No. 11-4200

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMBER BLUNT, *et al*.,
Appellants,

v.

LOWER MERION SCHOOL DISTRICT, *et al*.,
Appellees.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION NO. 07-3100

OPENING BRIEF OF APPELLANTS LYDIA JOHNSON, *et al.*

Carl W. Hittinger, Esq.
Lesli C. Esposito, Esq.
John D. Huh, Esq.
Monique M. Galloway, Esq.
Nathan P. Heller, Esq.
Patrick Castañeda, Esq.
DLA PIPER LLP (US)
1650 Market Street, Suite 4900
Philadelphia, PA 19103
T. (215) 656-2449
F. (215) 606-2149

Attorneys for Appellants (11-4200)

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I. JURISDICTIONAL STATEMENT

Appellants appeal the final judgment entered by the District Court on October 20, 2011 that disposed of all parties' claims. (A-4-39.) Appellants filed a Notice of Appeal in the District Court on November 18, 2011. (A-1-3.)

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a) and 42 U.S.C. § 2000d-2. The District Court's dismissal with prejudice constituted a final order. Thus, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES[1]

A. Whether the District Court erred in concluding, for purposes of summary judgment, that no reasonable jury could find that Lower Merion School District acted with the racial animus necessary to sustain liability under Title VI of the Civil Rights Act of 1964 and/or under the Equal Protection Clause of the United States Constitution.

Suggested Answer: Yes.

Preserved for review: (A-1117-1144.)

B. Whether the District Court erred in granting summary judgment to the District without considering appellants' challenge under *Daubert v. Merrel Dow Pharmaceuticals*, 509 U.S. 579 (1993), to the admissibility of evidence offered by Lower Merion School District's expert statistician.

Suggested Answer: Yes.

Preserved for review: (A-2914-2934.)

[1] Appellants incorporate by reference the argument regarding the improper dismissal of the Pennsylvania Department of Education, as put forth in the brief of Appellants Blunt and Concerned Black Parents, Inc., No. 11-4201.

III. RELATED CASES & PROCEEDINGS

All proceedings related to this case were assigned to a single docket in the District Court, No. 2:07-CV-3100 (E.D. Pa.). Two separate appeals have been filed in this Court, each representing a discrete group of plaintiffs. The present appeal, assigned to Docket No. 11-4200, addresses the claims of appellants Lydia Johnson, Carol Durrell, Chantae Hall, Saleema Hall, Christine Dudley, Walter "Jon" Whiteman, Eric Allston, June Coleman, Richard Coleman, Lynda Muse, and Quiana Griffin. The related appeal, assigned to Docket No. 11-4201, addresses the claims of appellants Amber Blunt, Crystal Blunt, Michael Blunt, and Concerned Black Parents, Inc. ("CBP"). Both appeals have been consolidated with the cross-appeal filed by Lower Merion School District (Docket No. 11-4315) for purposes of appellate proceedings.

IV. STATEMENT OF THE CASE

Lower Merion School District ("the District") has maintained for decades a policy, practice and custom of essentially segregating African American students. More specifically, the District improperly classifies and disproportionately places African American students in special education classes while excluding them from regular or upper level placements. Appellants are current and former African American students of the District, and are victims of that discrimination.

In response to the District's racial discrimination, Appellants initiated the action below before the District Court on July 30, 2007. Appellants filed their Third Amended Complaint against Appellees the District and the Pennsylvania Board of Education ("PDE") on August 5, 2008. A jury was requested. Subsequently, Appellants moved for class certification, which the District Court denied on August 19, 2009.

On July 15, 2011, Appellees moved for summary judgment as to the surviving individual claims for racial discrimination under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the United States Constitution for the remaining Appellants, namely Carol Durrell and her daughters Saleema Hall and Chantae Hall, Christine Dudley and her son Walter Jonathan Whiteman, June Coleman and her son Richard Coleman, Lynda Muse and her daughter Quiana Griffin, Eric Allston, and Lydia Johnson, and relied upon their

expert's opinions to support their motion for summary judgment. (A-3658-59, A-3734-37, A-2807, A-2844-46.) On September 16, 2011, Appellants filed a *Daubert* motion objecting to the admissibility of Appellees' expert's opinion and requested that the trial court conduct an *in limine* hearing on their objections. (A-2916-34, A-2933.)

On October 4, 2011, the District Court heard oral argument on the District's motion for summary judgment. (A-3065-3121.) No *in limine* hearings were conducted by the court. The District Court granted the District's motion on October 20, 2011. (A-4-37.) Appellants timely filed their notice of appeal on November 18, 2011. (A-1-3.)

V. STATEMENT OF THE FACTS

The District has engaged in a practice, policy and custom of discriminating against African American students, including Appellants, based largely on racial stereotypes and prejudices. Appellants began experiencing such racial discrimination early and often throughout their time in the District's schools. As explained in detail below, six of the seven Appellants were misidentified as being learning disabled and misplaced in lower level and special education classes based primarily on their race. This misidentification and incorrect placement resulted in Appellants being precluded from subsequently taking regular level classes, including in fundamental subjects, as well as upper level classes needed to adequately prepare them for college.

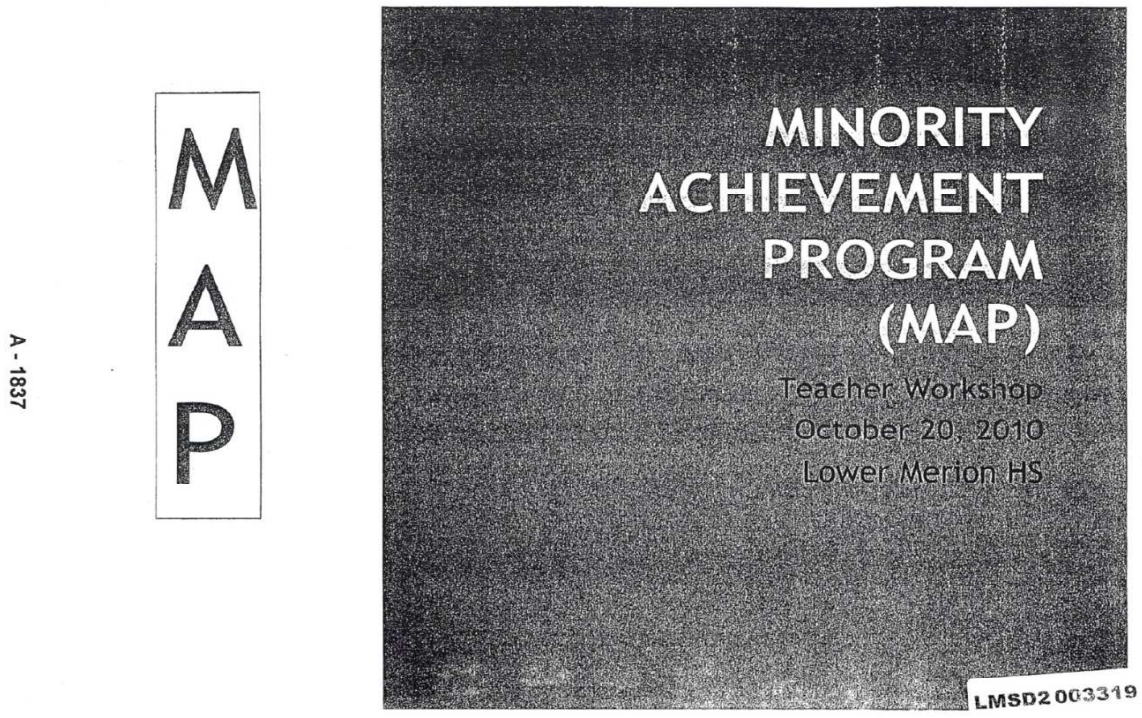
A. Lower Merion School District's Practice, Policy and Custom of Discriminating Against African American Students

Viewed in the light most favorable to Appellants, the summary judgment record established that racial discrimination exists throughout the District. This was borne out through the testimony of Barbara Moore-Williams, an independent consultant specifically hired by the District eight years ago to address minority issues. (A-1412, A-1416.) The District, through its current superintendent, Christopher McGinley, has admitted that some members of the District's Board believe that "African-American students" entering the District schools "create[]

additional stress that doesn't need to be there." (A-1424.) Such racial stereotypes have permeated the District and fueled a pattern and practice of misidentifying African American students for placement in lower level and special education classes. Indeed, the District has conceded in the face of official reprimand, that it (1) "stands out in comparison to other high achieving school districts as doing relatively poor with [its] African American achievement," and (2) has an overrepresentation of the African American student body in "special education and lower track classes." (A-1539, A-1147.6, A-1538-48.)

In an effort to address the history of racial discrimination in the District, the District hired Dr. Moore-Williams, a trained Education/Diversity consultant, to provide "cultural proficiency" training to its staff and personnel in 2005. (A-1147.3, A-1410-11.) At her deposition, Dr. Moore-Williams admitted that the prejudice among the District teaching staff toward African American students continues. (A-1412, A-1416.) Dr. Moore-Williams further conceded that this prejudice negatively affects African Americans' educational experiences, and is partly responsible for the District's disproportionate selection of African Americans for placement in lower level classes, including in special education. (A-1147.19, A-1415-16.)

A presentation prepared as part of the District's Minority Achievement Program ("MAP") done in a purported effort to turn the racial discrimination tide, only serves to further demonstrate the racial animus that exists in the school district. The presentation was prepared as a training material for a teacher workshop as part of the District's MAP program given on October 20, 2010 and is filled with discriminatory racial stereotypes. (A-1837.) The cover page of the presentation clearly shows it to be a District prepared and utilized business record produced by the District in response to Appellants' discovery requests:



(A-1837.) Specifically, the presentation states that African American students differ from Caucasian students because they:

- [prefer] more kinesthetic / tactile learning.
- [prefer] subdued lighting rather than bright light.
- rely heavily on visual input rather than auditory input.

* * *

- rely more on information from their surroundings.

* * *

- react intensely to being praised or criticized.

* * *

- respond better to awards such as praise, smiles, pats on the back, and the like.
- avert their eyes while being confronted about their behavior.

(A-1837-39.)

The racial attitudes reflected in the testimony of Dr. Moore-Williams and the District's MAP presentation also affected the process used to identify Appellants and others for placement in special education classes. The District evaluated each of the Appellants for special education identification and/or services in elementary school and placed them in some type of special education program and/or service going forward. (A-1147.6-1147.7, A-1284-85, A-2253, A-2703-31, A-2533-80.) These lower level and/or special education classes were comprised of nearly all, if not all, African American students. (A-1147.32, A-1187-97, A-1147.34, A-1192-96, A-1147.43, A-1638-40, A-1147.44-1147.45, A-1254, A-2217-30, A-1147.50,

A-1285-88, A-1147.51, A-1289, A-1291.) The District's process of identifying African American students as learning disabled is fraught with errors and inconsistencies, and is tainted by the racial discrimination that exists throughout the school district.

For example, the District admits that is has no written policies governing psychological testing or consistent standard measures to determine whether a student should be in special education. (A-1147.11, A-1306-07, A-1147.12, A-1394.) As a result of the District's arbitrary approach to evaluating Appellants and the District's perpetuation of racial stereotypes, the District misidentified most of the Appellants as having a learning disability despite having average intelligence and/or specific skills for which the student was identified as lacking. (A-1147.26, A-1876, A-1147.30, A-1815, A-1925-33, A-1147.36, A-1326-27, A-1147.40, A-1648, A-1147.47, A-1255, A-1307, A-2320-21, A-2342, A-1147.48, A-1147.51, A-2256-58.) Further, some of the misidentifications of Appellants lacked necessary components, such as basic parental consent, (A-1147.29, A-1799, A-1147.50, A-2260) and standard classroom observation. (A-1147.25, A-1884.) In most cases, the District did not even review the testing protocols used for an evaluation to ensure the identification was correct. (A-1147.26, A-1406.) In

addition, the District failed to notify Appellants' parents of their right to review those protocols.

The District's Director of Student Services, Barbara Shapiro, testified that parents/guardians have the right to ask for a private psychologist to independently review the testing protocols to determine whether the child truly has a learning disability. (A-1147.11, A-1395.) However, many Appellants' parents were not informed of this fundamental right. (A-1147.11, A-1396-97.) Moreover, both Shapiro and the District's Assistant Superintendent, Michael Kelly, admitted that the District routinely destroyed the testing protocols without prior notification to the parents, including protocols of the Appellants, thereby obfuscating the ability to later determine if students were improperly placed. (A-1147.11, A-1375, A-1396, A-1399, A-1405, A-1579-1635.) The District's written policies specifically endorsed this practice : "[t]esting protocols with respect to psychoeducational testing performed by District personnel are routinely destroyed within one year of the date of the testing without prior notification to the parents or eligible student." (A-1588.)

As acknowledged by the District's counsel at oral argument before the District Court, parents have the right to opt their child(ren) out of special education. (A-3705.) However, Appellants' parents encountered extreme

resistance from the District whenever they tried to opt their children out of special education services and/or special education. (A-1147.28, A-1167, A-1147.33, A-1796-98, A-1818, A-1147.43, A-1229-33, A-1147.53, A-2259.) For example, at the end of Appellant Quiana Griffin's fifth grade year, her mother requested that the District remove her from the REACH program, a program designed to provide additional support with reading comprehension. (A-1147.32, A-1201, A-1796.) The District prepared an IEP purportedly accommodating this request, but sent a different IEP to Quiana's sixth grade school under which she would continue in the REACH program. (*Id.*) When Quiana's mother discovered this, she contacted Doug Arnold, an assistant principal at Quiana's school, to request removal yet again. (A-1147.33, A-1796-98.) Arnold refused, stating "[REACH] was on her IEP and there … wasn't anything he was going to do to take her out …." (*Id.*) Likewise, Appellant Jon Whitman's mother requested that the District stop providing him with special education services in elementary, middle, and high school, but the District refused to do so each time. (A-1147.43, A-1229-33.)

The Appellants, and other African American students, also have expressed frustration with being unnecessarily and inappropriately placed in special education classes, without receiving any timely and meaningful response from the District. (A-1147.16, A-1197.) For example, Appellant Saleema Hall for years

complained that the material in her special education and lower level classes was rudimentary and not challenging. (A-1147.25, A-1166, A-1147.28, A-1167.) In fact, in Fifth Grade, Saleema told the District that she "did not want to go into Special Education." (A-1782.) The District finally removed her from special education after an independent evaluator discredited the District's identification of Saleema as learning disabled. (*Id*.) Indeed, the vice principal of Saleema's high school, Dr. Wagner Marseilles, testified that he did not believe that she should be in special education. (A-1147.28, A-1433-34.) Similarly, Appellant Chantae Hall complained that her "Math Apps II" class was "baby work" and "too easy." (A-1147.38, A-1335.) Chantae's mother passed these concerns on to her teachers and requested Chantae be transferred out of that class to Algebra I. (*Id.*) Also, the District kept Appellant Lydia Johnson in classes with children that had severe disabilities such as Down Syndrome even though she complained that her classes were not challenging enough. (A-1147.48, A-1273-74, A-1147.49, A-1277-80.)

The District has maintained a practice, policy and custom of discriminating against African American students for decades, including Appellants, by improperly steering them into lower level and special education classes. As further detailed below, the racial discrimination that African American students, including

Appellants, have endured at the hands of the District is reflected by the substantial over representation of African American students in those classes for years.

B. The Effects of Lower Merion School District's Racial Discrimination of African American Students

The disproportionate number of African American students in lower level or special education classes is evidenced in the undisputed statistical evidence as well as by the District's staff and its own documents. For example, Ms. Rebecca Metzger – employed by the District from 2006-2010 as a special education teacher, (A-1447) – testified that in one of her classes that had thirteen total students, nine students were African American, (A-1449). Further, the District's own self-assessments acknowledge that the District disproportionately misidentified African American students for special education from 2003-2010. (A-1147.8, A-2626, A-1147.9, A-1147.10, A-2693.) The District's own documents acknowledge that: (1) the District "stands out in comparison to other high achieving school districts as doing relatively poor with [its] African American achievement," (A-1539); and (2) the District has an overrepresentation of the African American student body in "special education and lower track classes." (A-1147.6, A-1538-48.)

In 2005-2008, the District failed to enroll any African American students in twelve of its offered Honors, Advanced Placement, or International Baccalaureate courses. (A-1147.14, A-1674-75.) Tellingly, on the other end of the spectrum,

African American students were drastically overrepresented in special education and lower level classes. (A-1147.9-1147.10, A-2678-86.) In every school year since then, African Americans have been overrepresented in the special education population. (*Id.*) This caused the Commonwealth of Pennsylvania's Department of Education to eventually issue a new Corrective Action Verification/School District Compliance Plan in 2006, indicating that the District was non-compliant, thus, requiring the District to develop a plan to address the disproportionality of African American students in lower level and special education classes. (A.1147.8, A-2637, A-2620.) However, the disproportionality persisted as, in the school years from 2005-2010, with African American students still making up approximately eight percent (8%) of total students enrolled in the District, yet made up approximately fourteen percent (14%) of total special education students consistently over a five year period. (A-1147.9, A-2678-86.)

The District's policy and practice of placing African American students, including Appellants, in lower level and special education classes based primarily on their race has had serious debilitating ramifications on the education of Appellants. Because of this incorrect placement, Appellants were precluded from enrolling in upper level classes (*e.g.*, honors and advanced placement classes) and many Appellants were deprived of even the general curriculum and fundamental

classes needed to adequately prepare for college. (A-1147.12, A-1349-50, A-1147.13, A-1442, A-1147.15, A-1345-46, A-1355, A-1311.)

For example, the District failed to offer science classes during each year of middle school to most Appellants. (A-1147.13, A-1442.) The District placed most Appellants in "Instructional Support Lab" ("ISL") or resource classes that do not count towards the student's GPA, which forced them to forgo classes such as science, social studies or a foreign language for the whole year. (A-1147.12, A-1349-50.) Similarly, the District placed Appellants in REACH and other reading programs, which are "pullout" classes that remove the child from the classroom. (A-1147.14-1147.15, A-1345-46, A-1355, A-1344, A-1769.) This caused Appellants to miss sessions of history or math, without an opportunity to make up those classes. (A-1147.15, A-1311, A-1147.51-1147.52, A-1294-95, 2261, A-1147.34, A-1819-20, A-1147.37-1147.38, A-1220-21.)

In addition, the District often placed Appellants in lower level or special education classes for longer periods of time than the classes were intended. For example, the District placed some Appellants in federally funded programs

designed by the federal government to provide short-term support.[2] (A-1147.25, A-1781-88, A-1147.36-1147.37, A-1165-66, A-1209-11, A-1215.) Students usually attend such programs between kindergarten and second grade, and are then returned to standard curriculum classes. The District, however, placed most of Appellants in the programs through fifth grade. (A-1147.15, A-1775-88, A-1147.36, A-1165-66.)

Additionally, the District placed many Appellants in "active" classes that the school classified as "college prep" level courses, but were actually below-grade level. (A-1147.13, A-1657.) For example, "Active Chemistry" covered far less material than regular chemistry. (*Id.*) Appellant Chantae Hall's tenth grade "Active Chemistry" class used no textbook, had no required lab period, and its tests were read aloud. (A-1147.13, A-1323-24, A-1331-32.) Also, the District admits that "Active Biology" taught to Ninth Grade African American students used a text book written for students reading at an approximately third or fourth grade level. (A-1147.13, A-1321.) These limited classes precluded Appellants from subsequently taking honors and advanced placement classes, which have

[2] Some programs are often referred to as "Title I reading programs" because they are funded pursuant to Title I of the Elementary and Secondary Education Act, 20 U.S.C. § 70.

enrollment prerequisites that do not include special education, "resource" or "active" classes. (A-1147.14, A-1463.)

VI. SUMMARY OF ARGUMENT

The District Court erred in granting the District's motion for summary judgment. Despite precedent in this Court instructing that the burden on a plaintiff in a discrimination case at the summary judgment stage must be relaxed, the District Court imposed a heightened burden on the Appellants. The District Court granted summary judgment against Appellants, finding that Appellants lacked evidence establishing that they had been misidentified as requiring special education and placed in lower level classes as a result of their race. In doing so, the District Court erred by ignoring or dismissing as inadmissible key evidence of discrimination presented by Appellants during the summary judgment proceedings. Notably, the District Court failed to properly consider evidence of a teacher training presentation showing that the District harbors racial animus toward African American students generally. In addition, the District Court failed to fully consider testimony of the District's own minority achievement consultant about admitted racism in the District in the light most favorable to Appellants, and rejected evidence from Appellant Ricky Coleman that detailed at least one occasion of racial discrimination once he was placed in special education classes.

The District Court erred by denying Appellants the right to present this and other evidence to a jury, instead taking it upon itself to summarily reject, fail to consider or wrongfully weigh and assess the evidence and credibility of witnesses.

The District Court erroneously discarded each piece of evidence in support of Appellants' case in piecemeal fashion, never looking at the evidence as a whole. By doing so, the District Court ignored this Court's instructions to review such evidence in the aggregate and be hesitant to grant a motion for summary judgment when inherently factual issues like racial intent are involved. For these reasons and the reasons set forth below, the judgment of the District Court should be reversed and this case should be remanded for trial before a jury.

VII. ARGUMENT

A. The District Court Erred in Granting the District's Motion for Summary Judgment

This court applies a plenary standard of review when evaluating a district court's entry of summary judgment. *Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir. 2009) (Aldisert, J.). Summary judgment is properly granted if there are no disputes of material fact and the movant has shown it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (Rehnquist, J.). The "party seeking summary judgment … bears the initial responsibility of informing the district court of the basis for its motion." *Id.* Once the moving party meets that burden, the court must credit all evidence offered by the non-movant, and all justifiable inferences must be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (White, J.). The court may enter summary judgment only if it concludes that no reasonable juror could return a verdict for the non-movant based on the evidence presented. *Id.* at 249; *Giles*, 571 F.3d at 322.

This case ultimately rests upon a single question: What quantum of evidence must a plaintiff produce to support an inference of intentional racial discrimination in order to overcome a summary judgment motion? The District Court entered summary judgment against Appellants after finding that they lacked

evidence to establish that, as a result of their race, the District misidentified them as requiring special education and placed them in lower level classes, where they were denied access to the same educational opportunities as their Caucasian peers. (A-33.) Appellants produced ample evidence for purposes of summary judgment to show that the District did precisely that. Among this evidence was the following:

- A PowerPoint presentation used to train District teachers in 2010, which stated that "[m]any African American students prefer … subdued lighting rather than bright light, … [and] respond better to rewards such as … pats on the back, and the like. (A-1838-39.)

- An admission from the District's independent consultant on minority achievement issues that "there's prejudice in the Lower Merion School District," including among the teaching staff, (A-1412.) and that racism is present throughout the school district. (A-1416.)

- An admission from the same District consultant that African-American students were systematically over-identified as requiring special education. (A-1418.)

- Unchallenged testimony from Appellants' expert witness Tawanna Jones, who explained that the District placed six of the seven plaintiffs in special education programs based on procedures that were "capricious" and failed to account for cultural differences between minority populations and white students, which comprise the majority of the District's student body. (A-2315, A-2318-19.)

From these facts, among others, reasonable jurors could have legitimately inferred that the District acted with the requisite racial intent when it placed Appellants in

special education classes, and the District Court by raising the bar too high erred in granting summary judgment to the District.

1. This Court has instructed that a discrimination plaintiff's burden on summary judgment must be relaxed because such a plaintiff must typically rely on circumstantial evidence.

Plaintiffs brought suit under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7, and the Equal Protection Clause of the United States Constitutional, actionable under 42 U.S.C. § 1983. Title VI prohibits entities, such as school districts, that receive federal funds from discriminating against members of a protected class. *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 562 (3d Cir. 2002) (Michel, J.) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (Powell, J.)). The Equal Protection Clause likewise prohibits intentional discrimination on the basis of race. *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 543 (3d Cir. 2011) (Greenberg, J.), *cert. denied*, 132 S.Ct. 2773 (2012).

Liability under both Title VI and the Equal Protection Clause attaches only when a defendant engages in intentional discrimination, as disparate impact alone does not support either theory. *Pryor*, 288 F.3d at 562 ("Title VI … provide[s] a private cause of action for intentional discrimination only."); *Doe*, 665 F.3d at 543 ("'[P]roof of racially discriminatory intent or purpose is required to show a

violation of the Equal Protection Clause.'" (quoting *Antonelli v. New Jersey*, 419 F.3d 267, 274 (3d Cir. 2005) (Aldisert, J.))). Title VI and Equal Protection claims are governed by the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Steward v. Rutgers, The State Univ.*, 120 F.3d 426, 432 (3d Cir. 1997) (Lewis, J.); *Hankins v. Temple Univ. (Health Sci. Ctr.)*, 829 F.2d 437, 440 (3d Cir. 1987) (Gibbons, C.J.). A prima facie case under that framework requires that a plaintiff only show that (1) he is a member of a protected class, (2) he suffered an adverse action in the pursuit of his education, (3) he was qualified to continue pursuit of his education, and (4) the adverse action occurred under circumstances that raise an inference of discrimination. *See, e.g.*, *Brewer v. Bd. of Trustees of the Univ. of Ill.*, 479 F.3d 908, 921 (7th Cir. 2007) (Cudahy, J.), *cert. denied*, 552 U.S. 825 (2007); *Bell v. Ohio State Univ.*, 351 F.3d 240, 253 (6th Cir. 2003) (Batchelder, J.). In this case, the only issue is whether plaintiffs have produced evidence to support an inference of discrimination for purposes of summary judgment, as necessary to satisfy the second and fourth elements of the prima facie case.

This Court has recognized the reality that "[d]iscrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered. Cases charging

discrimination are uniquely difficult to prove and often depend upon circumstantial evidence." *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1071 (3d Cir. 1996) (Sloviter, J.) (internal citation omitted), *cert. denied*, 521 U.S. 1129 (1997). Accordingly, the plaintiff need not produce a "smoking gun" that irrefutably establishes discriminatory intent. *Commonwealth of Pa. v. Flaherty*, 983 F.2d 1267, 1273 (3d Cir. 1993) (Mansmann, J.) ("It is now well established that a *prima facie* showing of discriminatory intent may be proven indirectly … on the totality of the relevant facts…." (internal quotation omitted)).

This means that a district court may not insist, as the District Court effectively did here, on "[e]xplicit evidence of discrimination—*i.e.*, the 'smoking gun,'" *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 523 (3d Cir. 1992) (Hutchinson, J.), *cert. denied*, 510 U.S. 826 (1993). Once the plaintiff presents admissible evidence of discrimination, the court must view the facts in the light most favorable to the plaintiff, and may not reject them based on credibility determinations or a balancing of competing evidence that is properly the function of the fact-finder. *See Sheridan*, 100 F.3d at 1072 (where the evidence meets the threshold requirement of admissibility, the court "may not pretermit the jury's ability to draw inference from testimony, including the inference of intentional discrimination drawn…."); *see also U.S. v. Haut*, 107 F.3d 213, 220 (3d Cir. 1997)

(Cowen, J.) (‘“evaluation of witness credibility is the exclusive function of the jury’”) (quoting *Sheridan*, 100 F.3d at 1072)).

Moreover, as this Court has observed, the existence of racial intent “***is clearly a factual question, [and] summary judgment is [therefore] rarely appropriate****”* in discrimination cases. *See Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 509 (3d Cir. 1996) (Sarokin, J.) (stating that because discrimination cases center on discriminatory intent, which is “clearly a factual question, summary judgment is in fact rarely appropriate”). *See also Doe 1 v. Lower Merion School Dist.*, 689 F. Supp. 2d 742, 755 (E.D. Pa. 2010) (Bayleson, J.) (“Not only would live testimony by the various Board members, district administrators, and outside consultants enable the Court to evaluate their credibility, thereby conducting its “sensitive inquiry” into whether the Board purposefully discriminated against Plaintiffs on the basis of race, but also, the Court is particularly reluctant to grant summary judgment and to deny Plaintiffs the right to trial in this case, which involves issues of public policy and great concern to the community.”). Instead, the sole question is whether a reasonable juror could draw an inference of discrimination from the direct and circumstantial evidence presented. *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 330-31 (3d Cir. 1995) (Cowen, J.).

The District Court's decision in this matter deviates from this standard in two crucial respects. First, the Court erred by ignoring or dismissing as inadmissible several key pieces of evidence during summary judgment proceedings. That evidence, considered alongside the balance of the facts, properly supports an inference of racial intent. Second, in ruling on the District's summary judgment motion, the District Court viewed Appellants' evidence in piecemeal fashion, improperly weighed the credibility of witnesses, and failed to look at the aggregate body of evidence in the light most favorable to Appellants. By conducting such an analysis, the District Court effectively placed a heightened burden on Appellants to produce a gun smoking with the fumes of racial bias. That approach is contrary to this Court's repeated admonition that the prima facie burden should be "relaxed in certain circumstances," including in discrimination cases. *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 273 (3d Cir. 2010) (Rendell, J.) (quoting *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 357 (3d Cir. 1999) (Becker, C.J.)).

2. The District Court erred by ignoring or dismissing as inadmissible key evidence of discrimination during summary judgment proceedings.

a. The District Court failed to properly consider evidence of a teacher training presentation showing that the District harbors racial animus toward African American students generally.

The Court should have considered the teacher training presentation previously discussed. In opposing the District's motion for summary judgment, Appellants submitted the presentation, which the District produced during discovery. The title slide reflects on its face that the District prepared the presentation as part of MAP, which was intended to improve academic performance among minority students. *See supra* at 8. The presentation was prepared for a "Teacher Workshop" given at Lower Merion High School given on October 10, 2010 and describes "affective characteristics" that the District attributes to African American students. (A-1838.) According to the District's presentation, ***"[m]any African American students prefer … subdued lighting rather than bright light," will "respond better to rewards such as praise, smiles, [and] pats on the back," and will "avert their eyes while being confronted about their behavior."*** (A-1838-39 (emphasis added.))

Despite the stereotypic overtones present in suggesting that a student might respond to dim lighting or a "pat on the back" by virtue of their race, the District

Court found that Appellants had failed to lay a foundation for the evidence because "the record does not reveal who created this document," or that it was created "with the authorization" and knowledge of the District. [3] (A-29-30.) At oral argument, the District Court said: "[w]ell, I'm not sure that's very probative. I mean I'm sure I have a lot of documents floating [sic] my chambers, and you probably have in your office. Simply because they happen to be there doesn't mean you endorse them." (A-3119.) That holding was in error. As this Court has explained, authenticity and foundation are "not on par with more technical evidentiary rules," and are satisfied if, based on the evidence available, a jury could infer that "'the matter in question is what its proponent claims.'" *Lexington Ins. Co. v. W. Pa. Hosp.*, 423 F.3d 318, 328-29 (3d Cir. 2005) (Fuentes, J.) (quoting FED. R. EVID. 901(a)). The proponent of the evidence need only make a

[3] The Court did not even give Appellants an opportunity to lay the requisite foundation. Appellants cited the document in opposition to the District's summary judgment motion, and the District mounted no challenge to its authenticity or foundation in their reply brief. Thus, the Appellants rightfully presumed that the District had no objection to the admissibility of the document. Then, for the first time at oral argument, the District's counsel claimed that the record did not "indicate how it was created who created it, [or] how it was used." (A-3111.)

Nothing from the record was cited by the District nor did the District Court make any reference to the record in summarily dismissing the document as somehow unauthenticated and not a business record, although produced by the District.

prima facie showing of authenticity to the court, "not a full argument on admissibility." *Id.* at 329 (quoting *Link v. Mercedes-Benz*, 788 F.2d 918, 928 (3d Cir. 1986) (Aldisert, J.)). Once that showing is made, the "the evidence goes to the jury … [to] ultimately determine the authenticity of the evidence, not the court." *Id*. Moreover, circumstantial evidence, in principle, may suffice to authenticate a document. *Link*, 788 F.2d at 927; *McQueeney v. Wilmington Trust Co.,* 779 F.2d 916, 928 (3d Cir. 1985) (Becker, J.) (same).

This Court has held that when, as here, documents are produced by a party in response to an explicit discovery request, that production is highly probative of the document's authenticity. *Lexington Ins. Co.*, 423 F.3d at 329; *McQueeney*, 779 F.2d at 929. This Court affirmed a district court opinion stating that "[a] party to litigation that produces documents during discovery in that litigation thereby authenticates the documents it has produced." *Rouse v. II-VI, Inc.*, 2008 WL 398788, at *1 (W.D. Pa. Feb. 11, 2008) (McVerry, J.), *aff'd*, 2009 WL 1337144, at *6 (3d Cir. May 14, 2009 (per curiam)). Thus, in *Lexington Insurance Co.*, the plaintiff sought to introduce a form containing handwritten notes, even though the author of those notes, like here, was unknown. Nonetheless, the form had been produced by the defendant, and it was undisputed that the document was created in the defendant's usual course of business, as here. This Court found, at the

summary judgment stage, that plaintiff had satisfied the foundation requirement, even though there was no evidence regarding authorship of the handwritten notes. *Lexington Ins. Co.*, 423 F.3d at 328-29.

Accordingly, the District Court should have considered the MAP presentation based on the same rationale. It is undisputed that the District created MAP in an attempt to address minority achievement issues, and that the program was sanctioned by District officials and operated subject to their approval. (A-4096.) It is further undisputed that the document was produced by the District, and, on its face, purports to be a training document prepared for use during a District teacher workshop on October 10, 2010 in furtherance of the MAP program. (A-1837.)

Moreover, the District modified its classroom structure based on many of the same points outlined in the presentation. In addition to the points described above, the MAP presentation states that African Americans "rely heavily on visual input rather than auditory input," prefer "simultaneous talk instead of alternating talk," and respond to "more active environments v[ersus] sedentary learning environments of American schools." (A-1838.) Dr. Moore-Williams testified that, since 2003, teachers within the District have changed their teaching style to incorporate precisely those purported traits into their classrooms. (A-1414.) The

District has also created "active classes" designed around a less-structured learning environment, in which African Americans are disproportionately represented compared to the overall student body. (A-1414-15.) Dr. Moore-Williams acknowledges that these classes were designed around the same characteristics set forth in the MAP presentation. (A-1414-15.) From this testimony, a reasonable jury could conclude that the MAP presentation was prepared and produced by the District, encapsulated the District's attitudes toward African American students, and was designed precisely for the purpose that Appellants claim: to train teachers regarding the District's perspective of minority students. The District Court therefore erred in refusing to consider that presentation for purposes of summary judgment, and should have taken into account the District's belief that African Americans respond well to "subdued lighting" and "pats on the back" when evaluating the issue of racial animus. (A-1837-39.)

b. The District Court failed to consider the testimony of Dr. Moore-Williams in the light most favorable to Appellants.

The District Court also erred by refusing to draw reasonable inferences of racial intent from the testimony of Dr. Moore-Williams. She testified that racism and prejudice is present throughout the Lower Merion School District and has a negative impact on the education of African American students:

> Q. Have you ever had conversations with any Lower Merion School District personnel regarding prejudice in the teaching staff?
>
> A. Prejudice in general that would include the teaching staff, yes.
>
> * * *
>
> Q. But you believe that there is prejudice in the Lower Merion School District teaching staff?
>
> A. I believe there's prejudice in everybody and, yes, in the staff too.

(A-1412.) Dr. Moore-Williams further testified that racism present within the District adversely affects the quality of the education that African American students receive:

> Q. [Y]ou mentioned that there is racism in all school districts?
>
> A. Yes.
>
> Q. And you mentioned that by implication that includes the Lower Merion School District?
>
> A. Yes.
>
> * * *
>
> Q. [Y]ou would agree that … racism[does] have an impact on an African-American student's learning experience?
>
> A. I agree.
>
> Q. And you would agree that the impact is negative?
>
> A. I agree.

(A-1416.)

Dr. Moore-Williams has observed that African American students – and especially African American males in special education classes – receive differential treatment from teachers and administrators as a result of these racial prejudices. She first noticed this differential treatment during meetings with a group of approximately thirty teachers known as a cultural proficiency cadre. The District assigns teachers to cadres, all of which are led by Dr. Moore-Williams and meet on a periodic basis to discuss minority achievement issues. (A-1412, A-1432.) During one of these meetings, Dr. Moore-Williams gave a presentation to cadre members regarding national trends in differential punishment imposed on African American male students. Dr. Moore-Williams testified that "[w]hen I brought [this differential treatment] up as a national trend, people agreed" that such treatment occurs within the District. (A-1413.) She further explained that, according to the District's special education teachers, those students are "disproportionately represented" in special education classes. (A-1413.) Because African Americans, including Appellants, are over-represented in such classes, they suffer more severe punishment at the hands of District administrators than their white peers in standard track classes.

Despite this evidence of differential treatment, the District Court refused to draw any inference of racial intent from Dr. Moore-Williams' testimony because she acknowledged that "there is racism in all school districts and that Lower Merion School District's problems are no different from any other suburban school district." (A-28.) In essence, the District Court was suggesting that the District cannot be held liable for its racial discrimination because other schools throughout the country are also guilty of the same offense. (A-28.) The District Court cites no legal authority for this profound public policy pronouncement, nor does the Court explain how certain sworn testimony can be simply rejected by looking at other testimony for purposes of summary judgment. That constitutes improper weighing of the evidence or, at best, assessing the overall credibility of the witness. *See Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co., Inc.*, 998 F.2d 1224, 1230 (3d Cir. 1993) (Greenberg, J.) ("at the summary judgment stage, a court is not to weigh the evidence or make credibility determinations. Instead, these tasks are left for the fact-finder … [a]dditionally a court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead, should analyze it as a whole to see if together it supports an inference of concerted [wrongful] action.") (internal citations omitted).

More importantly, the ubiquity of racial prejudice is no excuse for failing to correct it. Indeed, the Supreme Court has made clear that Title VI "prohibits … intentional discrimination" by school districts, regardless of whether the discrimination occurs on a discrete occasion or as part of a national trend. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (Scalia, J.); *accord Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 562 (3d Cir. 2002) (Michel, J.). Simply put, the societal phenomena underlying the discriminatory treatment Appellants received is irrelevant. The only pertinent question is: Could a reasonable jury conclude that plaintiffs were misidentified as requiring special education as a result of the District's prejudice toward their race? Based on the totality of Dr. Moore-Williams' testimony, that question should be answered in the affirmative.

Moreover, the Court rejected Dr. Moore-Williams' testimony because "her statements … are not based on anything she observed firsthand but rather on her own personal belief and the hearsay statements of others." (A-28.) Neither of those grounds provide an appropriate basis to exclude Dr. Moore-Williams' testimony for purposes of summary judgment. First, the District Court was incorrect in concluding that Dr. Moore-Williams lacked firsthand knowledge for her testimony. Her description of racism throughout the District was based on her experience as a consultant retained by the District in 2005 to improve minority

achievement and provide cultural proficiency for teachers and administrators. (A-1410.) That testimony was not based on hearsay or secondhand opinions, but rather on her first hand personal interactions with and observations of approximately 90 teachers and administrators over a several year period, during which she regularly conducted cultural proficiency training sessions and met with district administrators to discuss racism issues.[4] (A-1412.) That wealth of experience provided an adequate basis to admit her testimony—and to consider it at summary judgment—because the only foundation requirement for a lay-witness's testimony at trial is that it be "rationally based on the perception of the witness … and helpful to a clear understanding of the witness's testimony." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175 (3d Cir. 1993) (Greenberg, J.) (quoting FED. R. EVID. 701). Dr. Moore-Williams' descriptions of continued racism in the Lower Merion School District satisfy that standard, and the District Court should have considered it for purposes of summary judgment.

The District Court should also have considered those portions of her sworn testimony in which she related comments she received from cadre members of the

[4] Dr. Moore-Williams testified that she began consulting for the District in 2005 and was still doing so at the time of her deposition in 2011. (A-1410.) Since 2005, she has led at least three different cadres, each containing approximately 30 teachers. (A-1412.)

District regarding disproportionate discipline of African American students, as those comments qualify as party admissions immune from the hearsay rule. A statement constitutes an admission if it "is offered against an opposing party and … was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." FED. R. EVID. 801(d)(2)(D); *see also Blackburn v. United Parcel Serv.*, 179 F.3d 81, 96-97 (3d Cir. 1999) (Becker, C.J.) (an out-of-court statement by an employee constitutes an admission if made "concerning a matter within the scope of the agency or employment"). The declarant need not be a decision-maker in the organization, provided that the statement concern a matter within the scope of the individual's employment duties. *See Marra v. Phila. Hous. Auth.*, 497 F.3d 286 (3d Cir. 2007) (Ambro, J.) (affirming admission of a supervisor's statement about employment policy because, even though the supervisor played no role in the events underlying the case, the supervisor was authorized to discuss employment policies with employees).

Here, all of the individuals who stated that the District disciplined African American students more severely than white students were cadre members attending a cultural proficiency training session headed by Dr. Moore-Williams, who was hired by the District for that purpose. Those teachers were required by the District to attend the training sessions as a condition of their employment for

the purpose of discussing minority achievement issues. (A-1432.) All of the teachers' statements related to student discipline, a subject that they handle on a daily basis, and all of those statements were based on their firsthand knowledge regarding the District's disciplinary actions. The teachers made those statements to a District consultant within the course of their employment concerning a matter within the scope of their mandatory cadre discussions. They qualify as party admissions that the District Court should have considered on summary judgment. Testimony like that of Dr. Moore-Williams should ordinarily be submitted to a jury because "live testimony by the various Board members, district administrators, and outside consultants [would] enable the Court to evaluate their credibility, thereby conducting [a] "sensitive inquiry" into whether the Board purposefully discriminated against Plaintiffs on the basis of race." *Doe 1*, 689 F. Supp. 2d at 755 (quoting *Arlington Heights*, 429 U.S. at 266).

c. The District Court improperly rejected evidence from Appellant Ricky Coleman that detailed at least one occasion of racial discrimination once he was placed in special education classes.

The District Court erred by improperly rejecting evidence for purposes of summary judgment that one of the Appellants, Ricky Coleman ("Ricky"), has personally experienced racial prejudice within Lower Merion School District. The District placed Ricky in a special education class during his first grade year. His

mother, Appellant June Coleman ("Coleman") regularly visited the first grade class and observed that Ricky's teacher engaged in abusive or condescending treatment toward him, but not toward his white classmates. (A-1259.) Coleman complained to the building principal, Alice Reyes, and the District retained an independent consultant to observe Ricky's first grade classroom interactions. (A-1259.) This measure did not rectify the problem. Coleman testified that, in early spring of 2006,[5] the consultant informed her that:

> [Ricky's teacher] is talking down to [African American] kids…. They're made less—when she talks down to them, the other kids in the class are laughing at them. ***They're being targeted.***

(A-1259.) The consultant further told Coleman that she had informed Reyes of the problems in Ricky's classroom. (*Id.*)

Coleman met with Reyes, but neither Reyes nor any other District administrator acted to stop the degrading treatment that Ricky received from his first grade teacher. When Coleman asked Reyes the following school year about how the situation had been resolved, Reyes replied that the sole remedy was to place the teacher in sensitivity training during the summer months. (*Id.*) In other

[5] The precise date on which Coleman learned of the District's discriminatory treatment of Coleman from the consultant is unclear. She recalls the conversation taking place at the school's spring fair. (A-1259.)

words, even though both Coleman and the independent consultant informed Reyes of the situation in the spring of 2006, the District took no further action until the end of the school year.

The District Court rejected Coleman's testimony based on *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 283-87 (1998), holding that "[t]he School District cannot be held liable for the acts of a teacher" absent evidence that an administrator knew of the situation and failed to act. (A-30.) But that is precisely what Coleman's testimony alleges, i.e., that she informed Principal Reyes of the conduct of Ricky's teacher sometime in the early spring, but that the District took no action on the matter until the summer, leaving Ricky abandoned in a class in the hands of a racially hostile teacher for the remainder of the school year. Nor is it difficult to draw an inference of racial animus from the teacher's actions or the District's inaction when the District trains teachers using materials such as the MAP presentation filled with racial stereotypes discussed above and when those same teachers end up treating black students in a demoralizing racial manner, all while District administrators turn a blind eye. *See Gebser*, 524 U.S. at 290 (holding that "notice to … and official who … has authority to address the alleged discrimination and to institute correct measures" is sufficient to establish liability for violations of the Civil Rights Act). This evidence—like the testimony

of Dr. Moore-Williams and the MAP presentation—was sufficient to support an inference of discriminatory intent, and the District Court erred by failing to view it in the light most favorable to Appellants.

3. The District Court erred by imposing a heightened burden on Appellants to produce a "smoking gun" showing discriminatory intent.

The District Court further erred by failing to view all evidence in the light most favorable to Appellants. Rather than drawing inferences in Appellants' favor, the District Court conducted a piecemeal review of Appellants' facts, and concluded that, because no single piece of evidence established—in the Court's view—racial intent, Appellants must necessarily have failed to meet their summary judgment burden. The trouble with that approach is that the only evidence that could have satisfied the Court was a single "smoking gun" that conclusively established racial bias. This Court has frequently reiterated that a plaintiff need not meet such a weighty burden, and that the task of "establishing a prima facie case of disparate treatment is not onerous." *Sheridan*, 100 F.3d at 1084.

This Court's precedential decision in *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261 (3d Cir. 2010) (Rendell, J.), is particularly instructive regarding the standard that a District Court must employ on summary judgment. As Circuit Judge Rendell held, "the fourth prong of the prima facie case[, which requires an inference of intent,] should be '***relaxed in certain circumstances***.'" *Id.* at 273

(quoting *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 357 (3d Cir. 1999) (Becker, C.J.)). Such circumstances include those in which "comparative, or competitive, evidence" is not available, *id.* at 272, or when "it is not … easy to identify similarly situated individuals," *id.* at 274. In other words, discrimination claims rightfully receive a "relaxed" standard when, as in the present case, the plaintiff claims that the defendant treated him or her in an adverse manner on the basis of race, even though that treatment did not cause the plaintiff to lose an opportunity to someone outside the protected class. In such cases, a plaintiff's only burden for purposes of summary judgment is to produce facts that "'lead one to reasonably infer, if such actions remain unexplained, that it is more likely than not that such actions were based on discriminatory criterion such as race.'" *Id.* (quoting *Lindsay v. Yates*, 578 F.3d 407, 417 (6th Cir. 2009)).

Anderson is also instructive as to the quantum of circumstantial evidence necessary to raise an inference of discrimination. The African American plaintiffs there claimed that the defendant mortgage company imposed various conditions on their mortgage loan applications to deter them from moving into a predominantly white community. *Id.* at 266. Appellants supported that claim by arguing that they had never encountered similar conditions when they applied for previous loans, and that a mortgage company employee who was uninvolved in the transaction

informed them that the community was "exclusive[ly] lily white" and that " a lot or people . . . [were] not happy with [plaintiffs] purchasing homes [there]." *Id.* In addition, their loan officer purportedly stated on one occasion that "you people don't understand how the process works," a comment which plaintiffs interpreted as racially charged. *Id.*

On appeal, this Court recognized that plaintiff's evidence "connect[ing mortgage] conditions to racial animus is not that clear." *Id.* at 275. Though *Anderson* ultimately affirmed the grant of summary judgment at the pretext stage of the *McDonnell Douglas* analysis, this Court concluded that the racially insensitive remarks from the employee were probative of racial intent for purposes of the *prima facie* case, even though she exercised no influence over the outcome of the transaction. *Id.* at 276. Those comments, when aggregated with the loan officer's derogatory description of the plaintiffs as "you people" and the unexplained imposition of heightened loan conditions, were "sufficient to support at least an inference that [the defendant] imposed the conditions it did for racially discriminatory reasons, and were therefore sufficient to meet plaintiffs' *prima facie* burden." *Id.* at 275.

In the context of public education, other courts have similarly sustained an inference of racial discrimination when the school district relied upon "ability

grouping" and "tracking" practices to disproportionately assign minorities to lower-level classes. *People Who Care v. Rockford Board of Education*, 851 F. Supp. 905, 1001 (N.D. Ill. 1994), *overruled on other grounds*, 111 F.3d 528 (7th Cir.). There, the school employed invalid testing procedures and arcane assumptions to determine class assignments, with the result of "locking minority students into lower track classes with little or no hope of ever moving upward." *Id*. After trial, District Judge Roszkowski determined that such practices, coupled with the school district's failure to rectify them, supported an inference of discriminatory intent. *Id*. at 1203.

Not surprisingly, Appellees only cite to a single case on this point, *Rembert v. Monroe Township Board of Education*, 1997 WL 189318 (D.N.J. Apr. 14, 1997) (Irenas, J.). There, summary judgment was granted to the defendant school district based on the student plaintiffs' failure to meet their burden of showing discriminatory intent. However, in *Rembert*, the student plaintiffs failed to proffer *any* evidence, direct or circumstantial, in support of their allegations of discriminatory intent. *Id*. at *6. The student plaintiffs in *Rembert* failed even to take depositions of their primary witnesses. *Id*. at *6 n.11. Thus, the district court in *Rembert* selected to do something that is rarely done, *i.e.*, grant summary judgment based on the fact-intensive issue of discriminatory intent. *Id.* at *6.

Here, Appellants presented more compelling circumstantial evidence of racial intent claim than was present in *Anderson* or *People Who Care* and substantially more than in *Rembert*. Yet the District Court here either ignored, refused to review or improperly considered that evidence. In so doing, the Court adopted, in practice, an unprecedented burden of proof that could hardly be satisfied by anything except direct "smoking gun" evidence of discrimination, which is rarely forthcoming in discrimination cases. *Sheridan*, 100 F.3d at 1071. Therefore, the District Court failed to apply the "relaxed" standard announced in *Anderson* for establishing a *prima facie* case of racial intent, and its judgment should therefore be reversed and this matter remanded for trial.

a. The record, viewed in the light most favorable to Appellants, shows that racism is present in the District's systemic attitudes toward African Americans.

The summary judgment record, viewed in the light most favorable to Appellants, supports a reasonable inference that the District improperly placed Appellants in special education classes or provided them with differential treatment in those classes out of racial animus. (A-1416.) Dr. Moore-Williams admitted that institutional racism exists throughout the Lower Merion School District, a fact which must be taken as true for summary judgment purposes. *See Hollinger v. Wagner Mining Equip. Co.*, 667 F.2d 402, 410 n.10 (3d Cir. 1981)

(Sloviter, J.) (faulting a dissenting opinion for construing testimony "in the light least favorable to the plaintiff, when our duty in reviewing the grant of defendant's motion for summary judgment is to do quite the reverse"). The only outstanding issue is whether a reasonable juror could infer that Appellants' educational placements resulted from that racism.

The record, viewed most favorably to Appellants, supports such an inference. Perhaps no evidence is more striking in this regard than the testimony of Christopher McGinley, the District's Superintendent. McGinley testified that, in late 2009, the school board redrew the geographic boundaries used to assign students to schools within the District. (A-1424.) This redistricting resulted in many African American students being diverted from Lower Merion High School, which historically served most of the District's minority population, to Harriton High School. (A-1424.) McGinley testified that, during the redistricting process, two school board members exchanged the following incriminating email:

> Q. [This] e-mail from board member DiBonaventuro to board member Lorenz state[s] that she, quote, "has been thinking about diversity or lack thereof … at Harriton and believes that ***any of the low income and African-American students[,] … when they walk into Lower Merion[, they] simply creates an additional stress that doesn't need to be there.***" Is that an accurate quote?
>
> A. I believe so.

(A-1424 (emphasis added).) From this testimony, for purposes of summary judgment, a reasonable juror could infer that racial bias existed among the District's most senior management and elected Board.

Dr. Moore-Williams's testimony confirms that similar attitudes existed among the District's teachers. She testified that many teachers held "[s]tereotypic [a]ttitude[s] [regarding] South Ardmore," the predominantly African American, lower-income neighborhood that is home to all of the Appellants in this case. (A-1417.) She explained that South Ardmore was "where a lot of the black children who were poorer came from, and … there were stereotypes that people held about them." (*Id.*) Dr. Moore-Williams described these attitudes as "example[s] of the subtle racism that was occurring at the Lower Merion School District." (A-1410, A-1417.) She testified that she discussed these issues with school officials, including Superintendent McGinley and Assistant Superintendent Tom Tobin, on a regular basis. (*Id.*). Superintendent McGinley confirmed that Dr. Moore-Williams "has done extensive training for our administrators …, all of our principals, and our … teacher cadre." (A-1423.) Despite Dr. Moore-Williams' efforts to combat these racial prejudices, they persisted throughout the District, and, she acknowledged that as of 2011, African American students continued to experience systematic racism throughout the District. (A-1416.)

The District Court simply ignored the school board email described by McGinley and rejected the entirety of Dr. Moore-Williams' testimony, yet that evidence is at least as compelling as the racially offensive comments that this Court found supported a reasonable inference of discriminatory intent in *Anderson*. The ultimate issue of intent should therefore have been left to a jury, and the District Court erred by usurping fact and credibility questions properly reserved for the fact-finder. Presented with evidence showing that administrators knew of racism throughout the District and failed to take adequate corrective action, the Court should not have refused to draw the inference of racial intent requested by Appellants on summary judgment.

b. The Appellants produced evidence that the District's racial animus affected the manner in which they were identified for special education and the treatment they received in those classes, which the District Court failed to consider.

Appellants produced further evidence showing that, as a result of the prejudicial attitudes described above, the District improperly placed them in special education programs or provided them with an inferior education in those classes. The District concedes that it identified African American students for special education placement at an "[e]xcessively high … rate." (A-1851-60.) Dr. Moore-Williams testified that this over-identification, if proven, would

constitute an example of the institutional racism she observed within the District and that District administrators failed to rectify:

> Q. Do you agree that[,] if the achievement gap persists due, in part, to the overidentification of African-American students in special education, that that would be an example of institutional racism?
>
> A. Yes.
>
> * * *
>
> Q. And would your answer be the same regarding the overrepresentation of African-American students in lower level classes?
>
> A. Yes.

(A-1418.)

In turn, Appellants produced unchallenged expert opinion testimony and their own personal experiences to show that the institutional racism described by Dr. Moore-Williams did, in fact, influence their particular special education placements and the treatment they received thereafter. Appellants' expert, Tawanna Jones,[6] a certified school psychologist for the School District of

[6] Jones' report was prepared and offered to rebut the claim of the District expert, Reschly, that plaintiffs received no differential treatment from their white peers. (A-4592-94.) The District Court claimed that Reschly's report and testimony was not relied upon by it for purposes of summary judgment in order to avoid a *Daubert* challenge to his opinion. (A-37.) *But see* Section B *infra.*

Philadelphia, testified that the District operated its special education programs in a manner that ignored cultural differences associated with Appellants' race, and that the District failed to implement changes despite knowing of this problem. Jones reviewed each Appellant's educational files to determine whether the District properly identified him or her as requiring special education services. (A-2307-2309.) Jones identified seven deficiencies in the procedures the District used to place students in special education, (A-2314-2318), two of which are particularly relevant here.

First, Jones explained that Lower Merion failed to utilize nationally accepted procedures to identify students for special education placement. School districts customarily identify students for special education by administering tests to evaluate a student's academic performance and cognitive abilities. (A-2315.) School psychologists compare the results of those tests, and recommend students based on disparity between the two scores. (*Id.*) Jones explained that "[m]ost school districts across the country … utilize at least a 1.5 to 2 Standard Deviation rule," meaning that a student will receive special education services only if the disparity between their scores is at least 1½-2 standard deviations above the

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Notably, the District did not file a *Daubert* motion to challenge the report of Appellants' expert.

average. (*Id.*) In this case however, the District recommended six of the seven Appellants for special education "***without regard to the presence of any significant discrepancy.***" (*Id.*) In other words, it is undisputed that the District identified six Appellants for special education placement when they would not have received those placements in other school districts. (*Id.*) In fact, Jones described in her unrefuted opinion that the District's decision-making process as "capricious" and lacking "a clear standard to determine the student Appellants' [special education] classification." (*Id.*)

Second—and more problematic—Jones' unchallenged opinion, viewed in the light most favorable to Appellants, supports an inference that, in the absence of objective special education standards, Appellants' race and cultural background likely influenced their special education placement. Jones explained:

> [C]ommon trends [were present] in each student Plaintiffs' records [that] … fostered an environment that severely lacks cultural responsiveness, negatively impacted the student Plaintiffs' progress, and hampered the students' growth ….

(A-2314-15.) Among the "common trends" described by Jones were the District's failure to provide support for emotional trauma that disproportionately affect minority or lower-income students, such as "death of loved ones" or "incarceration of a parent." (A-2317.) She also opined that the District's special education programs emphasized assimilation to majority cultural norms, and that, as a result,

the District likely "exacerbated some of the behaviors" for which Appellants were placed in special education, such as inattention or argumentative behavior. (A-2317.) She summarized these problems as follows:

> Each of the students' files[] … reveal the absence of a culturally responsive approach to addressing the students' needs, but rather ***a culture that emphasizes assimilation as opposed to cultural plurality.*** Additionally, there is no record of discussion or consideration given to culturally-responsive educational materials, curricular content, or use of culturally-responsive teaching practices.

(A-2317.) In other words, based on Jones' uncontested testimony, a reasonable jury could find that the District's failure to establish objective criteria special education placement caused other factors—including Appellants' race—to be injected into the decision-making process.

The record contains sufficient evidence from which a jury could draw inferences to corroborate Jones' opinion. The District's MAP presentation exemplifies the lack of "culturally-responsive teaching practices," that Jones describes, and her observation that the District targeted students outside the "cultural plurality" is reflected in the both the school board email describing African American students as "additional stress[ors] that [don't] need to be there," (A-1424), and in the personal experiences of plaintiffs, such as June Coleman, who observed her son being "targeted" in District classrooms, (A-1259.). Dr. Moore-

Williams further acknowledged that systemic over-identification of African American students for special education, if proven, would be evidence of racism, and Jones' report proved precisely that. (A-1147.23, A-1418.)

This body of evidence far outweighs the comparatively scant untoward racial comments and heightened mortgage conditions that this Court was found sufficient to raise an inference of discrimination in *Anderson*. Further, the body of evidence presented to the District Court here far exceeds the evidence that was found to be lacking in *Rembert*, which granted the defendant school district summary judgment based on the issue of discriminatory intent, *id*. at *6. And yet this is not the limit of evidence that Appellants presented to the District Court for purposes of summary judgment.

Appellants' individual experiences, including the experiences of Ricky Coleman previously described, likewise establish that they suffered harm as a result of the systemic racism described by Dr. Moore-Williams and Jones. For example:

- The District identified Appellant **Saleema Hall** for special education classes when she was in fifth grade at the recommendation of school psychologist Craig Cosden, who concluded that she was having difficulty with standard-level curriculum. (A-1880.) Yet, Cosden failed to recognize that "there was no evidence whatsoever of a deficit in [her] overall basic psychological processes," (A-2335), and that her performance problems arose from the fact that her mother remarried and she "lost several relatives to a murder suicide" during her fifth

grade year. (A-1885.) A year later, Saleema earned average scores on follow-up IQ and academic tests performed by Cosden, yet neither he nor anyone else from the District recommended removing her from special education. (A-1878-1879.)

- The District placed Appellant **Chantae Hall** in special education classes beginning in second grade, but failed to conduct the standard writing and mathematics testing necessary to design a program appropriate to her needs. (A-2334.) As a result, Chantae was given work below her capabilities throughout her education. (*Id.*) In fact, during high school, she complained that she was receiving assignments that were "too easy" and "baby work." (A-1335.) Though her mother voiced these concerns to her teachers, the District made no effort to respond to these concerns or provide level-appropriate curriculum for Chantae. (A-1335.)

- The District evaluated Appellant **Quiana Griffin** for a learning disability in elementary school and placed her in a special education class without obtaining written permission to do so from a parent or guardian, a legally required prerequisite for such actions.[7] (A-1809.) This was an erroneous placement, as Quiana does not—and has never—had disabilities in reading comprehension, math, and language arts. (A-2323.) When Quiana entered middle school, her mother, Lori Muse, instructed Doug Arnold, the assistant principal at Quiana's building, to remove Quiana from special education programs. (A-1798.) Arnold responded "that [the District] w[as]n't going to follow" Muse's request. (A-1798.) Muse ultimately had to speak with Arnold's supervisor to enforce her instruction, and she never received an explanation for Arnold's refusal. (*Id.*)

[7] The District was required by law to obtain this consent before testing Quiana. *See* 20 U.S.C. § 1414(a)(1)(D)(i)(I) ("The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability … shall obtain informed consent from the parent of such child before conducting the evaluation.")

- The District evaluated Appellant **Eric Allston** in second grade, after he began engaging in disruptive behavior. (A-2343.) Like Quiana Griffin, the District did not obtain permission from his guardian, and placed him in special education classes even though test results showed he had no learning disability. (A-2260, A-2343.) The District's testing also failed to account for significant stress factors in Eric's life, including his mother's arrest and incarceration, his relocation to his grandmother's home, and resulting transfer from the Philadelphia School District to Lower Merion. (A-2346.) According to Jones, these stress factors likely account for most—if not all—of the behavioral issues Eric experienced. (A-2347.) Eric's guardian later requested that he be re-evaluated, a request that the District refused without completing legally required documentation of the refusal.[8] (A-2297-98.) As a result, the District failed to design education programs tailored to Eric's abilities. He "would have likely been a candidate for higher level academic courses" had the District done so. (A-2347.)

- The District diagnosed Appellant **Lydia Johnson** as a student with mental retardation even though it did not conduct the adaptive skills testing necessary to support such a diagnosis. (A-2319.) As a result, the District placed Lydia in classes with students who had Down Syndrome, could not communicate, or had other severe disabilities. (A-1277-80.) In seventh grade, Lydia expressed concerns to her teachers that her classes were not challenging enough, yet the District took no action to evaluate the propriety of Lydia's placement or to give her assignments tailored to her abilities. (A-1269-72.) According to Jones, the District's failure to properly evaluate (or to re-evaluate) Lydia's mental retardation status "caused continued

[8] Pursuant to the District's own policy, custom, and practice, upon receipt of a request for an independent reevaluation, a Child Study Team must convene to evaluate the request. (A-1390-92, A-2303.) If the District denies the request, as it did in Eric's case, the District must file a request for a Due Process Hearing with the Pennsylvania Department of Education. *Id.* However, the District has no knowledge of ever filing such a request after denying Eric's request for a private re-evaluation in 2004. *Id.*

inappropriate placement , which caused [her] overall academic performance … to suffer significantly." (A-2329.)

- The District identified Appellant **Walter "Jon" Whiteman** as having a learning disability in first grade despite his average intelligence. (A-1648, A-1652.) He was also identified as emotionally disturbed, a label that the District never reevaluated, even though he experienced "significant improvements in his behavior" and "there was concrete evidence" showing that he was no longer experiencing emotional disturbance. (A-2352.) Jones explained that the District's failure to re-evaluate him and his continued placement in special education classes left him "ill-equipped to transition from high school to post high school activities." (A-2353.)

These are but a few instances from a litany of acts and omissions that the Appellants presented to the District Court describing the many ways that the District was—to quote Jones—"capricious" and culturally and racially ignorant in its administration of special education testing and programs.[9] The District Court simply failed to consider this evidence at all, instead dismissing Appellants' proffered testimony as "conclusory" and "speculat[ive]." (A-27, A-32.)

Tellingly, the District has never offered a non-discriminatory explanation for any of the adverse actions experienced by Appellants, instead claiming that Appellants cannot show an inference of discrimination because they have not

[9] Appellants provided the District Court a complete description of the many ways that the District's improper administration of its special education programs injured them in their Statement of Material Facts in Opposition to Defendants' Motion for Summary Judgment. That disputed Statement appears in the record at pages A-1147.1 to A-1147.57 of the joint appendix.

identified similarly situated Caucasian students whom the District treated differently. (A-2789-90.) But such comparative evidence is not required, *Anderson*, 621 F.3d at 274, and the District cannot escape trial before a jury when Appellants have shown that racial prejudice exists throughout Lower Merion, have identified suspect personal experiences for which there is no explanation other than racial bias, and when the District has made no attempt to refute that claim.

c. Statistics confirm that the District's activities had a disproportionate effect on African Americans, and that the District has still failed to rectify that inequity.

Lastly, Appellants presented statistical evidence that the District has systematically over-identified African Americans for placement in special education classes for at least the past fifteen years, and that the District has failed to rectify this issue during that time. The District's own website admits that African American parents first expressed concern in 1997 "that there was an over identification of African American students in special education." (A-1460.) Additionally, the District has met with CBP to discuss this and other issues affecting the African American population attending the District's schools. (A-1456, A-1494-1498, A-3167.)

The District made little meaningful progress on that issue during the years that followed, and by the 2003-2004 school year, African Americans comprised 7.6% of the District's total student population, but 12.2% of the total special

education population. (A-2646.) As a result, ***over one-third of the African American students enrolled at the District received special education services.*** (A-1471.) Two years later, minority representation in special education programs had grown to 12.7%, even though African American representation in the general student body in Lower Merion Township held steady at 7.7%. (A-2678.) That trend has steadily risen:

School Year	African American Representation in Special Education Programs	African American Representation in General Student Body	Appendix Reference
2003–2004	12.2%	7.6%	A-2646
2004–2005	data not contained in record	data not contained in record	n/a
2005–2006	12.7%	7.7%	A-2678
2006–2007	14.5%	7.9%	A-2679
2007–2008	14.0%	8.1%	A-2681
2008–2009	13.7%	8.0%	A-2683
2009–2010	14.3%	8.6%	A-2685

As recently as 2010, the District has admitted that ***"Black … students with disabilities were represented in disproportion to their total enrollment in the general student population."*** (A-2693 (emphasis added).) Thus, even though the District has been aware of the problem for over thirteen years, it has failed to achieve any meaningful progress on the issue.

The District Court criticized Appellants for relying on these numbers because "[d]isproportionality is not per se evidence of discrimination." (A-17; *see also* A-3085-86.) While Appellants acknowledge that statistical disparity, standing alone, does not raise a prima facie inference of racial intent, that position ignores what these statistics represent when viewed in light of the balance of Appellants' other evidence. The statistics establish that, without question, the District disproportionately selects African American students for special education programs, that it has known of that problem for a decade and a half, and that it has failed to correct it. Those facts are highly probative of racial intent because, as this Court has recognized, "'***impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions.***'" *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 563 (3d Cir. 2002) (Michel, J.) (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) (O'Connor, J.)). Here, the District Court recognized that the statistics were evidence of possible discrimination, but refused to draw a corroborative inference of racial intent from the plethora of evidence that Appellants provided.

That refusal constitutes reversible error. When placed alongside the balance of the total body of evidence, these statistics confirm what Appellants have said

since the inception of this case: that a jury could draw the conclusion that there are racial attitudes present in Lower Merion School District based on the unrefuted experiences of the Appellants and their expert's unchallenged opinion and the undisputed statistical evidence. Therefore, a jury could reasonably conclude that Appellants were selected for special education placement based on their race or that their race affected the treatment that they received in those programs. A jury should have had a chance to make that determination, which cannot be properly determined in a motion for summary judgment by the District Court effectively acting as a gatekeeper, like here, as to what constitutes racism or not.

d. Appellants' evidence, viewed in the aggregate, supports an inference of racial intent.

This Court has emphasized that "the advent of more sophisticated and subtle forms of discrimination requires that [a court] analyze the aggregate effect of all evidence and reasonable inferences therefrom[.]" *Cardenas v. Massey*, 269 F.3d 251, 261 (3d Cir. 2001) (Sloviter, J.). Particularly when racial intent is at issue, a trial court "'should be reluctant to grant a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind, for in such cases much depends upon the credibility of witnesses testifying as to their own states of mind, and assessing credibility is a delicate matter best left to the fact finder.'" *Norfolk S. Ry. Co. v. Basell USA, Inc.*, 512 F.3d 86, 96 (3d Cir. 2008)

(Rendell, J.) (quoting *Metzger v. Osbeck*, 841 F.2d 518, 521 (3d Cir. 1988) (Greenberg, J.)). The District Court failed to heed those instructions, instead erroneously discarding each component of Appellants' case in piecemeal fashion, and never looking at the body of admissible evidence in the aggregate.

Viewing the evidence in its totality and drawing all reasonable inferences in Appellants' favor, the summary judgment record established the following:

1. Racism is admittedly present throughout the District. (A-1412, A-1416-17.)

2. The District's most senior officers and board members believe that, when African American students are placed in predominantly white classes, they created "an additional stress that doesn't need to be there." (A-1424.)

3. The District relied upon inaccurate and insensitive racial stereotypes when training administrators, teachers, and staff regarding minority performance, including that African Americans prefer subdued lighting, avert their eyes in response to authority, and respond to "pats on the back" and other demeaning gestures. (A-1838-39.)

4. As a result, racial bias exists among the District's administration and teaching staff. (A-1412.)

5. The process used by the District to identify students for special education was "capricious" and was designed to force minority students to assimilate to the "cultural plurality." (A-2315-17.)

6. Over-identification by the District of African American students for special education placement (or misidentification of a particular student) provides an example of the effects of institutional racism present through the District. (A-1418.)

7. Inattentive or differential treatment of African American students in special education provides a further instance of the District's institutional racism. (A-2317, A-1418.)

8. Six of the Appellants were misidentified for special education placement and the remaining Appellant was provided with levels of special education support that failed to reflect their individual abilities. (A-2315.)

9. Appellants Chantae Hall and Lydia Johnson expressed such concerns to their teachers, but no effort was made by the District to give them level-appropriate assignments. (A-1328, A-1335, A-1269-72.)

10. The District refused to remove Appellant Quiana Griffin from special education in a timely manner when requested to do so by her mother. (A-1798.)

11. The District refused to re-evaluate Appellant Eric Allston for special education, even when requested to do so by his guardian. (A-2297-98.)

12. Appellant Ricky Coleman received racially insensitive treatment from his teacher, and the District failed to respond in a timely manner despite knowledge of the problem. (A-1259.)

13. The District failed to re-consider special education placement for Appellants Saleema Hall and Walter "Jon" Whiteman despite evidence that those placements were incorrect. (A-2352, A-1878, A-1879-80.)

14. Each of the adverse action Appellants experienced were racially motivated.[10]

[10] Further evidence of racial discrimination at the District is shown by the undisputed fact that since 1997, LMSD has not had an African American Superintendent, Assistant Superintendent, Director of Student Services, Director of Pupil Services, or Special Education Advisor. (A-1147.4, A-1301-02.)

The weight of this collective evidence is significantly greater than existed in *Anderson*, where this Court found a few offhand comments and heightened mortgage conditions alone sufficient to raise a prima facie inference of racial intent. It is also greater than the evidence in *Rembert* found insufficient to overcome summary judgment. The District Court here should have permitted Appellants to present their evidence to a jury and to urge jurors to draw the fourteen inferences laid out above. The District Court erred by denying them that opportunity and instead taking it upon itself to either summarily reject, fail to consider or wrongfully weigh and assess the evidence. *See Petruzzi's IGA Supermarkets, Inc.*, 998 F.2d at 1230 ("at the summary judgment stage … a court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead, should analyze it as a whole to see if together it supports an inference of concerted [wrongful] action.") (internal citations omitted); *see also Haut*, 107 F.3d at 213 ("It is the basis tenant of the jury system that it is improper for the district court to 'substitute its judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury

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Additionally, during the academic years 2006-2010, only two special education teachers at Lower Merion High School were African American. (A-1147.4, A-1447-48.)

system….'") (*quoting Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 80 (3d Cir. 1960) (Biggs, J.)).

B. The District Court Abused Its Discretion By Failing to Rule on Appellants' *Daubert* Motion Prior to Deciding Summary Judgment

In reviewing a trial court's decision whether to admit or exclude expert testimony under *Daubert*, abuse of discretion is the appropriate standard of review. *See Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 139, 141-143 (1997) (Rehnquist, Jr.).

The Supreme Court has mandated that trial courts, as a gatekeeper, should exercise vigilance in assessing the admissibility of expert opinion. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) (Blackmun, J.). It is well established in this Circuit that challenges to a party's expert report and testimony should be heard before the trial court considers summary disposition of a case. *In re TMI Litigation*, 199 F.3d 158, 159 (3d Cir. 2000) (per curiam) ("We have long stressed the importance of in limine hearings under Rule 104(a) in making reliability determination under Rule 702 and Daubert, … especially when a Daubert challenge is made in the context of a summary judgment motion …") (internal citations omitted), *cert. denied*, 530 U.S. 1225 (2000). "[W]hen the ruling on admissibility turns on factual issues, as it does here, at least in the summary judgment context, failure to hold such a hearing may be an abuse of

discretion." *Id; Padillas v. Stork-Gamco*, 186 F.3d 412, 418 (3d Cir. 1999) (Schwarzer, J.).

Appellees proffered Reschly as an expert witness, and used his report to support their motion for summary judgment by arguing that Reschly's comparison analysis demonstrated a lack of racial intent toward Appellants. (A-2935-74); (A-2976-3007); (A-3658-59); (A-3734-37); and (A-2807, A-2844-46.) On September 16, 2011, Appellants filed a Daubert motion objecting to the admissibility of Appellees' expert on grounds that the proffered opinions and report were based unreliable methodology, flawed analysis, and as a result could not be used by the Court for purposes of summary judgment and would not aid the trier of fact in making factual findings at trial. (A-2916-34.) Appellants further requested an in limine hearing on their objections. *Id*. at 18 (A-2933.) The District Court failed to conduct such a hearing. Instead, it granted Appellees' motion for summary judgment, and dismissed as "moot" Appellants' *Daubert* motion in its summary judgment memorandum opinion. (A-37.)

The District Court justified its decision by stating, "[b]ecause we have not considered that portion of the report [which was challenged by the Daubert motion] in granting the motion for summary judgment, we will deny the motion to exclude as moot." *Id*. This rationale amounts to an abuse of discretion. *See In re*

TMI Litigation, 199 F.3d at 159; *Padillas*, 186 F.3d at 418 (holding that the district court abused its discretion in excluding an expert's opinion without conducting an *in limine* hearing focused on the *Daubert* reliability of his testimony). Contrary to the trial court's statement that it did not rely on Reschly's expert report, his expert opinions and conclusions are entwined throughout the trial court's factual findings portion of the memorandum opinion, often times word for word.

Worse yet, the statements the District Court relied upon from Reschly's report are arguably the underpinnings for the District Court's conclusions. The District Court made the following dispositive findings that reside exclusively in Reschly's report, nigh verbatim: (1) "Disproportionality is defined as 'significantly greater or lower participation in special education by one or more groups compared to the participation rates for other groups.'; (2) '"Risk" is calculated 'by dividing the number of students with disabilities' in a particular group 'by the total number of students' in that group." *See* (A-15-17); *compare* (A-2935-37, A-2942.) Even where the District Court did not quote Reschly letter-perfect, the district court borrowed dispositive findings from his report. (*Id.*) ("The 'preferred' methods of analyzing disproportionality are 'risk and relative risk' or risk ratio …. "The Pennsylvania Department of Education uses a disproportionality risk ratio of 3.0, that is, three to one."). If *arguendo*, the District Court did not rely on Reschly's

report for purposes of summary judgment, the Court erred by incorporating Reschly's challenged findings in its opinion, particularly as to disproportionality statistics and the acceptable ratio. This was particularly in error when Reschly conceded at his deposition that the "relative risk analysis" he performed had no bearing on whether the District discriminated against Appellants here. (A-2992-2994.) ("**Q**. All the statistical analysis that you do on almost every page of your report up until paragraph 67 – 31 pages of analysis of statistics – how do those statistics in any way help us determine whether these individual plaintiffs were discriminated against or not? **A**. I don't know.").

Alternatively, if the District Court did, in fact, rely upon Reschly's Report for purposes of summary judgment, as appears to be the case, it erred by failing to conduct a requisite *Daubert* hearing concerning Appellant's objections that Reschly's proffered opinions and report are based on unreliable methodology and flawed analysis or rule substantively on Appellant's opposition. Consequently, the district court's error fits squarely within the reasoning of this Court in *Padillas* and *In re TMI Litigation* and was an abuse of discretion.

VIII. CONCLUSION

Appellants respectfully request that this Court reverse and remand the District Court's October 20, 2011 order.

Dated: December 17, 2012

Respectfully submitted,

/s/ Carl W. Hittinger

Carl W. Hittinger, Esq.
Lesli C. Esposito, Esq.
John D. Huh, Esq.
Monique M. Galloway, Esq.
Nathan P. Heller, Esq.
Patrick Castañeda, Esq.
DLA PIPER LLP (US)
1650 Market Street, Suite 4900
Philadelphia, PA 19103
T. (215) 656-2449
F. (215) 606-2149

Attorneys for Appellants (11-4200)

CERTIFICATE OF SERVICE

I, Carl W. Hittinger, Esquire, hereby certify that on December 17, 2012, Appellants Lydia Johnson, *et al.* Brief and Joint Appendix were served electronically via ECF on the following:

Jennifer R. Clarke, Esquire
Sonja D. Kerr, Esquire
Benjamin D. Geffen, Esquire
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Parkway
United Way Building, Second Floor
Philadelphia, PA 19103

Michael D. Kristofco, Esquire
Jenna B. Berman, Esquire
Wisler Pearlstine
460 Norristown Road, Suite 110
Blue Bell, PA 19422-0000

Amy C. Foerster, Esquire
Saul Ewing
Two North Second Street
Penn National Insurance Tower, 7th Floor
Harrisburg, PA 17101-0000

M. Abbegael Giunta, Esquire
Howard G. Hopkirk, Esquire
Office of Attorney General of Pennsylvania
Strawberry Square, 15th Floor
Harrisburg, PA 17120-0000

Dated: December 17, 2012

/s/ Carl W. Hittinger
Carl W. Hittinger, Esq.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of the Microsoft Word word-processing program, the foregoing Brief contains 13,987 words.

Dated: December 17, 2012

/s/ Carl W. Hittinger
Carl W. Hittinger, Esquire

CERTIFICATE OF TEXT

I, Carl W. Hittinger, hereby certify that the text of the electronically filed Brief and the text of the hard copies of the Brief are identical.

Dated: December 17, 2012

/s/ Carl W. Hittinger
Carl W. Hittinger, Esquire

CERTIFICATE OF A VIRUS CHECK

I, Carl W. Hittinger, hereby certify that a virus check has been performed on the PDF file containing the Brief. The virus check was completed using McAfee VirusScan Enterprise–Antispyware Enterprise 8.7i.

Dated: December 17, 2012

/s/ Carl W. Hittinger
Carl W. Hittinger, Esquire

CERTIFICATE OF ADMISSION TO BAR

1. I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: December 17, 2012

/s/ Carl W. Hittinger
Carl W. Hittinger, Esquire