May 18, 2016

Tommy Chang, Superintendent
Boston Public Schools
2300 Washington Street
Roxbury, MA 02119
Sent via email

RE: Boston Latin School's Admissions Process

Dear Superintendent Chang:

We share your concern that Boston Latin School (BLS), Boston's flagship public school, "does not reflect the diversity of the rest of the city." Adrian Walker, *The Education of Tommy Chang*, Boston Globe (Mar. 13, 2016). This letter reviews several constitutionally permissible ways that Boston Public Schools (BPS) can adjust its admissions policies to exam schools to make 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.

I. Boston Latin School's Current Admissions Process Disproportionately Excludes African-American and Latino Students.

Enrollment figures at BLS paint a stark reality: African-American and Latino students from traditional public schools in Boston are being disproportionately excluded by the current BLS admissions policy. Currently, admission to BLS and Boston's two other exam schools is based entirely on a student's grades and test scores on the Independent Schools Entrance Exam (ISEE). In this current school year, African-American and Latino students are dramatically underrepresented at BLS. Although African-American students account for 32.4% of the district, they only account for 8.5% of BLS; similarly, Latino students account for 41.5% of the district but only 11.6% of the school.[1]

These alarmingly low rates – the lowest for African Americans since BPS was under a desegregation order – are not for lack of interest. African Americans and Latinos comprise,

[1] The enrollment rates for economically disadvantaged students, English language learners, and students with disabilities, are similarly troubling. Economically disadvantaged students account for 49.5% of the district but only 14.9% of BLS. English language learners account for 30.3% of the district but only 0.2% of BLS. Students with disabilities make up 19.6% of the district but only 1.6% of BLS.

respectively, 18.9% and 25.4% of BLS's applicant pool. Stephanie Ebbert, *At Boston Latin, Little Outreach to City's Black, Latino Students*, Boston Globe (Apr. 23, 2016). Nor are they for lack of ability; in previous decades when BLS had much higher rates of enrollment, African-American and Latino students thrived at the school.

Not only do these enrollment numbers indicate that qualified African-American and Latino students are being disproportionately denied the opportunity to enroll at BLS, they also negatively impact the African-American and Latino students who do gain admission to BLS. Social scientists have long known that when a school lacks a critical mass of students from racial minority groups, those students risk being isolated and seen as spokespersons for their race. *See, e.g.*, Janice McCabe, *Racial and Gender Microaggressions on a Predominantly-White Campus: Experiences of Black, Latina/o and White Undergraduates*, 16 Race, Gender & Class 133, 141-43 (2009). That racial isolation negatively impacts both their school experience and the culture of the school as a whole. *Id.* BLS knows this well. This past January, 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 of the campaign 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 have rightly captured the entire city's attention, leading to calls for change from civil rights groups, Mayor Martin Walsh, and the Boston School Committee, and the U.S. Attorney's Office has opened an investigation into the school's racial climate.

II. Numerous Constitutionally Permissible Options Exist That Would Allow BLS To Diversify Its Student Body.

BPS has numerous options available to it that would allow it to diversify the BLS student body while maintaining academic excellence. Court rulings over the past two decades, while limiting some options available, have left other methods of voluntary integration fully intact.

As you know, several of these cases have involved BLS itself. After desegregation, BPS adopted voluntary integration measures for exam school admissions. As these plans considered the races of individual students, the courts that analyzed them applied strict scrutiny – the highest level of scrutiny applicable to claims under the Equal Protection Clause - to determine whether the plans were "narrowly tailored to achieve a compelling state interest." In the *McLaughlin* case, a federal district court enjoined BLS from maintaining a set-aside policy that reserved 35% of seats for under-represented students. The court did not dispute that BLS had a compelling interest in a diverse student body, but ruled that the set-aside means chosen was not narrowly tailored to meet this goal. *McLaughlin by McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001 (D. Mass. 1996).[2] A subsequent effort, in which BPS exam schools filled half their seats with their highest scoring applicants and divided the other half based on the racial diversity of the

[2] The court determined that the set-aside plan was not narrowly tailored for two reasons: the plan did not have a built-in termination provision, and the district did not appear to have explored race-neutral approaches to promoting diversity first, even though such alternatives were available.

pool of remaining qualified applicants, was also found not to be narrowly tailored. *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998).[3]

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. Most 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 case produced a 4-1-4 split between the Court's more liberal and conservative blocs, it offered Justice Kennedy – often, as here, the "swing vote" between the blocs – the opportunity to significantly shape the principles established in the case. While Justice Kennedy agreed with the conservative bloc that the Seattle and Louisville plans were unconstitutional, he wrote separately to emphasize that the Court's 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). He went on to detail constitutionally permissible means to do so. *Id*. at 788-89.

From the *Parents Involved* decision and Justice Kennedy's concurrence, and other Supreme Court decisions in the higher education context, several principles emerge. First, school districts have compelling interests both in achieving diversity and avoiding racial isolation, and can adopt measures to pursue these interests. Second, those measures can include more generalized, race-conscious approaches that are "unlikely" to "demand strict scrutiny…." *Id*. Finally, districts can use race as a component in appropriate cases, so long as these measures are narrowly tailored.[4]

From these principles, there are a number of constitutionally permissible steps BPS can take to promote racial diversity at BLS. For instance, if it helped to achieve racial diversity, BPS could set aside a number of seats at each exam school for students already attending BPS schools. The U.S. Departments of Justice and Education offer additional examples of steps that competitive schools such as Boston's exam schools 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). These

[3] Under the policy challenged in *Wessman*, BPS identified the top 50th percentile of applicants for each school, based on entrance exam scores and GPAs, as the Qualified Applicant Pool. Then, each exam school filled 50% of the available seats with the highest scoring applicants. Finally, the other 50% of seats were filled by identifying the percentages of each racial group present in the remaining Qualified Applicant Pool and allotting seats to the highest scoring members of each racial group at a number proportionate to their presence in the Pool. 160 F.3d 790 at 793.

[4] In *Parents Involved*, the Court applied a four-part test it developed in higher education cases to determine whether the Seattle and Louisville integration plans were narrowly tailored, summarized by the U.S. Departments of Justice and Education as: "whether an educational institution has considered workable race-neutral alternatives; whether its plan provides for flexible and individualized review of students; whether it has minimized undue burdens on other students; and whether its plan is limited in time and subject to periodic review." 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* 3 (2011).

examples all contain elements that can be used together in different ways to arrive at a constitutionally permissible plan:

> A school district could give special consideration to students from neighborhoods selected specifically because of their racial composition and other factors. In the selection process, a district would treat all the students who live in the selected neighborhood the same regardless of their race.
>
> If it would help achieve racial diversity or avoid racial isolation, a school district could decide to admit all applicants with grades that put them within the top quartile of their class at the schools from which the competitive program draws.
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> For students who meet the basic admissions criteria, a school district could give greater weight to the applications of students based on their socioeconomic status, whether they attend underperforming feeder schools, their parents' level of education, or the average income level of the neighborhood from which the student comes, if the use of one or more of these additional factors would help to achieve racial diversity or avoid racial isolation.
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> A school district could identify race-neutral criteria for admission to a school (e.g., minimum academic qualifications and talent in art) and then conduct a lottery for all qualified applicants rather than selecting only those students with the highest scores under the admission criteria, if doing so would help to achieve racial diversity or avoid racial isolation.

Id. at 12. Importantly, the Guidance goes on to recognize districts' ability to consider an individual student's race as part of a holistic review for admissions, if necessary to achieve diversity:

> If a school district concludes that these types of programs [such as Examples 1-4] would be unworkable to achieve diversity or avoid racial isolation, the district may then consider using race as one factor among others in the selection of individual students for admission to competitive schools or programs.

Id. In short, there are numerous constitutionally permissible options available to BLS to diversify its student body. More data, more analysis, and more community input are necessary to determine which of the many available options would work best for BLS. What is clear, however, is that doing nothing and maintaining the *status quo* is not an acceptable option. Such a course of action would continue to disproportionately exclude qualified African-American and Latino students and create racial isolation for those minority students who do enroll – all to the detriment of BLS, its students, and the community as a whole. Equally important, maintaining the *status quo* would also expose BLS to legal liability, as explained directly below.

III. Maintaining the *Status Quo* Exposes BLS To Legal Liability

Both federal and state law prohibit racial discrimination in admissions to public schools. 42 U.S.C. § 2000d; 76 M.G.L. § 5.[5] 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. 34 C.F.R. Part 100.3(b)(2); 603 C.M.R. 26.02.[6]

To prove discrimination under disparate impact, there must be a causal connection between the policy or practice in question and the 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.* Even if such an educational necessity exists, the challenged practice is still illegal if there are "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).

Here, BLS's liability under disparate impact is clear. As the statistics above demonstrate, the facially neutral admissions policy at BLS has a disproportionate impact on the number of African-American and Hispanic students at the school. Indeed, the disparities here are enormous, much larger than would be needed to show a *prima facie* case of disparate impact.[7] Nor is there any dispute, given overall BPS demographics and BLS's applicant pool, that the cause of the disparity is BLS's admissions policy.

Moreover, BLS's admissions policy is not an "educational necessity." Maintaining a certain GPA and ISEE score is not essential to safeguarding educational success. To the contrary, there is significant reason to doubt the validity of either measure. Methods for grading and calculating GPAs differ greatly between and among the public and private schools that BLS applicants attend. And 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. Even if the current admissions policy were seen as an "educational necessity"

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[5] 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." Similarly, 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."

[6] Title VI's implementing regulations forbid admissions policies that "*have the effect* of subjecting individuals to discrimination because of their race, color, or national origin," etc. (emphasis added). Similarly, implementing regulations for Massachusetts' school attendance law, Ch. 76, prohibit admissions policies that "*have the effect* of subjecting students to discrimination because of their race, color," etc. (emphasis added). While this letter focuses on liability under disparate impact, a school that continues to maintain an exclusionary admissions policy in the face of other clear alternatives available could also be found to be intentionally discriminatory. *See, Washington v. Davis*, 426 U.S. 229 (1976).

[7] The number of standard deviations between the percentage of BLS's African-American applicants and enrollees is well above the 2-to-3 standard deviations the U.S. Supreme Court recognizes as establishing a *prima facie* case of disparate impact. *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977); accord *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309 n.14 (1977).

– which is doubtful – it would still be illegal if other less discriminatory alternatives existed that served BLS's educational mission equally well. As explained above, there are many such alternatives that would support a high-performing student body while resulting in less discrimination. As such, the current admissions policy for Boston's exam schools likely violates both federal and state law. [8]

IV. Conclusion

While BLS must certainly be mindful of legal limitations, it also is under 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, which has led in part to the harms that #BlackAtBLS brought to the fore.

We appreciate your interest in changing admissions policies for Boston's exam schools and the steps BPS is taking to explore these admissions alternatives. Given the constitutionally permissible models available to BPS, we urge you and the School Committee to move forward expeditiously to develop and approve an admissions process for exam schools that makes the racial diversity of BLS's student body reflective of the students enrolled in BPS's elementary schools. This process should include analyzing less discriminatory alternatives in conjunction with the impacted communities. We stand ready and able to assist in this effort, to ensure that BLS can fully serve our city's students in a way that benefits us all for generations to come.

Please contact Matt Cregor, Education Project Director at the Lawyers' Committee for Civil Rights and Economic Justice, with any questions: 617-988-0609, mcregor@lawyerscom.org.

Respectfully Submitted,

The Lawyers' Committee for Civil Rights and Economic Justice
American Civil Liberties Union of Massachusetts
Black Educators' Alliance of Massachusetts (B.E.A.M.)
Boston Alumnae Chapter, Delta Sigma Theta Sorority, Inc.
Boston Branch of the NAACP
Ella J. Baker House
George Cox
Kevin Peterson, founder, New Democracy Coalition
Dr. Jacqueline C. Rivers, Ph.D.
Rev. Mark Scott

Cc: Michael O'Neill, Chair, Boston School Committee

[8] The under-signed note that, while BLS appears to suffer from the largest disparities, BPS's other exam schools have similar problems, indicating that any reforms for BLS should be applied districtwide. Helena P. Miranda et al., Annenberg Institute for School Reform, *Opportunity and Equity: Enrollment and Outcomes of Black and Latino Males in Boston Public Schools* 115 (2013) (finding that African-American and Latino males represented 40.9% and 35.2%, respectively, of BPS's total grade 7–12 enrollment, but only 20.6% and 16.4%, respectively, of exam school enrollment in 2012).