June 19, 2019

Mayor Martin J. Walsh
1 City Hall Square, Suite 500
Boston, MA 02201-2013

Dr. Brenda Cassellius, Superintendent
Bruce C. Bolling Building, Fifth Floor
2300 Washington Street
Roxbury, MA 02119

Boston School Committee
2300 Washington Street
Roxbury, MA 02119

Re: Reforming the Admissions Process for Boston's Exam Schools

Dear Mayor Walsh, Superintendent Cassellius and Members of the Boston School Committee:

Lawyers for Civil Rights and the NAACP Boston Branch respectfully write concerning community-driven reforms to the admissions process for Boston's exam schools—reforms that the Superintendent and Boston School Committee are empowered to make. Although these institutions represent some of the best in public education, it is a simple and irrefutable fact that the schools do not reflect the diversity of the rest of the city. This letter reviews several constitutionally permissible ways that Boston Public Schools (BPS) can adjust its exam school admissions policies to make the exam schools—particularly, Boston Latin School (BLS)—more reflective of the students BPS serves. Taking these steps would be sound policy for the district; conversely, failing to do so risks legal liability under state and federal anti-discrimination laws, as well as under the Massachusetts Constitution.

I. Current Enrollment at the Exam Schools

Enrollment figures at the exam schools paint a stark reality: African-American and Latinx students are disproportionately excluded by the current admissions policy. In the 2018-2019 school year, African-American and Latinx students attended the exam schools at percentages far beneath their district enrollment. Although African-American students accounted for 30.9% percent of the District, they only accounted for 7.5% percent of the BLS and 20.9% of the Boston Latin Academy (BLA) student body; similarly, Latinx students accounted for 42.1% percent of the district but only 12.5% of BLS, 25.5% of BLA and 32.5% of John D. O'Bryant School students. Similar statistical disparities have existed for many years, and we have every reason to expect they will persist in the 2019-2020 academic year.

Currently, admission to the three schools is based entirely on a student's grades and test scores on the Independent Schools Entrance Exam (ISEE). However, neither is a fair or reliable

measure of student aptitude, given the enormous variations in grading amongst Boston's charter, parochial, and traditional public schools, the undeniable presence of grade inflation in parochial and private schools, the failure of the ISEE to test material studied in most BPS classrooms, and the fact the ISEE has never been validated for students of color.

The evidence supporting the necessity of a change to these admissions criteria continues to mount. In October 2018, Joshua Goodman and Melanie Rucinski of the Harvard Kennedy School's Rappaport Institute for Greater Boston released a policy brief entitled "Increasing Diversity in Boston's Exam Schools."[1] Noting that African-American and Latinx students are "less likely to . . . be invited to exam schools" than their peers, Goodman and Rucinski observed that "only some" of the ISEE's topics are covered in BPS classrooms and that many of the tested concepts, including algebra, are "accessible only to students who have prepared for the exam outside of school."

The Harvard researchers concluded that the substantial racial gaps in ISEE-taking rates, ISEE scores, and GPAs could not be explained by or attributed solely to "underlying differences in academic strength," given that high-achieving African-American and Latinx students were "substantially less likely to be invited to exam schools" than peers of "similar academic strengths." Goodman and Rucinski concluded that "many talented [African-American] and [Latinx] students in BPS do not enroll at the exam schools due to various factors that make it more difficult for them to succeed in the admissions process" and that alternative means of admitting students could be accomplished "while maintaining the high academic requirements of the current admissions process."

Disproportionate enrollment numbers also negatively impact the African-American and Latinx students who do gain admission to the exam schools. When a school lacks a critical mass of students from racial minority groups, those students may feel isolated and be seen as spokespersons for or tokens of their race, which negatively impacts both their school experience and the culture of the school as a whole. *See Grutter v. Bollinger*, 539 U.S. 306, 317 (2003).

BPS is well aware of the ramifications of racial isolation. In January 2016, African-American students at BLS mobilized around the campaign #BlackatBLS to raise awareness of the discrimination that African-American students at BLS have experienced. A YouTube video released by two student leaders at BLS B.L.A.C.K. urged others to share their stories of prejudice, and the response was overwhelming. Students and alumni poured out stories of racial slurs, hate speech, and micro-aggressions at BLS, exposing how students of color endure a hostile and unsafe learning environment. The social media campaign and these student leaders captured much-deserved attention from civil rights groups, the Mayor, and the School Committee. The campaign prompted the Department of Justice (DOJ) to launch an independent probe into the allegations of racism and racial hostility. After several months of investigation, DOJ concluded BLS had violated Title IV of the Civil Rights Act. As a result of the

[1] Goodman, J. & Rucinski, M., *Increasing Diversity in Boston's Exam Schools*, Harvard Kennedy School, Rappaport Institute of Greater Boston (Oct. 2018).

investigation, BLS agreed to adopt a comprehensive, multi-pronged strategy to address and end racial harassment of students of color.

BPS appears to acknowledge that its efforts to create an inclusive school climate have not been entirely successful. At a March 5, 2019 City Council Hearing, BPS administrators noted that some African-American and Latinx students who could enroll at BLS opt out, potentially because they "perceive BLS as not welcoming or supportive."

II. There Are Numerous Constitutionally Permissible Options That Would Allow the Exam Schools To Diversify Their Student Bodies.

Over the past several years, LCR, the NAACP Boston Branch, and other community organizations have continuously identified numerous options available to BPS that would allow for diversification of the exam schools while maintaining academic excellence. Court rulings over the past two decades, while limiting some options available, have left numerous methods of voluntary integration fully intact.

Several of these cases have involved BLS itself. In *McLaughlin by McLaughlin v. Boston School Committee*, a federal district court enjoined BLS from maintaining a set-aside policy that reserved 35% of seats for under-represented students. 938 F. Supp. 1001 (D. Mass. 1996). Importantly, the court did not dispute that BLS had a compelling interest in a diverse student body, but ruled that the set-aside was not narrowly tailored to meet this goal. A subsequent effort, in which BPS exam schools filled half its seats with the highest scoring applicants and divided the other half based on the racial diversity of the pool of remaining qualified applicants, was also deemed insufficiently narrowly tailored. *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

Since the *McLaughlin* and *Wessman* cases, U.S. Supreme Court rulings have further clarified the legal landscape and have provided a roadmap for how districts can adopt constitutionally permissible voluntary integration efforts. Notably, in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), the Court issued rulings on the voluntary integration plans of the Seattle and Louisville school districts. While the Seattle and Louisville plans were found unconstitutional, the Court emphasized that its decision should not be read to stop states and school districts from reviewing the racial makeup of schools and adopting "general policies to encourage a diverse student body." *Id.* at 788. (Kennedy, J., concurring in part and concurring in the judgment). *Parents Involved* establishes that:

- School districts have compelling state interests both in achieving diversity and avoiding racial isolation;
- School districts can adopt measures to pursue these interests;
- In some circumstances, school districts can use a "more nuanced individual evaluation of school needs and student characteristics that might include race as a component" so long as it complies with the requirements for narrow tailoring described in the Court's opinion, *id.* at 789; and

- Beyond this more individualized use of race, school districts can achieve diversity through more generalized approaches that are "race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race." *Id.* These more generalized, race-conscious approaches are "unlikely" to "demand strict scrutiny," the level of scrutiny applied in the BLS cases. *Id*.

Following *Parents Involved,* the U.S. Departments of Justice and Education issued guidance to explain the ruling and provide specific examples of steps that selective admission schools like the O'Bryant, BLA, and BLS can take to promote racial diversity. U.S. Department of Justice, U.S. Department of Education, *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* (2011).[2]

Importantly, the Guidance recognizes that many race-neutral measures—for example, admitting all applicants with grades that put them within the top quartile of their class—are permissible. Race-conscious measures, such as considering an individual student's race as part of a holistic review for admissions, are also permissible if race-neutral measures are not sufficient to improve an exam school's diversity. *Id.* These principles are firmly grounded in Supreme Court precedent. In both *Grutter* and *Fisher v. University of Texas at Austin*, 579 U.S. ___ (2016) (*Fisher II*), the U.S. Supreme Court upheld the use of an applicant's race as one factor in the admissions policy of a public educational institution if the policy is narrowly tailored to the compelling interest of promoting a diverse student body, the policy uses a holistic process to evaluate applicants, rather than a quota system, and race-neutral programs would not achieve the same effect.

III. Legal Liability for Current Admissions Policy

Not only is BPS constitutionally permitted to take steps to diversify its exam schools, its failure to do so risks violating both federal and state anti-discrimination laws. Both federal[3] and state[4] law prohibits racial discrimination in admissions to public schools. Importantly, regulations promulgated under both federal and state law make clear that policies and practices that have an unjustified disproportionate *impact* on minority students are illegal, even if there is no discriminatory intent.[5]

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[2] Although this guidance was withdrawn by the Trump Administration in July 2018, the recommendations remain permissible under current federal law.

[3] Title VI of the Civil Rights Act of 1964 provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d.

[4] Chapter 76 of the Massachusetts General Laws provides that "No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, gender identity, religion, national origin or sexual orientation." 76 M.G.L. § 5; *see also* Mass. Const. Art. CVI.

[5] 34 C.F.R. Part 100 (implementing regulations, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq*.); 603 C.M.R. 26.02. (implementing regulations for Massachusetts' school attendance law, Ch. 76, that prohibit admissions policies that "*have the effect* of subjecting students to discrimination because of their race, color") (emphasis added). While this letter focuses on liability under disparate impact, a school that continues to maintain an

To prove discrimination, there must be a causal connection between the facially neutral policy or practice and the disproportionate and adverse impact, and the policy must lack a substantial legitimate justification. *Elston v. Talladega County Bd. Of Educ.*, 997 F.2d 1394, 1413 (11th Cir. 1993). In an educational context, the policy or practice in question must have an "educational necessity" to survive. *Id.* If such an educational necessity exists, a court or agency's inquiry will then focus on whether there are any "equally effective alternative practices" that would result in less racial disproportionality. *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985). If such practices exist and are not implemented, the policy or practice that causes the disparate impact violates the law.

Here, as BPS's own data makes clear, the facially neutral admissions policy at the exam schools has a disproportionate impact on African-American and Latinx students. These numbers are a direct result of the policy implemented by BLS, a policy that is not educationally necessary. As demonstrated by the Rappaport report, there is no reason to believe that maintaining a certain GPA and ISEE score as the sole bases of admission is essential to safeguarding educational excellence.

Moreover, there is significant reason to doubt the validity of either measure. Methods for grading and calculating GPAs differ greatly between and among the public, parochial, and private schools that exam school applicants attend, and BPS has made no attempt to engage with the reality of grade inflation in private schools. For example, in 2016, 69% of the students applying to BLS from Holy Name Parish School in West Roxbury had A+ averages; 10% of BLS' entering class came from Holy Name alone.[6] By contrast, only 22% of students applying from BPS had those grades—an unsurprising fact, given that BPS students are only awarded the highest possible grade if they are deemed to be performing at a full grade level ahead of their current year. Additionally, the validity of the ISEE exam as a measure of admission to Boston's exam schools is questionable when success on the exam appears more tied to private preparation programs than BPS's curriculum and when there is no evidence that the ISEE "accurately predicts the high school performance of students of color," as its predictive validation study lacked sufficient sample sizes of students of color.[7]

As explained above and detailed below, there are many alternative admissions policies that would support a high-performing student body while resulting in a less discriminatory impact. As such, the current admissions policy for Boston's exam schools likely violates both federal and state law.

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exclusionary admissions policy in the face of other clear alternatives available could also be acting in an intentionally discriminatory fashion. *Washington v. Davis*, 426 U.S. 229 (1976).

[6] Toness, Bianca Vázquez, *Boston Public School Students May Be at a Disadvantage for Getting Into Boston Latin*, WGBH (Sept. 5, 2017), available at https://www.wgbh.org/news/2017/09/05/local-news/boston-public-school-students-may-be-disadvantage-getting-boston-latin.

[7] Boigon, M., *Boston Schools Ignored Anti-Bias Bid Specs In Awarding Testing Contracts*, WGBH (Nov. 2, 2018), available at: https://www.wgbh.org/news/education/2018/11/02/boston-schools-ignored-bid-specs-in-awarding-testing-contracts.

IV. Community Proposals

BPS retains a duty to ensure that its policies do not discriminate against both current and prospective students under state and federal law. Failure to do so not only results in legal violations, but also creates racial isolation, as demonstrated by the #BlackatBLS campaign.

In 2017-2019, LCR and the NAACP Boston Branch convened a series of neighborhood meetings in Dorchester, East Boston, Mattapan, and the North End of Boston. At these neighborhood meetings, which were co-hosted by a large and diverse coalition of community stakeholders, hundreds of parents, students, educators and concerned community members came together to discuss how BPS should change exam school admissions policies to better reflect the diversity of our city. Key proposals included:

1. BPS could invite a top percentage of students in each public school to attend the BPS high school of their choice;
2. BPS could invite a top percentage of students in each Boston zip code to attend the BPS high school of their choice;
3. BPS could employ a holistic model to evaluate students individually and seek to admit an academically excellent class that is diverse across multiple dimensions, including socio-economic status, school of attendance at the time of application, artistic and/or athletic ability, community service, race/ethnicity, prior BPS attendance, and zip code; and/or
4. To the extent that BPS retained use of an exam as part of any revamped admissions process, BPS could institute an exam that actually reflects curricula taught in its public schools.

All of these proposals are aligned with state and federal law. Data indicates that the adoption of even one of these strategies—separately, in combination, and/or in conjunction with the current admissions process—would markedly increase the number of African-American and Latinx students invited to enroll in BLA, BLS, and the O'Bryant, while maintaining the schools' rigorous academic standards. Notably, BPS has been aware of all of these alternatives for many years, but has thus far refused to implement any of them.

V. Conclusion

Given the constitutionally permissible models available to BPS, we urge the Superintendent and School Committee to adopt one of the above admissions processes—either alone or in tandem with current or alternative measures—for Boston's selective admission schools in order to make them reflective of the students enrolled in the district's elementary schools. Doing so will ensure that the O'Bryant, BLS, and BLA can fully serve all of our city's students in a way that benefits us all for generations to come.

We understand that you have an interest in creating more diverse learning environments. We look forward to your response and to working closely with you to start implementing these strategies and solutions. We ask that you let us know within fourteen (14) days of receipt of this letter what changes, if any, you are willing to make.

Respectfully Submitted,

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cc: Boston City Councilors