only responsible for "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Id* at 994. Moreover, "disparate-

impact plaintiffs are permitted to rely on a variety of statistical methods and comparisons to support their claims." *Adams v. City of Indianapolis*, 742 F.3d 720 (7th Cir. 2014); *see* JSOF 84 (describing statistical significance and that "the Uniform Guidelines on Employee Selection Procedures, Part 1607.4(D) of the U.S. Code of Federal Regulations state that a selection rate for one group that is less than 80% of the selection rate for the highest group shall generally be regarded as evidence of adverse impact.").

Furthermore, a plaintiff need only demonstrate that a single step of an employment process has a discriminatory impact, as such discrimination taints the entire process. Under *Connecticut v. Teal*, 457 U.S. 440 (1982), a "nondiscriminatory 'bottom line' is no answer, under the terms of Title VII," to a "prima facie claim of employment discrimination." *Id*. at 456. In *Teal*, the plaintiffs challenged their employer's multi-step promotion process, in which the first step required applicants to obtain a passing score on a written exam. *Id*. at 443. Significantly fewer African American employees passed that exam than white employees. *Id*. at 443–44. But favorable outcomes for African Americans at later stages of the process ensured that a high percentage of African American employees—a higher percentage than white employees—ultimately received promotions. *Id*. at 443. However, the apparently nondiscriminatory outcome could not undo the illegal discrimination embedded into an earlier stage of the promotion process. *Id*.

When it granted class certification in this case, the Seventh Circuit already made clear that *Teal* "is directly on point." *Chi. Teachers Union Local 1 v. Bd. Of Educ. of Chi.*, 797 F.3d 426, 435 (7th Cir. 2015). Where, as here, an employer discriminatorily selects workplaces for layoffs, it is no defense to suggest that later stages of the layoff decision process alter the "bottom-line result," as *Teal* "instructs that an early discriminatory process can taint the entire process." *Id*. at

435–36. So if "criteria [used] in the first [ ] steps narrowed the pool in such a way as to have a disparate impact on African-American teachers," the impact of any "later [ ] step" is immaterial to Plaintiffs' claims. *Id*.

Plaintiffs' evidence demonstrates all of the above, at a minimum. There is no dispute that the first step of the Turnaround selection process in 2012-2014, in which schools are selected based on probationary status, had a statistically significant adverse impact on African American employees. JSOF ¶¶ 91-96, 98-107, 109. The Board's reliance on performance points is also obviously discriminatory because the race of teachers was highly correlated to performance points used to select schools for turnaround in 2012, 2013, and 2014. JSOF ¶¶ 98, 109 (selecting schools for Turnaround based on performance points could be used as a method to select schools based on race in 2012 and 2013 to 2014). In fact, the Board's expert Dr. Blanchflower "accept[s] the claim that there is a statistically significant correlation in the raw data between the probability of a school being turned around and the proportion of CTU members that are African-American." *See* JSOF Exhibit N (Rebuttal Report of Defendant's Expert Dr. Blanchflower, dated October 9, 2017, pg. 8; s*ee also* JSOF ¶¶ 91-92, 94, 102.

Moreover, the Board's racial discrimination is not limited to the first step of the selection process for turnarounds or to its reliance on performance points. Evidence provided by the Board's own expert shows a significant adverse impact on African Americans at every cut of the turnaround process in 2012. In the 2011-2012 school year, 35.4% of employees were African American. JSOF ¶ 91-92; s*ee also*, JSOF Exhibit M (May 20, 2015 Blanchflower Report); JSOF Exhibit Ex. IIII, CTU Interrogatory Ans., #5. Yet, "the percentage of African American employees was 51% across the first 'cut' or selection of eligible schools, 53.3% across the second 'cut' of eligible schools, and finally 60.2% across the schools selected for turnaround."

Id. Both Dr. Blanchflower's and Dr. Walker's reports found that "when race was the only control variable and schools' academic performance was not included as a control variable in the analysis, race also had a statistically significant effect on the probability of being impacted by a Turnaround when analyzing *each of the cuts* and when comparing African American to Caucasian employees." JSOF ¶ 96 (emphasis added). Even though *Teal* requires only one discriminatory step to taint the entire process, each cut of the Board's turnaround selection process had a disparate impact upon African Americans.

Despite Plaintiffs' evidence that the Board's turnaround policy has a disparate impact on African Americans, the Board may suggest that various other stages of its turnaround selection process may have been non-discriminatory, such an argument does nothing to undermine or rebut Plaintiffs' prima facie case. Indeed, the Board offers even *less* than the prototypical *Teal* defense, as it does not claim that favorable treatment at some later stage balanced out an earlier discriminatory effect. To the extent the Board managed to avoid an adverse impact at a single stage in its decision-making process in some years of Turnarounds, that would not absolve it of its illegal discrimination elsewhere.

Teal forecloses precisely this type of "bottom-line" defense, and the Seventh Circuit has already discredited it in this very case. *See Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chi.*, 797 F.3d 426, 436 (7th Cir. 2015). Of course, the Board has offered no evidence that its "bottom line" result is non-discriminatory. Nor could it, precisely because of its discriminatory process for selecting schools for turnarounds and, correspondingly, employee displacement.

B. Displaced teachers suffered an adverse employment action because of the turnarounds.

Additionally, there is no material dispute that teachers who were discriminatorily displaced following the Board's turnaround procedures were subjected to an adverse employment action under Title VII. This Court has already found that "class members suffered an adverse action when they received termination notices, and the Board's assessment that only thirty-one class members suffered an adverse action is erroneous." Dkt. 289, p. 18 (Order regarding the parties' *Daubert* motions).

"An adverse employment action is 'a materially adverse change in the terms and conditions of employment [that is] more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Stockett v. Muncie Indiana Transit Sys.*, 221 F.3d 997, 1001 (7th Cir. 2000) (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)); *see also Burlington Northern & Santa Fe Railway Co. v. Wright*, 548 U.S. 53 (2006) (holding that retaliatory discharge was an adverse action actionable on its own under Title VII, even though the plaintiff had received back pay and reinstatement). "A layoff is generally accepted to be an adverse employment action." *Curry v. City of Chicago*, No. 10-CV-7153, 2013 WL 884454, at *4 (N.D. Ill. Mar. 8, 2013). The only potential disputed issue in this case, then, is whether placement in the reassigned teachers' pool or cadre pool itself constitutes an adverse employment action before such a layoff takes final effect. It does.

Under *Delaware State College v. Ricks*, 449 U.S. 250 (1980), in employment discrimination cases, "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts become most painful." *Id*. at 258 (emphasis in original). In *Ricks*, a professor challenged as discriminatory his employer college's decision to deny him tenure. Though that denial did not, considered alone, effect any change in the plaintiff's employment, it

ultimately resulted in his termination from employment. *Id*. at 257–58. As a result, the Court concluded, in determining the starting point for the statute of limitations, that the "alleged discrimination occurred . . . at the time the tenure decision was made and communicated[,] . . . even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id*. at 258. In so holding, the Court specifically rejected the court of appeals' basis for reaching the opposite conclusion—that it "believed that the initial decision to terminate an employee sometimes might be reversed." *Id*. at 255.

Furthermore, the Seventh Circuit has made clear that the statute of limitations on a discrimination claim begins running upon teachers' receipt of notice that they will lose their jobs. This is true even where the employer school district has a practice of rehiring many teachers who receive such notice. Those were precisely the facts before the court in *Kuemmerlein v. Bd. of Educ. of Madison Metropolitan School District*, 894 F.2d 257 (7th Cir. 1990). There, the court observed that "[p]recedent [ ] instructs us to focus on the discriminatory act, not the point at which the consequences of the act become painful." *Id*. at 260. And the teachers' "actual termination only made painful the consequences of . . . the layoff decision itself." *Id*.

The court considered and rejected the argument that teachers were "not yet irrevocably terminated" when they received layoff notices, despite the district's "practice of soon rehiring fifty-four percent of the teachers given layoff notices." *Id*. The court reasoned that such an argument "would undermine the needed certainty behind the statute of limitations." *Id*. Indeed, "[n]o matter what the chance of recall, a plaintiff's cause of action for employment discrimination stemming from a layoff decision runs from the time of notice, not from the time of actual termination." *Id*. This Circuit recently reaffirmed *Kuemmerlein* in *Draper v. Martin*, 664 F.3d 1110 (7th Cir. 2011), making clear that the *initial decision* to lay off an employee is an

adverse action in its own right: "In discriminatory discharge cases, the plaintiffs' injury coincides with the decision to layoff the plaintiffs, not the actual termination date." *Id*. at 1113 (citing *Kuemmerlein*, 894 F.2d at 259).

If the statute of limitations begins to run when plaintiffs receives notice that they will lose their jobs, that layoff notice must also constitute an adverse employment action giving rise to a cause of action. Though the Seventh Circuit has not squarely stated as much, every court to have considered the issue has arrived at the same conclusion. *See Watson v. Eastman Kodak Co.*, 235 F.3d 851, 852–53, 856 (3d Cir. 2000) (interpreting *Ricks* as holding that "an adverse employment action occurs, and the statute of limitations therefore begins to run, at the time the employee receives notice of that action and termination is a delayed but inevitable result," and noting that a "letter cannot be deemed equivocal merely because it preserved the possibility of continued employment"); *Nance v. Maxwell Fed. Credit Union (MAX)*, 186 F.3d 1338, 1341 n. 6 (11th Cir. 1999) (affirming that "Supreme Court precedent regarding when the statute of limitations begins to run on a claim should [ ] be controlling in regard to whether an adverse employment action has occurred").

The above-noted approach of those Circuits regarding statutes of limitations comports with common sense. There is no area of law in which the statute of limitations begins running from an event which is not itself actionable. The following example highlights why: suppose an employer conducting layoffs elected to, as a general matter, ensure that no layoff took effect sooner than 180 days after issuance of the layoff notice. If notice alone is not an adverse action, employees who received a discriminatory layoff notice would not have a ripe claim until that layoff actually took effect. But by that time, their claim would be barred by the statute of limitations. So, an event that triggers the statute of limitations—like receipt of a layoff notice—

must also constitute an adverse action, or else employers could quite easily shield themselves from *all* liability for discrimination by strategically timing their layoff processes.

The Eleventh Circuit voiced exactly this concern, concluding that severing the statute-of-limitations trigger from adverse action "would leave many discrimination victims without a cause of action." *Nance*, 186 F.3d at 1341. The court illustrated the problem through example. "For instance, if an employer notifies an employee that he will be discharged in two years because of his race, the employee is without a cause of action—he cannot sue after receiving the letter, because no adverse employment action has been taken, and he cannot sue after being terminated, because the statute of limitations has run." *Id*.

Teachers displaced following the Board's turnaround decisions were subjected to an employment action analogous to the adverse actions in *Ricks* and *Kuemmerlein*. All teachers and PSRPs employed in the every turnaround school were displaced from their positions. JSOF ¶ 110. The Seventh Circuit has helpfully summarized the consequences of displacement:

> Pursuant to the collective bargaining agreement between the Chicago Teachers Union and the Board, tenured teachers affected by reconstitution are placed in a reassigned teachers' pool where they continue to receive a full salary and benefits for one school year. If a tenured teacher does not find a new position within that year, she is honorably terminated unless her time in the pool is extended. Probationary appointed teachers, other teachers, and para-professionals are not placed in the reassigned teachers' pool but are eligible for the cadre pool where they can receive substitute assignments for which they are paid per assignment. Tenured teachers who are not reassigned within a year are also eligible for the cadre pool. Teachers in the cadre pool continue to receive health benefits for one year and receive a higher rate of payment than those in the ordinary substitute pool.

Chi. Teachers Union, Local No. 1, 797 F.3d at 430 (7th Cir. 2015). *See also* JSOF ¶¶ 17–19.

Just as in *Kuemmerlein*, displacement did not mean that a teacher had no chance whatsoever of returning to her former position. In both *Kuemmerlein* and the present case, the school districts maintained a practice of rehiring some teachers who were laid off or displaced. The

Seventh Circuit has made abundantly clear that a mere possibility of a positive outcome down the line cannot alter the moment at which an adverse action occurs. And it is undisputed that employees laid off in a turnaround were "displaced from their positions . . . without any promise of another position with the Board/CPS." JSOF ¶ 17. *See also* JSOF ¶ 19 ("Board employees . . . displaced from their positions in connection with a Turnaround . . . were not guaranteed a job even if vacancies exist for which they are qualified."). And absent some proactive action, placement into the reassigned teachers' pool or cadre pool entailed the loss of a job. Per *Ricks* and *Kuemmerlein*, that initial decision to remove teachers and PSRPs from their jobs constitutes an adverse employment action.

Finally, in a very similar case involving Board layoffs, this District Court found that the receipt of a layoff notice was an adverse employment action as a matter of law. *Chi. Teachers Union, Local 1 v. Bd. of Educ. of City of Chi.*, 419 F. Supp. 3d 1038 (N.D. Ill. 2020) ("2011 Layoffs Case") (class action lawsuit brought by CTU and African American teachers against the Board of Education of the City of Chicago, alleging racial discrimination in violation of Title VII in connection with the Board's 2011 layoffs). The court specifically found that "the layoff notices plaintiffs received were adverse employment actions in their own right, even if many class members never actually experienced an interruption of pay or benefits." *Id*. at 1048. In addition, just like in this case, "[r]egardless of the fact that many class members found other positions during a short grace period, the fact remains that their positions were closed and the onus was on them to secure new ones." *Id.* The court made it clear that subsequent employment did not affect the analysis of an adverse employment action and "the fact that some class members managed to find new positions quite quickly merely mitigates their damages; it does not nullify the adverse action." *Id.*

The adverse employment action in the 2011 Layoffs Case was the same as in this matter – layoffs of predominately African American employees. At summary judgment, the court found that the Board's layoffs were an adverse employment action and that had an adverse impact on the class of African American teachers and PSRPs. The court ultimately granted the Board summary judgment, however, when it found that plaintiffs' proposed equally-effective and less discriminatory alternatives were not sufficient. Plaintiffs appealed and the case is currently pending in the Seventh Circuit (Case No. 20-1167). Regardless, the ultimate conclusion of the 2011 Layoffs Case is not applicable here. The Board's reason for the layoffs in that case were to correct for an alleged budget deficit and declining enrollment, not to attempt to improve students' academic performance, like in this case. As such, this Court's evaluation of the business necessity/job-relatedness and less-discriminatory alternatives elements of the disparate impact claim will be entirely different in this matter. In addition, the 2011 Layoffs Case did not involve a claim for a pattern or practice of discrimination like this case does.

Therefore, this Court should find that the Plaintiffs suffered an adverse employment action and have succeeded in demonstrating disparate impact stemming from the Board's facially neutral policies.

C. The Board has not met its burden to show that the process used to select schools for turnaround, and the ensuing adverse employment actions, was job-related and consistent with business necessity.

"A test is job-related if it measures traits that are significantly related" to an employee's ability to perform the job." *Gillespie v. Wisconsin*, 771 F.2d 1035, 1040 (7th Cir. 1985). The job-relatedness requirement ensures that "there is a fit between job criteria" and an employee's "actual ability to do the job." *Hendricks-Robinson v. Excel Corp*., 154 F.3d 685, 699 (7th Cir. 1998). For criteria used to make employment decisions to be valid, they must bear "a

demonstrable relationship to successful performance of the jobs for which [they were] used." *Griggs*, 401 U.S. at 431. *Cf. Melendez v. Illinois Bell Tel. Co.*, 79 F.3d 661, 669 (7th Cir. 1996) (plaintiff's disparate impact claim supported by expert testimony that there was no correlation between performance on challenged test and performance in job for which applicant is being tested). Furthermore, "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. Finally, testing or measuring procedures used to assess employee performance must "measure the person for the job and not the person in the abstract." *Id.* at 436.

In the present case, the Board cannot demonstrate that using performance points to evaluate teacher and PSRP performance is job related. First, the Board has not shown that using performance points is significantly related to teachers' abilities to perform their jobs given that data on *individual* teacher or PSRP performance was not accounted for in performance points. *See* JSOF ¶¶ 26, 27 (showing teacher performance is not related to performance points); *see also* JSOF ¶¶ 22, 24 (further admitting the Board evaluated schools as entities, not whether the teachers and PSRPs were effective). As Dr. Baker explained, the performance points used to select schools for Turnaround did not measure or take into account individual teachers' and/or PSRPs' job performance or effectiveness in any way. JSOF ¶ 116. Indeed, the Academic Performance Policy measures make no attempt to isolate employees' effectiveness. JSOF ¶ 111. The ISAT standardized test, the scores of which contributed to the performance point determination, "was not designed to test for individual teacher or PSRP effectiveness." JSOF ¶ 113. Instead, Baker found that performance points were "largely reflective of *students' race and socioeconomic status*." JSOF ¶ 111.

There are many reasons why poor student performance may not be reflective of the work of teachers. These could include, but are not limited to, students coming to school unprepared or unsupported, a school being disinvested in, a school being under threat of school closure or turnaround, and a school having programs cut. JSOF ¶ 124. The data also reflects the disconnect between teacher performance and turnaround selections: about 73% of the teachers in the 2012 Turnaround schools were rated Excellent or Superior, about 60% of the teachers in the 2013 Turnaround schools were rated Excellent or Superior, and about 76% of the teachers in the 2014 Turnaround schools were rated Excellent or Superior. JSOF ¶ 120. Regardless, the Board cannot establish a "demonstrable" relationship between a school's poor performance points score and the quality of teachers' performance because it has presented no such evidence. *Griggs*, 401 U.S. at 431.

The Board could have attempted to establish that performance points correspond to teachers' actual job performance by conducting a validity test. As in *Ernst*, a validity study can establish job relatedness. *Ernst* , 837 F.3d at 796. However, the Board has neglected to conduct any validation studies on the question. Instead, the Board adopted the use of performance points to determine which employees to lay off without regard to their performance and without any meaningful study of their relationship to job-performance or ability. Therefore, it is clear that the Board has not met its burden to show that Turnarounds were job-related.

Just as the Board has failed to show job-relatedness, it has also failed to meet its burden of showing business necessity. The Board has not shown that turnarounds led to a consistent improvement in school performance – calling into question whether the turnarounds, and the failure to consider individual teacher performance before laying off teachers and PSRPs at turnaround schools, was based on business necessity. JSOF ¶¶ 68, 70–74. Even if the Board

could illustrate some improvement in schools that were turned around, it has not presented any evidence to determine whether laying off teachers and PSRPs led to the improvement or whether it was something else, such as the increased funding given to turnaround schools relative to non-turnaround schools. JSOF ¶ 66. Indeed, there are numerous examples of non-Turnaround schools with similar geographic and demographic profiles as Turnaround schools that improved pursuant to the Board's Academic Performance Policy more than Turnaround schools over the same period of time. JSOF ¶¶ 70–74, 118, 121. Finally, according to the full range of academic research, layoff-driven school interventions, including the Board's Turnarounds, do not result in improved student academic performance. JSOF ¶ 125. In sum, because of the inconsistent record of schools post-turnaround and the Board's failure to show a connection between laying off employees at Turnaround schools with its business reason for conducting Turnarounds, the Board has not met its burden to rebut Plaintiffs' disparate impact case.

Plaintiffs have established that there was a statistically significant adverse impact on African American teachers and that the Board has failed to meet its burden to show that the turnaround policies were job-related and consistent with business necessity. Therefore, this Court should grant summary judgment on Plaintiffs' disparate impact claims.

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

To prove class-wide liability for a pattern or practice of discrimination, plaintiffs must show that "racial discrimination was the company's standard operating procedure–the regular rather than the unusual practice." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (footnote omitted); *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1109 n. 4 (11th Cir. 2001) (pattern or practice claims can be brought under both Title VII and § 1981 and the legal standard is the same for both). Plaintiffs have shown that in this case, so they prevail

unless the Board can "demonstrat[e] that the [plaintiffs'] proof is either inaccurate or insignificant." *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 308 (7th Cir. 1988) (citing *Coates v. Johnson & Johnson*, 756 F.2d 524, 532 (7th Cir. 1985)). Once the pattern or practice is established, the case proceeds to the remedial stage and the court addresses "the question of individual relief." *Teamsters,* 431 U.S. 324 at 361–62. At that stage, since liability was proven, the employer cannot "claim that there is no reason to believe that its individual employment decisions were discriminatorily based." *Id.* at 362. Therefore, the burden of proof is shifted to the employer to demonstrate that the specific "employee was not fired or demoted pursuant to the discriminatory policy." *King v. Gen. Elec. Co.*, 960 F.2d 617, 627–28 (7th Cir. 1992).

Plaintiff classes establish a pattern or practice of discrimination through strong statistical evidence that similarly situated employees outside of the protected group systematically received better treatment. *Teamsters,* 431 U.S. 324 at 337–39; *Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 307–08 (1977); *Sears, Roebuck & Co.*, 839 F.2d at 310–11. Stark statistics can be enough to infer a pattern or practice of intentional discrimination. *Teamsters*, 431 U.S. at 339; *Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1051 (7th Cir. 1991). However, plaintiff classes often bolster such statistics with anecdotal evidence of the employer's intent to treat the protected class unequally. *Id.* The statistical evidence used to establish the disparate impact claim may be the same evidence used to satisfy the pattern-or-practice claim. *Id.*

Plaintiffs' statistical evidence demonstrating stark racial disparities that disfavored African American teachers and PSRPs from at least 2008-2014 shows that the Turnaround selection process constituted a pattern or practice of discrimination against African American teachers and staff. *See* JSOF ¶¶ 86, 95–96, 100–106. The Board cannot rebut this statistical evidence: the Board's alternative statistical analyses misapprehend the adverse employment action at issue in

the case and are methodologically improper. Therefore, Plaintiffs statistical showing is enough to infer intentional discrimination in the form of a pattern-or-practice claim pursuant to *Sears, Roebuck, & Co*, 839 F.2d at 310–11.

Yet, Plaintiffs have gone further and provided anecdotal evidence of intentional discrimination by the Board. Namely, Plaintiffs have shown that schools with *lower* performance points but *higher* percentages of white teachers than selected schools were passed over by the Board for turnarounds. *See* JSOF ¶¶ 133–34, 137–39. The evidence also confirms that the Board was aware that turnarounds disproportionately affected African American teachers and PSRPs, and despite this, maintained the discriminatory policy. JSOF ¶¶ 130, 140–41.

Plaintiffs' anecdotal evidence combined with their statistical analyses confirm that similarly situated teachers and PSRPs outside of the class systematically received better treatment under the Board's turnaround policy than African American teachers and PSRPs. As such, Plaintiffs have shown that racial discrimination was the standard operating procedure of the Board and have met their burden in establishing a pattern or practice of discrimination.

A. Statistical evidence on the selection of schools for turnaround shows that Plaintiffs were systematically treated worse than their similarly situated peers and, therefore, that the Board engaged in a pattern or practice of intentional racial discrimination.

Evidence for each year of turnarounds between 2008 and 2014 cumulatively illustrates that racial discrimination was the Board's "standard operating procedure–the regular rather than the unusual practice." *Teamsters* , 431 U.S. at 336 (footnote omitted). 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 extremely unlikely that these statistical disparities occurred by chance. *See* JSOF ¶¶ 86, 95–96, 102–03, 106. No turnarounds occurred in 2011.

For example, Plaintiffs' expert Dr. Walker found that for the 2008 to 2010 Turnarounds, selection rates for Caucasian CTU members ranged from 20% to 32% of the selection rates of the African American CTU members, and that the differences in selection rates by race were "statistically significant to a virtual certainty." *See* JSOF ¶ 87. 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 Turnaround school. *Supra* at pp. 13-16; *see also* JSOF ¶ 86, 85-90. The same was true for 2012, 2013, and 2014. *Supra* at pp. 13-16; JSOF ¶¶ 91-96, 98-107, 109. Further, the disproportionate impact on African American CTU members extended beyond the first cut in the process for choosing turnaround schools. Namely, when race was the only control variable and academic performance was not included as a control variable, race had a statistically significant effect on being impacted by a Turnaround *at each of the cuts* in 2012. JSOF ¶ 96.

Plaintiffs' statistical evidence is not rebutted by the Board's alternate statistical inquiries. The Board's expert posited that there is no statistical evidence of disparate impact on African American CTU members based on two alternative and equally fatal analyses. First, the Board's expert performs an alternative analysis on only the CTU members who could not find subsequent employment following the Turnaround. JSOF ¶¶ 76–77. Second, the Board's expert uses an alternative statistical analysis controlling for both race and the school's academic performance JSOF ¶¶ 97, 108. Neither analysis rebuts the Plaintiffs' statistical evidence of a pattern or practice of discrimination.

First, the analysis of only CTU members who ultimately could not find employment following the turnaround misunderstands the adverse impact at issue in this case. As articulated above, Plaintiffs experienced an adverse impact due to the discriminatory displacement from

their positions regardless of whether they found another job with the Board. *See Delaware State College v. Ricks*, 449 U.S. 250 (1980) ("[T]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts become most painful.") (emphasis in original); *supra* at pp. 17-22. Moreover, even under the Board's disputed definition of "termination," in which only CTU members who did not find employment after a Turnaround by the following year were considered impacted by the Turnarounds, being African-American was a statistically significant predictor of a worker being "terminated" (Board's definition) because of turnarounds in 2008, 2009, and 2010 when analyzing all of the turnaround schools in each year. JSOF ¶ 88.

Second, the analysis controlling for both race and academic performance metrics is not legally necessary to demonstrate disparate impact, nor is it methodologically proper. The court in *Mozee*, 940 F.2d at 1047, held that the plaintiff class's statistical evidence on disparate impact would have been strengthened by controlling for "the major variables one might expect to cause a statistical disparity" where the exact selection criteria were unknown. However, controlling for alternative explanatory variables is *not* required when, as here, the employer's discriminatory selection criteria *is* explicitly known. *See Allen v. Seidman*, 881 F.2d 375, 380 (7th Cir. 1989) (holding that multivariate regression analysis of more explanatory variables is not necessary where the plaintiff class claimed disparate impact from an aptitude exam used for promotion decisions). In this case, the Plaintiffs know, and the Board acknowledges, that the exact selection criteria used by the Board were probation status and academic performance points. Therefore, Plaintiffs did not need to add further explanatory variables to their statistical evidence to root out all possible criteria for why schools could have been selected for turnaround and it is improper

for the Board to do so. An analysis of racial disparities using the known criteria suffices to warrant a finding of a pattern or practice of discrimination.

Moreover, the academic performance metrics used are correlated with race. JSOF ¶ 109. Thus, controlling for academic performance "masks" the effect of disparate racial impact when included alongside race in the regression analysis. JSOF ¶¶ 98, 109. Therefore, the Board's alternative statistical inquiry does not rebut Plaintiffs' strong statistical evidence. Indeed, the Board's reliance on performance points to narrow the turnaround-eligible schools to a final selected group is facially discriminatory because the race of teachers and PSRPs is highly correlated to school performance points. JSOF ¶¶ 89–90, 98, 109. Therefore, there is no genuine dispute over the significance of Plaintiffs' statistical evidence, which is sufficient to establish that discrimination was the Board's standard operating procedure and that it intentionally used performance points as a proxy for race in selecting schools for turnaround. *See Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1044 (7th Cir. 1988) (while correlation does not equal causation, correlations can be suggestive of causality).

B. Schools with lower performance points and higher percentages of white teachers were passed over by the Board for turnarounds, providing additional evidence of intentional discrimination.

Out of the seventy-four schools considered for turnaround in 2012, the ten schools ultimately selected had majority African American CTU members. JSOF ¶¶ 37, 42. However, there were twenty-three schools with a majority of Caucasian teachers that were part of the seventy-four schools considered for turnaround that were ultimately not selected. JSOF ¶¶ 133-34. In addition, eight schools located in the North-Northwest high school network had majority Caucasian faculty and were not turned around in 2012. Each of these thirty-one schools had fewer

performance points than Tilden High School, which was selected for the 2012 Turnaround and had 56% African-American CTU members. JSOF ¶¶ 42, 133–34.

Further, Plaintiffs provided several subsequent examples in which a predominantly African American school and a predominantly Caucasian school had nearly identical performance points but only the African American school was selected for turnaround. For instance, Chalmers was selected for turnaround in 2013. Chalmers had 40.5% of possible performance points and a teacher and PSRP staff that was 70% African American. JSOF ¶ 137. In comparison, McAuliffe, Everett and Holden also had 40.5% of possible performance points and were (like Chalmers) on probation: these schools, however, had between 2% and 18% African American teachers and paraprofessionals, and were not selected for turnaround in 2013. JSOF ¶ 137. Similarly, Carter was selected for turnaround in 2013, had 38.1% performance points, and a teacher and paraprofessional staff that was 81% African American. JSOF ¶ 138. In comparison, Hay, Hearst, Kilmer, Pilsen, and Brentano were (like Carter) on probation and had between 35.7% and 38.1% performance points. JSOF ¶ 138. Unlike Carter, these schools had a teacher and paraprofessional staff that ranged between 3% and 40% African American, and were not selected for turnaround. JSOF ¶ 138.

Turnarounds also resulted in "whiter" teaching forces after they were implemented. More specifically, after the Turnarounds in 2009-2010 and 2012-2014, there were more Caucasian and fewer African American teachers and PSRPs than before the Turnaround. JSOF ¶ 140. This was also true for Turnarounds in nine out of eleven schools AUSL managed post-turnaround from 2007-2011. JSOF ¶ 140. In addition, the Board claims that Turnarounds were an investment in the chosen schools, which it alleges were "failing as a unit." *See* JSOF ¶¶ 16, 22, 24. However, the Board's investments also favored schools with relatively high proportions of white students

and staff. For example, of the $520 million the Board budgeted for new facility construction between 2011-2016, 66% was invested in schools with numbers of white students that were at least twice their overall representation in CPS. JSOF ¶ 15. All of these examples supplement the statistical models provided above to further illustrate that racial discrimination was the standard operating procedure of the Board's turnaround selection process.

C. The Board's knowledge of the racial disparity in their selection process is also evidence of intentional discrimination.

Finally, the Board was generally aware that from 2009 to 2015, the race of the students at a CPS school was highly correlated to the race of the teachers and staff at that school. JSOF ¶ 130. In 2011, the Board was also aware that there was a net loss of African American teachers in 9 of the 11 schools turned around and subsequently managed by AUSL in the school years 2007 through 2011. JSOF ¶ 140. In addition, the Board assessed its school actions from 2012 to 2016 and admitted that Turnarounds (and other school actions) disproportionately impacted African American employees, but took no action to mitigate this impact. JSOF ¶ 83 ("In 2006, about 33% of CPS teachers were black. In 2017, about 21% of CPS teachers were black."); JSOF ¶¶ 140-141.

When such awareness is considered alongside evidence that turnarounds were not effective, the inference of intentional discrimination becomes unavoidable. In the 2012-2013 and 2013-2014 school years, schools that were not turned around often performed better than their turnaround counterparts on academic metrics, despite having similar academic metrics prior to the turnarounds JSOF ¶¶ 71–73. Yet, the Board maintained its turnaround policy despite knowing it was both discriminatory and ineffectual. This evidence confirms that the selection process amounted to a pattern and practice of discrimination against class members.

Because there is no material dispute of fact over Plaintiffs' significant statistical evidence of discrimination over a period of years, the anecdotal evidence that African American teachers and PSRPs were treated worse than their white counterparts, and the evidence that the Board knew Turnarounds disproportionately harmed African Americans, summary judgment should be granted to Plaintiffs on their pattern-or-practice claims for intentional discrimination.

CONCLUSION

Plaintiffs have established all of the elements of their disparate impact claim. They have shown that the Board's 2012, 2013, and 2014 Turnarounds caused the certified class to suffer a statistically significant adverse impact. Next, they have demonstrated that the Board failed to meet its burden to prove that the 2012, 2013, and 2014 Turnarounds were job related and consistent with business necessity. Plaintiffs' showing on the above elements alone render them successful on their disparate impact claims.

Plaintiffs are also entitled to summary judgment on their pattern-or-practice of discrimination claims. The Plaintiffs have combined convincing statistical evidence with evidence that the Board did not subject majority Caucasian-staff schools to turnarounds despite similar academic performance metrics to the schools ultimately selected. Additionally, Plaintiffs have provided anecdotal evidence that the Board knew the layoffs would disproportionately harm African American teachers. Plaintiffs have, therefore, sufficiently established that the Board's Turnarounds constituted a pattern or practice of discrimination, which the Board cannot rebut.

WHEREFORE, for all of the above reasons, this Court should grant Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2020, I electronically filed the foregoing **PLAINTIFFS' 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