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

CHICAGO TEACHERS UNION, LOCAL 1, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, TERRI FELLS, LILLIAN EDMONDS, and JOSEPHINE HAMILTON PERRY, individually and on behalf of all similarly situated persons, Plaintiffs, v. BOARD OF EDUCATION OF THE CITY OF CHICAGO, a body politic and corporate, Defendant.	Case No. 12 C 10338 Judge Jorge Alonso Magistrate Judge Susan Cox

DEFENDANT BOARD OF EDUCATION OF THE CITY OF CHICAGO'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

POINTS AND AUTHORITIES

INTRODUCTION

Defendant, the Board of Education of the City of Chicago (the "Board"), seeks summary judgment on the disparate impact and disparate treatment claims alleged by Plaintiffs Chicago Teachers Union ("CTU"), Local 1, American Federation of Teachers, AFL-CIO, Terri Fells, Lillian Edmonds, and Josephine Hamilton Perry, individually and on behalf of all similarly situated persons (collectively herein "Plaintiffs") related to layoffs that occurred following the 2010-2011 school year. In the Collective Bargaining Agreement ("CBA") in effect in 2011, the CTU and the Board set forth safeguards and procedures for layoffs, anticipating and agreeing that they were a distinct possibility. The Board complied with the terms of the CBA in implementing the 2011 layoffs. It is against this backdrop that Plaintiffs brought this lawsuit.

There are four equally compelling reasons for entry of summary judgment in favor of the Board on Plaintiffs' claims. First, on their disparate impact claim, Plaintiffs cannot demonstrate an adverse impact on Class Members[1] who suffered an adverse employment action, a necessary condition for a Title VII claim. Second, even if adverse impact exists, the Board was justified in laying off teachers and staff at the end of the 2010-2011 school year because enrollment was in sharp decline and the Board was facing a substantial projected budget deficit. Third, Plaintiffs fail to offer an available, equally effective and less discriminatory alternative to the layoffs. Fourth, and finally, Plaintiffs did not exhaust their administrative remedies for the disparate treatment claim, and even if they did, they provide no evidence of intentional discrimination. Thus, the Board is entitled to summary judgment. Lastly, if any portion of the case survives summary judgment, the Court should dismiss the CTU as a plaintiff because it lacks associational standing.

[1] The class is defined as all African American CTU members "who received a layoff notice from the [Board] pursuant to the its (sic) 'layoff policy' in 2011." Dkt. 167-1, ¶ 9. For simplicity, this group will be referred to herein as the "Class" and its individual members as "Class Members."

FACTUAL BACKGROUND

I. The Board's Layoff Decisions Were the Result of Insufficient Funds and Declining Student Enrollment.

A. The Board was confronted with a projected budget deficit of over $700 million for the 2011-2012 school year.

In the spring of 2011, the Board was faced with a projected budget deficit of $724 million for the following 2011-2012 school year. Statement of Uncontested Facts ("SOF") ¶ 10. This substantial deficit was the result of many factors, including: the loss of $260 million in federal stimulus money from the American Recovery and Reinvestment Act ("ARRA"); a four percent salary increase for CTU members and additional step-lane salary increases pursuant to the CBA; increases in employee health insurance benefit costs; increases in operational expenses; and a decrease in state revenue. *Id.* at ¶ 11. The Board sought revenue from other sources to cover this deficit, including by increasing property taxes and releasing surplus tax incremental financing ("TIF") funds, but these efforts were only partially successful. The Board was successful in obtaining an additional $140 million in local revenue (*i.e.*, property taxes) and the release of another $140 million in TIF funds. *Id.* at ¶ 10. Nevertheless, the Board was still left with a projected budget deficit of $428 million. *Id.*

The Board's senior team, including CEO Jean-Claude Brizard, Deputy Budget Director Arnoldo Rivera, CFO Diana Ferguson, COO Tom Cawley, and Chief of Staff Andrea Saenz, met throughout May 2011 to discuss the available options for addressing the deficit. *Id.* at ¶ 13. At these meetings, the senior team discussed several possible solutions to reduce the projected budget deficit, including closing programs, reducing central office staff, and increasing class size.[2] *Id.* at ¶ 14. Ultimately, the Board made numerous spending cuts, including a $107 million cut in Central Office spending, a $27 million cut in operations efficiencies, and an $86.7 million cut in

[2] Despite having the authority under the CBA to increase class sizes, CEO Brizard rejected this proposal, which would have resulted in more layoffs. *Id.* at ¶¶ 11, 19.

programming.[3] *Id.* at ¶ 15. These cuts were reported to the CTU and other unions in an August 4, 2011 PowerPoint presentation. *Id.*

In addition to these spending cuts, the Board determined that certain teaching and paraprofessional positions would have to be closed for the upcoming 2011-2012 school year. *Id.* at ¶ 9. Employee-related expenses including salaries, pensions, health insurance benefits and related expenses, made up approximately 70% of the Board's projected operating expenses for the 2011-2012 school year. *Id.* at ¶ 12. A four percent salary increase for CTU members, in addition to the step-lane salary increases required under the CBA, amounted to additional financial burdens on the Board. As a result, the Board determined a reduction in its workforce was essential to address its projected budget deficit. *Id.* at ¶ 15.

B. Enrollment in Chicago Public Schools was projected to decline for the 2011-2012 school year.

The Board's decision to issue layoff notices was not due exclusively to the substantial projected budget deficit; student enrollment at Chicago Public Schools ("CPS") had also been steadily declining for the past decade. From 2001 to 2011, overall student enrollment declined by 7.6% (a loss of 33,467) and African American student enrollment declined even more dramatically by more than 25%, from 224,494 to 168,020 students (a loss of 56,474 students):

School Year	20th Day Student Enrollment	African American Student Enrollment
2001	437,618	224,494
2002	438,589	223,302
2003	434,419	218,330
2004	426,812	212,502
2005	420,982	204,664
2006	413,694	198,205
2007	408,601	189,973
2008	407,955	188,316

[3] The 2011 program reductions eliminated supplemental positions in turnaround and selective enrollment schools, as well as "cushion" positions, which were positions allowed to certain schools in excess of enrollment based quota positions. *Id.* at ¶ 15.

2009	409,279	184,604
2010	402,681	171,462
2011	404,151	168,020
percent change	***-7.60%***	***-25.20%***

See SOF ¶ 17. Because the majority of schools in CPS are neighborhood schools with attendance boundaries, the dramatic decline in African American student enrollment in CPS has predominantly affected the neighborhood schools in the south and west sides of Chicago where African American CPS students tend to live. *Id.* at ¶ 19.

II. The Board Had the Authority Under Illinois Law and the CBA to Address the Budget Deficit and Enrollment Decline.

Pursuant to Illinois law, the Board has the duty to manage its workforce, including the right to establish procedures governing the layoff, reduction in force, or recall of its employees. 10 ILCS 5/34-18.31. In compliance with this statutory duty, and in light of the Board's projected budget deficit and the declining enrollment in CPS, the Board determined it needed to close certain teaching and paraprofessional positions for the 2011-2012 school year.

In 2011, the CTU and the Board were parties to a CBA in effect from July 1, 2007 through June 30, 2012. SOF ¶ 21. By agreement between the Board and the CTU, the CBA addressed student enrollment through formulas that calculated class size for grades K-4, 5-8 and high school, as well as for subjects such as art, music, and physical education. *Id.* These negotiated formulas dictated the number of "quota positions"—positions a school was allocated based on student enrollment—a school received for the 2011-2012 school year. Quota positions made up the majority of teaching positions a school received. *Id.* at ¶¶ 20-22. Consequently, the budgets for Board schools for the 2011-2012 school year were affected by CPS's declining enrollment. *Id.* at ¶¶ 16; 20-22. Schools suffering declines in enrollment were allotted fewer quota positions in the Board's budgeting process, which resulted in closures of positions at these underutilized schools.

Between January and May of 2011, the Board's Demographics Department ("Demographics") prepared enrollment projections for Board schools and provided these projections to the Board's Budget Department ("Budget"), just as it had done in years past. *Id.* at ¶ 23. Budget then determined the quota positions for each school in light of these enrollment projections. *Id.* Schools were also allocated programmatic positions such as special education or bilingual education by the head of the programmatic unit. *Id.* at ¶ 25. In addition, a majority of Board schools also received discretionary funds either through Title I of the No Child Left Behind Act or the State Government Supplemental Aid. *Id.* at ¶ 26. A principal could use discretionary funds to create new or additional positions within a school, in addition to the allocated programmatic and quota positions. *Id.* at ¶ 34. But because discretionary funds were based on the number of students receiving free or reduced lunch in the school, *id.* at ¶ 26, the amount of discretionary funding a school received was also impacted by declining enrollment.

Upon completion of the budget projections, in May 2011, Budget sent each CPS principal a packet explaining the budgeting process for the 2011-2012 school year and providing information regarding: the number of quota positions and middle grade specialization positions the school had been allotted for the next year, the number of bilingual positions the school would be required to fill for the next year, and the amount of discretionary funding the school would receive for the upcoming year ("Budget Packet"). *Id.* at ¶ 32.[4] CPS principals were then responsible for determining their school's staffing needs in light of the information in their respective Budget Packet. *See id.* at ¶ 33. If a school was allocated fewer quota positions than in the previous year, the principal had to either close positions or use their discretionary funding to keep a position open. *Id.* at ¶¶ 33-34. These decisions were made based on the principal's educational vision for their school (*i.e.*, whether, for example, they thought it was important to have two science teachers

[4] Principals could appeal the enrollment projection for their school to Demographics if they believed the projected enrollment was incorrect. SOF ¶ 21.

versus an art teacher). *Id.* at ¶ 33. The principal then had the responsibility of determining, based on the seniority, certifications, and performance of the individuals in their school, who would fill the open positions and who would receive a layoff notice. *Id.* at ¶¶ 33, 35-36.

The Board's Talent Office Workforce Planning Department ("Workforce Planning") reviewed each principal's proposed staffing decisions to confirm compliance with the CBA and requisite teacher certifications for each position. *Id.* at ¶ 37. If the principal's choice did not comply with the CBA or the chosen individual did not have the requisite certifications, a Workforce Planning representative assisted the principal in properly staffing that particular position. *Id.* At times, this process required a principal's chosen candidate to be "bumped" or replaced by a teacher with more seniority, as the CBA required. This process was consistent with prior years. *Id.* at ¶ 31.

At the end of the budgeting process, on or about July 1, 2011, the Board sent a total of 1,470 layoff notices to CTU members: 1,077 teachers and 393 paraprofessionals ("PSRPs"). *Id.* at ¶ 38. Of these, 630 notices were sent to Class Members. All CTU members who received layoff notices in July 2011 continued to receive full pay and benefits through August 31, 2011, because, under the CBA, CTU members were paid over 12 months. *Id.* at ¶ 39. Of the 630 Class Members who received layoff notices, 369 or 58.6%, had full-time positions with the Board or had voluntarily retired by September 1, 2011, and therefore lost no pay or benefits as a result of receiving a layoff notice. *Id.* at ¶ 44 and Ex. 24, demonstrative aid. In fact, 140 of these 369 had returned to full-time positions *in the same school*, and another 195 had full-time positions in a different school by September 1, 2011. *Id.* at ¶ 45. The remaining 34 of the 369 Class Members had retired before September 1, 2011. *Id.* at ¶ 46.

III. The Board's Layoff Decisions Were Governed By the Illinois School Code, the CBA, and Board Policies.

The Board has a statutory right to lay off employees under appropriate circumstances pursuant to Sections 34-8.3 and 34-8.4 of the Illinois School Code. Moreover, the Board and the

CTU planned for this exigency by codifying in the CBA the protocol for instituting layoffs.

Appendix H of the CBA and Board Policy 504.2 authorized layoffs of tenured teachers for declining enrollment, among other reasons. SOF ¶ 28. Teachers were selected for layoffs under Appendix H and Board Policy 504.2 based on seniority; "Provisional, Day-to-Day substitutes, Cadre Substitutes, Temporarily Assigned Teachers ("TATs") and Probationary Teachers ("PATs")" within a school were removed, in that order, before any regularly certified and appointed tenured teachers with appropriate certifications. *Id.* Tenured teachers who received layoff notices pursuant to Appendix H and Policy 504.2 were transferred to the reassigned teachers' pool, where they received full salary and benefits for a minimum of 10 months (paid over a full year per the CBA) while working as substitute teachers, and had the opportunity to obtain a full-time position in a school if they substituted there for at least 90 days. *Id.* at ¶ 40.

Board Policy 504.2A also governed layoffs of teachers for reasons other than those covered in Policy 504.2. Pursuant to Policy 504.2A, teachers were selected for layoff in the following order (in reverse seniority within each category): (1) teachers without appropriate certifications or credentials; (2) teachers with unsatisfactory performance ratings (such as Plaintiffs Fells and Perry); (3) retired teachers; (4) TATs; (5) PATs; and (6) tenured teachers. *Id.* at ¶ 29. Tenured teachers with "satisfactory" performance ratings who received layoff notices pursuant to Policy 504.2A were not transferred to the reassigned teachers' pool, but were given the opportunity "to avoid honorable termination and continue his or her employment with the Board as a day-to-day substitute teacher immediately following the effective date of his or her layoff." *Id.* at ¶ 42.

Finally, Appendix I of the CBA authorized layoffs of PSRPs due to lack of work or funds and declining student enrollment, among other reasons. *Id.* at ¶ 30. The Board considered seniority and job performance, among other factors, in determining which PSRPs to lay off. *Id.* Under Appendix I, laid off PSRPs had priority staffing rights for any bargaining unit positions that opened at their school within10 school months of their layoff from that school. *Id.*

By agreeing to these terms in the CBA, the CTU and the Board acknowledged that layoffs of CTU members were a distinct possibility under certain circumstances. Plaintiffs should not be allowed to undermine the agreed-upon terms of the CBA through this litigation.

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Abrego v. Wilkie*, 907 F.3d 1004, 1011 (7th Cir. 2018). On a motion for summary judgment, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris,* 550 U.S. 372, 380 (2007). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the nonmoving party must set forth specific facts showing a genuine issue for trial. *Id.* at 587.

ARGUMENT

I. The Board is Entitled to Summary Judgment on Plaintiffs' Disparate Impact Claim.

Count I of the Complaint alleges a Title VII disparate impact Class claim. A disparate impact claim exists when an employer, without justification, adopts an employment practice that has a negative, disproportionate impact on a protected group. *Adams v. City of Indianapolis*, 742 F.3d 720, 732 (7th Cir. 2014). To establish a *prima facie* case of disparate impact, Plaintiffs must offer statistically significant evidence sufficient to show a causal connection between a specific employment practice and the alleged statistical disparity. *Bennett v. Roberts*, 295 F.3d 687, 698 (7th Cir. 2002). If Plaintiffs establish a *prima facie* case, then the Board has the burden to show any such adverse impact[5] was justified by business necessity or an important public policy. *Tex.*

[5] Cases sometimes use the term disparate impact to refer to both the cause of action authorized by 42 U.S.C. § 20004e2 and the statistical disparity an employment practice allegedly caused. To avoid confusion, we will use "adverse impact" to refer to a statistical disparity and disparate impact to refer to the cause of action.

Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys.. Project, Inc., 135 S. Ct. 2507, 2518, 2522-23 (2015). If the Board meets that burden, then Plaintiffs can prevail only if they prove that the Board had an equally effective, less discriminatory alternative practice available at the time and refused to adopt it. *Id.* at 2518; *see also Allen v. City of Chicago*, 351 F.3d 306, 312 (7th Cir. 2003).

A. Plaintiffs cannot make a prima facie showing of adverse impact on Class Members with actionable Title VII claims.

The policy/practice at issue is the Board's issuance of layoff notices to 630 Class Members in or about July 2011. To prevail on their *prima facie* Title VII disparate impact claim, Plaintiffs must present admissible evidence showing that they suffered a materially adverse employment action. *De la Rama v. Ill. Dep't of Human Servs.*, 541 F.3d 681, 685 (7th Cir. 2008). However, as set forth below, simply receiving a layoff notice, without more, is not a materially adverse employment action.

1. Of the 630 Class Members, only 261 suffered an adverse employment action as a result of receiving a layoff notice.

A Title VII claim for disparate impact based on race, like the claim Plaintiffs raise here, requires proof by a preponderance of the evidence that the plaintiff suffered a materially adverse employment action. *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772, 779 (7th Cir. 2007). Plaintiffs claim that all 630 Class Members suffered adverse employment actions when they received layoff notices from the Board, regardless of whether the notice actually had any impact on their employment with the Board. This position finds no support in the law or facts of this case.

A materially adverse employment action is something more disruptive than a mere inconvenience or an alteration of job responsibilities. *Id.* at 780. "While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action." *O'Neal v. City of Chicago*, 392 F.3d 909, 911 (7th Cir. 2004). The Seventh Circuit has identified three categories of materially adverse employment actions: (1) a diminishing of an employee's compensation or benefits or a termination; (2) a nominally lateral

transfer or other job change that significantly reduces career prospects by preventing the use of skill and experience; or (3) a change in working conditions that subjects the employee to "a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in [her] workplace environment." *Id.*; *see also Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1116 (7th Cir. 2009). The Court has cautioned that the second category of cases are "to be distinguished from cases involving 'a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance.' " *O'Neal*, 392 F.3d at 911 (citation omitted).

The Board's econometric and labor economics expert, Dr. David Blanchflower, reviewed the work histories of the 1,470 CTU members who received layoff notices in or around July 1, 2011, to determine the impact of the layoff notice on their employment with the Board.[6] SOF ¶ 43. He determined that of the 1,470 CTU members who received a layoff notice, 630 were African American and therefore qualify as Class Members. *Id.* at ¶ 38. The CBA established a 12-month pay cycle for CTU members, which ran from September 1 through August 31. Accordingly, the 630 Class Members all received full pay and benefits through August 31, 2011. *Id.* at ¶ 39. Moreover, of the 630 Class Members, only 261 did not have a full-time job with the Board or had not retired by September 1, 2011, and therefore arguably suffered a loss as a result of receiving a layoff notice. *Id.* at ¶ 47. The 261 Class Members who suffered some cognizable loss include:

- 163 who were terminated after receiving the layoff notice;
- 34 who became day-to-day substitute teachers;
- 26 who because cadre substitutes; and

[6] Plaintiffs' expert, Dr. Jonathan Walker, admitted that he did not review Class Members' work histories after they received their layoff notice in or around July 1, 2011. Instead, he relied on the CTU's litigation position that receipt of a layoff notice was a *per se* adverse employment action, regardless of whether the layoff notice actually had an impact on an employee's employment with the Board. The Board has filed a *Daubert* motion against Dr. Walker.

- 38 who were not in a full-time position at a school by September 1, 2011 (*e.g.*, were assigned as substitute teachers or in the reassigned teachers' pool on September 1, 2011 but later found a full-time position).

Id. at ¶ 47; SOF, Exhibit 24, demonstrative aid. Dr. Blanchflower treated this group as having suffered an adverse employment action because their compensation was diminished, their job changed and reduced their career prospects, or they were terminated. *O'Neal*, 392 F.3d at 911.

The remaining 369 Class Members had full-time positions in a CPS school or had voluntarily retired[7] by September 1, 2011. SOF ¶¶ 44-46. This group suffered no gap in their employment and lost no salary, benefits, or seniority. Nor did they suffer any material inconvenience or change in their working conditions. In fact, 140 of the 369 had returned to a full-time position in the same school by September 1, 2011.[8] *Id.* at ¶ 45. As such, these 369 individuals do not have actionable claims under Title VII because they did not suffer an adverse employment action as a result of receiving a layoff notice. *See O'Neal*, 392 F.3d at 911-12 ("A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either."); *see also Nichols*, 510 F.3d at 786-787 (paid administrative leave was not an adverse employment action because the plaintiff's "position, salary, or benefits were [not] impacted by the paid administrative leave" and he ended up in a substantially similar position).

Ajayi v. Aramark Business Services, Inc. is highly instructive. 336 F.3d 520 (7th Cir. 2003). In February 2000, Ajayi was issued a memorandum stating that her position was being eliminated and that she was being demoted. *Id.* at 524-26. Aramark, however, never actually demoted Ajayi. *Id.* at 524. Ajayi nonetheless filed a charge of discrimination with the EEOC and later brought suit

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[7] A total of 34 Class Members had voluntarily retired by September 1, 2011. SOF ¶ 44. Ten of the retirees had actually retired as early as 2009, but were working on a non-annual or hourly basis to avoid cancellation of their pensions. *Id.*; *see* 40 ILCS 5/17-147(b). Pursuant to Article 44-39 of the CBA, retired teachers could not supplant or displace appointed teachers. SOF ¶ 44. Thus, these retired teachers had no legitimate expectation of continued employment.

[8] An additional 195 of the 369 Class Members had a full-time position in a different Board school by September 1, 2011. *Id.* at ¶ 43.

alleging Aramark discriminated against her due to her race and identifying the February 2000 demotion as one specific instance of discrimination. *Id.* at 526, 528. The Seventh Circuit concluded that Ajayi could not establish that she suffered an adverse employment action because "she, in fact, never was demoted." *Id.* at 531. As the Court explained, "[a]n unfulfilled threat, which results in no material harm, is not materially adverse." *Id.*; *see also Lanza v. Postmaster Gen. of U.S.*, 570 F. App'x. 236, 239-40 (3d Cir. 2014) (concluding that receipt of a notice of proposed removal was not an adverse employment action because it was later rescinded and did not result in a demotion, suspension, or alteration of the employee's compensation or terms of employment).

The rule and rationale of *Ajayi* and *Lanza* apply to the 369 Class Members who were in full-time positions by September 1, 2011 and suffered no gap in employment or loss of pay or benefits as a result of receiving a layoff notice. For these individuals, the layoff notices were nothing more than "unfulfilled threats" that resulted in "no material harm" and therefore were not "materially adverse" employment actions actionable under Title VII. *See Ajayi*, 336 F.3d at 531. These 369 Class Members cannot proceed on their Title VII claims as a matter of law.

2. The Board's layoff decisions did not have an adverse impact on the 261 Class Members who suffered an adverse employment.

The appropriate population for purposes of the adverse impact analysis is the 261 Class Members with actionable Title VII claims (*see supra* Argument Section I.A.1). *See Aliotta v. Bair*, 614 F.3d 556, 569 (D.C. Cir. 2010) (explaining that the "group of employees actually hurt by [a reduction in force] and thus probative of the plaintiff's age discrimination claim were those who had received [reduction in force] notices and were either separated or downgraded as a result" (internal quotations omitted) (*citing Schmid v. Frosch*, 680 F.2d 248, 250-51 (D.C. Cir. 1982))). The Board's layoff decisions did not have an adverse impact on these 261 Class Members.

The Board's expert, Dr. Blanchflower, ran multiple variable regressions to determine whether being African American was a statistically significant predictor of a CTU member

suffering an adverse employment action after receiving a layoff notice. SOF ¶ 48. In his analyses, Dr. Blanchflower controlled for relevant variables including race, probationary teacher and tenure status, years of tenure, change in enrollment both in the current year and over time, and individual performance evaluations. Dr. Blanchflower also ran a second regression controlling for school "fixed effects," a methodology used by Plaintiff's expert, Dr. Jonathan Walker, which Dr. Walker testified controlled for all variables within a school. *Id.* In each of these regressions, the African American variable was not statistically significant. In other words, when controlling for other potentially explanatory variables, a CTU member's African American race was not the reason for the adverse employment action. *Id.* at ¶ 49. Dr. Blanchflower's results demonstrate that the Board's layoff decisions did not have an adverse impact on the 261 Class Members who suffered an adverse employment action. *Id.*; Ex. 12, Blanchflower Amend. Rep., Tables 4 & 5. Dr. Walker offered no statistical evidence to rebut this conclusion.

Dr. Walker did not analyze the work histories of the CTU members who received layoff notices, and therefore did not determine which of the Class Members actually suffered an adverse employment action as a result of receiving a layoff notice. SOF ¶ 48. Instead, Dr. Walker analyzed the adverse impact of the Board's layoff decisions on all 630 Class Members and determined adverse impact existed for this entire group. *Id.* at ¶ 50. By failing to consider the actual harm following receipt of a layoff notice, Dr. Walker ignored the rule and rationale of *Aliotta* and considered individuals who (1) suffered no loss in pay or benefits, (2) voluntarily retired, (3) received a promotion, and (4) in at least one case, died, as having suffered an adverse employment action for purposes of his analysis. *See* 614 F.3d at 569. As a result, Dr. Walker's analysis improperly inflated the number of Class Members actually harmed by the Board's layoff decisions, and therefore lacks probative value. *Cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977) (The "usefulness" of statistical evidence "depends on all of the surrounding facts and circumstances."); *Tinker v. Sears, Roebuck & Co.*, 127 F.3d 519, 524 (6th Cir. 1997) (Statistical

evidence "is rendered suspect when the sample includes persons" who were not subject to the complained-of adverse employment action.). The Court should reject Dr. Walker's flawed analysis and conclusion. *See also* Board's Motion to Exclude the Reports and Testimony of Dr. Walker.

The evidence establishes that the Board's layoff decisions did not have an adverse impact on the 261 Class Members who suffered an adverse employment action. Accordingly, Plaintiffs cannot establish a *prima facie* Title VII disparate impact claim and this Court should grant summary judgment in favor of the Board on Count I.

B. The Board's layoff decisions were practical business choices that were justified by business necessity and complied with the CBA.

Even if Plaintiffs could establish that the Board's layoff decisions had an adverse impact on Class Members, the Board satisfies its burden to show business justification for the layoff decisions. Disparate-impact liability condemns only practices or policies that are "artificial, arbitrary, and unnecessary," while authorizing "employers and other regulated entities . . . to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system." *Inclusive Cmtys.*, 135 S. Ct. at 2518, 2524. Accordingly, a business justification for a challenged practice need not be "essential" or "indispensable" to the business to rebut the prima facie impact case. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) (superseded by statute on other grounds). Instead, the proffered justification need only serve "the legitimate employment goals of the employer." *Id.* The Board's 2011 layoffs were practical business choices justified by a $428 million budget deficit and dramatic declines in student enrollment. Both of the justifications are legitimate employer concerns upon which the Board was justified to act under *Wards Cove* and *Inclusive Communities*.

The Board initially projected a $724 million budget deficit for the 2011-2012 year. SOF ¶ 10. The budget deficit was due to many factors beyond the Board's control, including the loss of $260 million in federal stimulus money from the ARRA, the loss of state revenue, step and lane

salary increases under the CBA and increasing operational costs. *Id.* at ¶ 11. The Board attempted to address the deficit first by releasing $140 million in TIF funds and raising $140 million in tax revenue, which reduced the projected deficit to $428 million. *Id.* at ¶¶ 61-62. The Board also made operational and programmatic spending cuts, including a reduction of $107 million in Central Office spending, $27 million in operations efficiencies, and $86.7 million in program reductions. *Id.* at ¶ 15. These cuts lowered the deficit to approximately $200 million. Ultimately, because employee expenses made up nearly 70% of the Board's projected operating expenses, and it had to pay annual step and lane salary increases under the CBA, the Board made the practical choice to reduce its workforce to address the remaining budget deficit and declining enrollment.

On top of this budget crisis, the Board was also facing enrollment declines in many schools. In the decade leading up to the 2011 layoffs, the number of students in CPS declined by 7.6 percent, while the number of African American students declined by 25.2 percent.[9] *Id.* at ¶ 17. This dramatic decline in enrollment translated to fewer required teacher positions under the negotiated class size and quota formulas in the CBA, which were based on school enrollment. *Id.* at ¶¶ 20-21. Under the circumstances, the Board's decision to close positions in schools with declining enrollment was reasonable, practical, and consistent with the CBA and Illinois school code.

The overwhelming weight of the evidence demonstrates that the 2011 layoffs were not "artificial, arbitrary, [or] unnecessary." *Inclusive Cmtys.*, 135 S. Ct. at 2524. There is no contested, triable issue as to the justification for, and frankly, the necessity of the 2011 layoffs in light of the budget deficit and declining enrollment.

[9] This decline closely corresponded with a decline in the African American population in Chicago, in general, during this time. SOF ¶ 16.

C. Plaintiffs offer no equally effective and less discriminatory alternative to layoffs available to the Board in 2011.

Because the Board's 2011 layoff decisions were justified by business necessity, Plaintiffs have the burden of proving that there was an equally effective, less discriminatory alternative to layoffs available to the Board in 2011. *Adams v. City of Chicago*, 469 F.3d 609, 613-614 (7th Cir. 2006). The purpose of this step is not to "second guess" the Board's business decisions. *See Johnson v. City of Memphis*, 770 F.3d 464, 472 (6th Cir. 2014). Accordingly, to satisfy this step, Plaintiffs "must demonstrate: (1) the availability of alternative procedures that serve the [Board]'s legitimate interests and (2) produce 'substantially equally valid' results, but with (3) less discriminatory outcomes." *Id.*; *see Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988).

Plaintiffs "may not rest on speculation regarding the availability, validity, or less discriminatory nature of their proffered alternatives." *See Johnson*, 770 F.3d at 472; *see also Allen*, 351 F.3d at 313, 316-17 (deeming insufficient "vague or fluctuating" alternatives, and finding that the plaintiffs failed to substantiate their "bare assertion" of valid, less discriminatory alternatives). Rather, Plaintiffs must demonstrate that a proposed alternative would be "equally effective" at serving the defendant's interests, taking into account "[f]actors such as the cost or other burdens" that the alternative would impose. *Wards Cove*, 490 U.S. at 661. Further, an alternative that does not result in "less disparate impact" compared to the challenged policy will not withstand scrutiny in step three. *Inclusive Cmtys.*, 135 S. Ct. at 2518.

Plaintiffs argue that the Board could have done any of the following to avoid the disparate impact of the 2011 layoffs: (1) utilize "nondiscriminatory factors other than student enrollment" and exempt high poverty schools from layoffs; (2) conduct an adverse impact study; (3) implement a policy where teachers were transferred to vacant positions in other schools for which they were qualified; (4) raise property taxes and ask for additional state funding; (5) release TIF funds; or (6) reduce excess salaries of Board administrators. *See* SOF ¶¶ 57-64. Plaintiffs have failed to

substantiate with admissible evidence the availability, validity, and less discriminatory nature of their proposed alternatives. Their proposed alternatives amount to speculation and spit-balling, and do not pass muster under *Wards Cove* and *Inclusive Communities*.

Plaintiffs have failed to meet their burden on their first proposal. Plaintiffs offer no evidence that relying on student enrollment as a factor to allocate positions to schools was discriminatory. Nor can they. The CBA, itself, authorizes staffing formulas based on student enrollment. SOF ¶ 21. Under the class size formulas negotiated in the CBA, declining student enrollment resulted in fewer quota positions at a school. *Id.* The Board was required to follow the CBA in allotting quota positions to schools and was not required to maintain unnecessary positions at schools with declining enrollment. Further, Plaintiffs have not provided a workable definition of the "high poverty" schools that should have been exempted from layoffs.[10] *Id.* at ¶ 57. Plaintiffs have also failed to demonstrate that the Board could have addressed its budget deficit while ignoring student enrollment information and exempting high poverty schools from the 2011 layoffs. Nor have they shown that doing so would have had a less discriminatory impact.

Plaintiffs' second proposal fails as well. Assuming for a moment that an adverse impact analysis would have alerted the Board to the alleged discriminatory impact of the 2011 layoff decisions, what then? Plaintiffs offer no valid, available and less discriminatory alternative to resolve the financial crisis and enrollment decline confronting the Board. *Id.* at ¶ 59; SOF, Ex. 30, Jankov Dep. II, 132:12-14 (stating simply that the Board would "be aware . . . and then adjust their layoff policy accordingly"). When further pressed on what the Board should have done with respect to the layoffs, Plaintiffs reverted back to their first proposal, addressed above. SOF, Ex. 30, Jankov Dep. II, 132:15-20. Plaintiffs also fail to demonstrate how the Board could have

[10] Plaintiffs point to schools with "high incidences of free and reduced lunch," Jankov Dep. II, 132:17-20. This definition would involve the vast majority of CPS schools. Approximately 80% of CPS schools had at least 80% of their students receiving free or reduced lunch in 2011 (almost 60% of schools had at least 90% of their students on free or reduced lunch that year). SOF ¶ 56.

adjusted its layoff policy to select more non-African American teachers while also complying with the terms and process for layoffs negotiated by the CTU in the CBA, including seniority. *Id.* at 130:17-137:5. The Board could not have determined layoffs according to the population of different racial or ethnic groups in CPS generally or in individual schools. To do so would have constituted an unconstitutional quota system. *See Ricci v. DeStefano*, 557 U.S. 557, 582 (2009) ("[A]n amorphous claim that there has been past discrimination . . . cannot justify the use of an unyielding racial quota.").

Plaintiffs have already acknowledged that their third proposal—transferring laid off teachers and PSRPs to vacant positions in other schools—was not an option available to the Board in 2011 under the seniority rules in the CBA. SOF ¶ 60. Moreover, such transfers would have violated the School Reform Act, under which principals were responsible for selecting their teachers and staff from applicants who applied directly to the school. *See* 105 ILCS 5/34-8.1. Lastly, Plaintiffs offer no evidence as to how such transfers would have addressed the Board's budget deficit, especially in light of the undisputed evidence that employee expenses, including salaries and benefits, made up approximately 70% of the Board's projected operating expenses for the 2011-2012 school year. SOF ¶ 12.

The undisputed evidence shows that in 2011 the Board did as Plaintiffs suggest in their fourth and fifth proposals (increased property taxes and released TIF funds). *Id.* at ¶¶ 61-62. The Board's $428 million budget deficit already accounted for a projected $140 million in property tax increases and $140 million in released TIF funds. *Id.* Plaintiffs offer no evidence that any additional funds were available to the Board from these sources in 2011. *Id.* at ¶ 63. And, as Plaintiffs acknowledged, the Board lacked the authority to obtain any additional funding on its own; it would have had to lobby the legislature or Illinois State Board of Education for such assistance. *Id.* Finally, Plaintiffs fail to demonstrate how either of these proposed alternatives would have addressed the declining enrollment in CPS that led, in part, to the 2011 layoffs. *Cf.*

Gillespie v. Wisconsin, 771 F.2d 1035, 1045 (7th Cir. 1985) (holding that the plaintiff's proposed alternatives were insufficient because he failed to demonstrate that any of his hypothetical alternatives would have accomplished employer's goals).

Plaintiffs' sixth proposal suffers similar infirmities as the others. Plaintiffs claim that the Board should have reduced excess salaries of Board administrators. Plaintiffs ignore the fact that the Board did, in fact, cut approximately $107 million in Central Office spending to reduce the deficit. SOF ¶ 15. Moreover, Plaintiffs never identified which central office administrators had excessive salaries in 2011 and produced no evidence as to how much money the Board could have saved making further Central Office cuts. 63. Lastly, Plaintiffs offered no evidence as to how such cuts would have addressed the declining enrollment in CPS. *See Gillespie*, 771 F.2d at 1045.

At best, Plaintiffs' alternatives are "vague [and] fluctuating." *Allen*, 351 F.3d at 313. Plaintiffs fail to substantiate their claim that the proposed alternatives were, in fact, available to the Board in 2011, and would have been equally effective and less discriminatory than the layoffs. *See id.* at 316-17. Thus, the Board is entitled to summary judgment on the disparate impact claim.

II. The Board Did Not Intentionally Discriminate Against African Americans.

A. Plaintiffs failed to exhaust their administrative remedies on their disparate treatment claims.

Plaintiffs' individual and class claims of disparate treatment fail at the outset because they have failed to exhaust their administrative remedies with respect to these claims. A Title VII plaintiff may bring only those claims that were included in his or her EEOC charge or that are "within the scope of the EEOC charge" *Ajayi*, 336 F.3d at 527 (internal quotation omitted). The purpose of this rule is to give the EEOC and the employer an opportunity to settle the dispute outside of court, and to provide the employer fair notice of the conduct being complained of. *See Haugerud v. Amery School Dist.*, 259 F.3d 678, 689 (7th Cir. 2001). When the EEOC charge "alleges a particular theory of discrimination," a subsequent complaint raising "allegations of a

different type of discrimination" is outside the scope of the charge "unless the allegations in the complaint can be reasonably inferred from the facts alleged in the charge." *Cheek v. W. & S. Life Ins. Co.,* 31 F.3d 497, 503 (7th Cir. 1994).

Here, Plaintiffs' EEOC charges were limited to one theory: disparate impact; there is nothing in the charges that would reasonably lead one to conclude that the Board engaged in intentional discrimination. SOF ¶ 75. Equally important, Plaintiffs' position statement and supplemental position statement with the EEOC, again, only raised allegations of disparate impact on African American CTU members; indeed, their supplemental position statement was entitled "Disparate Impact Position Statement." *Id.* at ¶ 65. Accordingly, Plaintiffs failed to put the Board on notice of the separate theory that the Board intentionally discriminated based on race. For these reasons, Plaintiffs failed to exhaust administrative remedies with respect to their disparate treatment claims and those claims should be dismissed. *Geldon v. S. Milwaukee School Dist.*, 414 F.3d 817, 819-20 (7th Cir. 2005).

B. The Individual Plaintiffs offer no evidence that their layoffs were motived by discriminatory intent.

Even if they had exhausted their administrative remedies, to avoid summary judgment on their disparate treatment claims, the Individual Plaintiffs must present evidence that the Board intentionally singled them out for layoff because they are African American. *Madlock v. WEC Energy Grp., Inc.*, 885 F.3d 465, 470 (7th Cir. 2018). They have failed to do so. The evidence establishes that the three individual Plaintiffs were selected for layoff, in the normal course, by the principals of their three respective schools. The Board did not have any involvement in the principals' layoff decisions.

Plaintiff Fells had an unsatisfactory performance rating and was selected for layoff by Stagg Principal Ruth Miller, who Fells claimed was "the kind of evil that none of us were used to dealing with." SOF ¶ 66. This vague, subjective statement is not evidence that Plaintiff Fells was

discriminated against because of her race. *Cf. Hill v. AMOCO Oil Co.*, No. 97 C 7501, 2003 WL 262424, at *5 (N.D. Ill. Jan. 27, 2003) ("A person's subjective belief that she has been discriminated against, without more, is not sufficient to prove disparate treatment."). Plaintiff Edmonds was laid off from her position at Henderson Elementary, when funding for the position ended at the close of the 2010-2011 school year and led to closure of the position. SOF ¶ 68. Plaintiff Perry was selected for layoff from Tanner Elementary because she was one of two teachers with an unsatisfactory performance rating at the school and had the lowest "bumping" rights. *Id.* at ¶ 72. Plaintiff Perry submitted a complaint to the Board's EEO Office regarding the 2011 layoffs that younger, less experienced teachers were being retained over her; she did not, however, allege discrimination based on her race. *Id.* at ¶ 73.

The Individual Plaintiffs offer no evidence—either in their virtually identical EEOC Affidavits, or in their interrogatory answers or depositions in this case—as to how the Board intentionally discriminated against them individually. Rather, their Affidavits to the EEOC were limited to their opinions that the 2011 layoffs had a "disparate impact on minority teachers." *Id.* at ¶ 75. Similarly, the Individual Plaintiffs never identified any way in which they were singled out or treated differently than the other Class Members. *Id.* at ¶ 76. Accordingly, just as the Class disparate treatment claim fails, as discussed below, so to do the Individual Plaintiffs' claims.

C. Plaintiffs presented no evidence of intentional discrimination to support their Class disparate treatment claim.

Plaintiffs also have adduced no evidence to support the Class claim that the Board intentionally discriminated against Class Members in instituting the 2011 Layoffs. At best, Plaintiffs try to use their flawed statistical evidence of disparate impact as evidence of intentional discrimination. But, even if the Court accepts Plaintiffs' flawed statistical evidence, that evidence is insufficient, by itself, to prove that the Board acted with discriminatory intent. *Bell v. EPA*, 232 F.3d 546, 552 (7th Cir. 2000) (rejecting "efforts to use statistics as the primary means of

establishing discrimination in disparate treatment situations"). There is nothing in the record to elevate Plaintiffs' flawed statistical evidence to proof of intentional discrimination.

Plaintiffs make two conclusory allegations in their complaint regarding a "pattern and practice" of discrimination in the Board's layoff policies, *see* Dkt. 167-1, ¶¶ 1, 8, yet, they produced no evidence to support this claim. The evidence Plaintiffs presented relates only to 2011, not prior years. Likewise, the Individual Plaintiffs' EEOC charges identify the earliest date of alleged discrimination as June 2011 and do not claim a pattern of discrimination in prior years. *See* Dkt. 167-2. There is also no anecdotal evidence to support a pattern or practice here. *See, e.g.*, *Teamsters,* 431 U.S. at 337; *King v. Gen. Elec. Co.*, 960 F.2d 617, 624 (7th Cir. 1992) ("Without significant individual testimony to support statistical evidence, courts have refused to find a pattern or practice of discrimination.").

Lastly, Plaintiffs defend their disparate treatment claim by arguing that the Board used student enrollment as a proxy for race of CTU members in making the 2011 layoff decisions. *See* SOF, Ex. 3, CTU Resp. 6th Rogs, ¶¶ 2-3. Plaintiffs cite no factual evidence to support this assertion. Instead, Plaintiffs rely, once again, on their expert, Dr. Walker, who reported a correlation between schools with higher percentages of Class Members and schools with greater declines in enrollment. SOF, Ex. 28, Walker Rep., p. 24. Under the law, however, correlation does not mean causation. *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1044 (7th Cir. 1988). Dr. Walker's opinion as to this correlation says nothing about whether the Board intentionally used enrollment to make race-conscious layoff decisions. In addition, Plaintiffs offer no evidence from any Board member or CPS official to support their claim that the Board used enrollment as a proxy for race.

The undisputed evidence shows that the Board followed a multi-layered process in instituting the 2011 layoffs, authorized by Illinois law, Board policies and the CBA negotiated and agreed to by the CTU. There was no room nor tolerance for intentional discrimination in this process. *See* SOF ¶¶ 20, 23, 32, 34-36. The decisions regarding which CTU members in a school

would receive a layoff notice were made by the school's principal in accordance with the terms of the CBA. *Id.* at ¶¶ 32, 34-35, 36. The Board only stepped in, through Workforce Planning, if a principal's choice did not comply with the CBA. *Id.*

Moreover, the results of Dr. Blanchflower's multiple regression analyses confirm that the 2011 Layoffs were instituted in conformance with the CBA. *Id.* at ¶¶ 54-56. First, school enrollment was statistically significant and negative, meaning that as a school's enrollment declined, the likelihood that a CTU member would suffer an adverse employment action increased. *Id.* at ¶ 55. Moreover, a CTU member's years of tenure was also significantly negative; the more years a CTU member had on tenure status, *e.g.* their seniority or "bumping" rights, the less likely they were to be subject to an adverse employment action. *Id.* at ¶ 53. Tenured teachers were the least likely to suffer an adverse action, *id.* at ¶¶ 53-54, which is consistent with the order of layoffs under Appendix H and Board Policy 504.2A, *see id.* at ¶¶ 27-28. Further, CTU members with lower performance ratings were more likely to be laid off than those with higher performance ratings. *Id.* at ¶ 56. In sum, the evidence demonstrates that the Board did not act with racial animus in implementing the 2011 layoffs, but, rather, did what it was authorized to do under the CBA. Accordingly, Plaintiffs' Class disparate treatment claim also fails.

III. The CTU lacks standing to pursue this action on behalf of its members.

If any portion of Plaintiffs' suit survives summary judgment, the CTU should be dismissed as a plaintiff because it lacks standing to represent the rights of its members in this litigation. An organization, like the CTU, does not have "associational standing" to represent the rights of its members when, as here, "the association's suit, if successful, would cause a direct detriment to the interests of some of its members." *Retired Chi. Police Ass'n v. City of Chicago*, 76 F.3d 856, 864 (7th Cir. 1996) ("*RCPA II*"). Under such circumstances, the association lacks standing unless it can show that "the litigation was properly authorized in accordance with the association's procedures." *Id.* at 865. Where such a factual challenge is made to a plaintiff's standing, the

plaintiff bears the burden of establishing "by a preponderance of the evidence, or proof to a reasonable probability, that standing exists." *Id.* at 862. Accordingly, as Judge Shadur concluded in ruling on the Board's motion to dismiss for lack of standing, the CTU "may defeat Board's challenge to its associational standing by showing either that the litigation will not cause a direct detriment to any of its members or by showing that the litigation was properly authorized." Dkt. 37, p. 6 (emphasis in original). The CTU has failed to carry its burden on either front.

If Plaintiffs prevail in this litigation, the result will be detrimental to currently-employed CTU members. As part of the requested relief, Plaintiffs seek "[a]n order reinstating Plaintiffs and Class members to their positions or substantially equivalent positions . . . ." Dkt. 167-1, p. 17. Reinstatement of Class Members would necessarily result in currently-employed CTU members being displaced. This inherent conflict of interest is especially true given the continuing decline in student enrollment in CPS (total enrollment has decreased an additional 10% since the 2011-2012 school year). *See* SOF ¶ 17. This increasing decline in student enrollment translates to fewer teaching positions in CPS. Consequently, reinstatement of Class Members will inevitably cause currently-employed CTU members to lose their positions.

Reinstatement would also unfairly compromise the seniority of currently-employed CTU members by putting Class Members ahead of CTU members who were not displaced as a result of the layoffs. And, in some instances, reinstatement would result in Class Members displacing currently-employed CTU members of a different race, which would violate Article XII Section 3 of the CTU's Constitution barring the CTU from making "any distinction among its members on account of race, ethnicity, sex, sexual preference, age, or political, social, religious, or economic views." SOF ¶ 4, Ex. 1, Jankov Dep. I, Ex. 36, CTU Const., Art. 12 § 4. The CTU offers no evidence as to how the suit, if successful, will not be detrimental to the interests of currently-employed CTU members.

The CTU lacks associational standing due to these conflicts of interest, unless it can prove that this litigation was properly authorized in accordance with CTU procedures. *RCPA II*, 76 F.3d at 865. Article XII of the CTU's Constitution, entitled "Safeguards and Obligations," states: "[t]his Union shall not promote or permit itself to be used to promote any advantage to any member of a particular group of its members, unless the House of Delegates shall decide by majority vote that such action is in the interest of the Union as a whole." SOF ¶ 4; Ex. 1, Jankov Dep. I. Ex. 36, Art. XII § 1. Article XII states further that "[t]he union [sic] shall not take any action affecting a particular group of its members without the advice and counsel of that group." *Id.* at Art. XII § 2. It is undisputed that this litigation was never voted on by the CTU's House of Delegates, and therefore did not receive majority approval that it was in the interest of the Union as a whole. SOF ¶ 4; Ex. 1 , Jankov Dep. I, 83:19-21 ("Q: Did the CTU take any vote to determine whether it should bring this lawsuit? A: No."). Nor is there any evidence that such authorization was subsequently obtained. SOF ¶ 4. Absent such proof, the CTU cannot proceed with this suit. *Cf. 1550 MP Rd. LLC v. Teamsters Local Union No. 700*, 2019 IL 123046, ¶¶ 24-27 (voiding *ab initio* a union contract because union failed to provide notice and an opportunity to vote to its members, as required under its bylaws).

The CTU has failed to carry its burden of proving by a preponderance of the evidence that it has associational standing. Therefore, it should be dismissed from this litigation going forward, should any portion of Plaintiffs' claims survive summary judgment.

CONCLUSION

For all of the above reasons, the Court should grant summary judgment in favor of the Board on Count I and II of the Second Amended Complaint, and, if any portion of the case survives summary judgment, dismiss the CTU as a plaintiff in this suit.

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Respectfully submitted,

BOARD OF EDUCATION FOR THE CITY OF CHICAGO

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