DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD OF PROFESSIONAL RESPONSIBILITY

In the Matter of

BRYAN A. CHAPMAN, ESQUIRE **Disciplinary Docket No. 2014-D269**

Respondent

A Member of the Bar of the
District of Columbia Court of Appeals
Bar Number 439184
Date of Admission: October 4, 1993

CONDUCT AND VIOLATIONS

The conduct and the standards that Respondent has violated, are as follows:

2. Myna Roberts was hired in 1999 as a mathematics teacher at Crossland High School in Temple Hills, Maryland.

Respondent Agrees

3. In October 2010, while still employed at Crossland High School as a teacher, Ms. Roberts alleged that she was discriminated against by the principal (Charles Thomas), based on her national origin (Virgin Islands) beginning in 2005 up until March 2008, when the principal removed her from teaching regular mathematics courses and assigned her to a mathematics computer lab, and subsequently assigned her to a role as a co-teacher. Ms. Roberts alleged that: 1) she was retaliated against for complaining about alleged discriminatory practices of the principal; 2) she worked in a hostile environment; and 3) Prince George's County Educator's

Association (Union) breached its duty of fair representation when the Union failed to assist in addressing her claims.

Respondent Disagrees:

A radical change in the nature of one's work can constitute an adverse action.

a) In October 2010, while still employed at Crossland High School as a teacher, Ms. Roberts alleged that she was discriminated against by the principal (Charles Thomas), based on her national origin (Virgin Islands) beginning in 2005 and continuing to the present. Ms. Roberts alleged a pattern of **continuing violations** in her Complaint that deprived her of her own classroom and students.

   - Ms. Roberts alleged that she complained directly to Superintendent John Deasy in 2007, but he did not investigate Ms. Roberts's complaint or take corrective action.
   - Ms. Roberts alleged that she complained directly to Superintendent William Hite in 2009, but he did not investigate Ms. Roberts's complaint or take corrective action.
   - Ms. Roberts alleged that she attempted to file a discrimination complaint against Principal Thomas through her union (PGCEA) in 2009, but Ms. Roberts's union refused to provide her with a complaint form.

b) Ms. Roberts's harasser was her supervisor, Principal Charles Thomas. Principal Thomas deprived Ms. Roberts of her own classroom and students from 2005 to the present.

During the 2006-2007 and part of the 2007-2008 school years, Ms. Roberts reported to work each day but was given nothing to do.

c) A transfer that results in a radical change in one's work can constitute an adverse action, even if there is no loss in pay. *Fordyce v. Prince George's County Maryland*, 43 F. Supp. 3d 537, 548 (2014) ("courts have found that a new job assignment with reduced supervisory duties or diminished responsibility can constitute an adverse employment action."); *Czekalski v. Peters*, 475 F.3d 360, 364 (D.C.Cir.2007) (noting that a lateral transfer can constitute an adverse employment action if it results in the withdrawal of an employee's "supervisory duties" or "reassignment with significantly different responsibilities"); *Kessler v. Westchester Cnty. Dep't of Soc. Servs.*, 461 F.3d 199, 206-07 (2d Cir.2006) (stating that a transfer is an adverse employment action if it causes a "radical change in nature of the [plaintiff's] work")

A motion to dismiss a national origin discrimination claim can be defeated with circumstantial evidence under the McDonnell Douglas test.

National Origin Discrimination

At the time Judge Messitte dismissed her Title VI national origin discrimination claim, Ms. Roberts's complaint had established a *prima facie* claim of national origin discrimination under the *McDonnell Douglas* test, which relies on circumstantial

evidence as opposed to direct evidence. The elements of a *prima facie* national origin discrimination case are:

i. The employee is in a protected class (Ms. Roberts was born in the Virgin Islands).

ii. The employee was qualified for the position (Ms. Roberts is a certified high school mathematics teacher who had consistently received satisfactory job performance evaluations).

iii. The employee was removed from her position (Ms. Roberts has been removed from her classroom and students beginning in 2005 and continuing to present).

iv. An employee outside of the protected class was selected for the position (Ms. Roberts, who was born in the Virgin Islands, was replaced by an American born teacher).

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973):

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. In the instant case, we agree with the Court of Appeals that respondent proved a prima facie case."

Title VI

Ms. Roberts brought her national origin discrimination claim under Title VI, which provided a three (3) year statute of limitations.

Judge Messitte ruled: "Plaintiffs' are entitled to assert claims pursuant to Title VI…"

In *Rogers v. Board of Educ. Of Prince George's County*, 859 F. Supp. 2d 742, 744 (2012), Judge Peter Messitte ruled that "the Court FINDS that Plaintiffs' are entitled to assert claims pursuant to Title VI and the Board is not entitled to summary judgment at this juncture." *Fordyce v. Prince George's County Maryland*, 43 F. Supp. 3d 537, 545 (2014) ("Courts have interpreted Section 601 of Title VI as providing a private right of action to enforce claims of intentional discrimination and retaliation."); *Bowman v. Baltimore City Bd. of School Com'rs*, 173 F. Supp. 3d 242, 247-248 (2016) ("For purposes of a motion to dismiss, the plaintiff must allege receipt of federal funds by the defendant, and that this funding was received for the 'express purpose of creating jobs and maintaining existing ones.' In this case, Plaintiff adequately alleges that Baltimore City Public Schools receive federal stimulus funds through the American Recovery and Reinvestment Act of 2009 for the 'expressed purpose of creating jobs and maintaining existing ones.'")

Ms. Roberts met the requirements for defeating a motion to dismiss under Title VI laid out by Judge Messitte and other Maryland federal judges. *Roberts Complaint* stated:

"3. This is an action for declaratory relief, injunctive relief, damages and to secure protection of and to redress deprivation of rights secured by Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-7 et seq. The U.S. Department of Education has provided Maryland public schools with more than $1 billion under the American Recovery and Reinvestment Act of 2009. Prince George's County Public Schools are receiving stimulus funds for the express purpose of creating jobs and maintaining existing ones. Title VI requires the recipient of federal funds to waive Eleventh Amendment sovereign immunity."

Judge Messitte dismissed Ms. Roberts's Title VI claim prior to ruling that "Plaintiffs are entitled to assert claims pursuant to Title VI..."

Judge Messitte had already dismissed Ms. Roberts's Title VI claim on December 8, 2011 when he ruled that "Plaintiffs are entitled to assert claims pursuant to Title VI..." in April 2012.

In 2011, Title VI had a three (3) year statute of limitations in the State of Maryland.

In 2011, the statute of limitations for Title VI in Maryland was equivalent to Maryland's personal injury statute of limitations, which was three (3) years. In 2009, Ms. Roberts

complained directly to Superintendent Hite about Principal Thomas's harassment. In 2009, Principal Thomas was in his fourth year of depriving Ms. Roberts of her own classroom and students. During the 2006-2007 and part of the 2007-2008 school years, Principal Thomas had Ms. Roberts report to work each day but had nothing to do. Superintendent Hite did not investigate Ms. Roberts's complaint and did not take corrective action. These events, involving Superintendent Hite, all occurred in 2009, which is within the three (3) year statute of limitations provided by Ms. Roberts's Title VI claim.

Continuing Violations

Furthermore, Ms. Roberts should have been able to proceed with her Title VI claim, which included Principal Thomas' pattern of discriminatory behavior that began in 2005 and continued to the present, under the doctrine of Continuing Violations. *Etefia v. East Baltimore Community Corp.*, 2 F. Supp. 2d 751, 757 (1998) ("The Fourth Circuit has long recognized that incidents outside of the statutory window are not time-barred if they relate to a 'timely incident as a 'series of separate but related acts' amounting to a continuing violation.'" *Beall v. Abbott Laboratories* 130 F.3d 614, 620 (4th Cir.1997) citing *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 312 (4th Cir. 1980); *Beall v. Abbott Laboratories*, 130 F.3d 614, 620 (4th Cir.1997) ("Incidents outside of the statutory window are time-barred unless they can be related to a timely incident as a 'series of separate but related acts' amounting to a continuing violation." *Jenkins v. Home Ins. Co.*,

635 F.2d 310, 312 (4th Cir.1980).); *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996) (Under the continuing violation theory, "[i]f one act in a continuous history of discriminatory conduct falls within the charge filing period, then acts that are plausibly or sufficiently related to that act, which fall outside the filing period, may be considered for purposes of liability.")

Plaintiffs collectively established "actual knowledge" and "deliberate indifference".

In 2009, Ms. Roberts complained directly to Superintendent Hite about Principal Thomas's harassment ("actual knowledge"). Superintendent Hite did not investigate Ms. Roberts's complaint or take corrective action ("deliberate indifference").

Under Title VI, actual knowledge and deliberate indifference are essential to establishing liability against the Board of Education of Prince George's County. Unlike Title VII, under Title VI discriminatory and retaliatory behavior by Principal Angelique Simpson Marcus and Principal Charles Thomas, in the absence of "actual knowledge" and "deliberate indifference" by Superintendent Hite, would not be enough to impose liability on the Board.

In this case, Plaintiffs would have to establish that Superintendent Hite had "actual knowledge" of discriminatory behavior by his principals and failed to take corrective action ("deliberate indifference"). *Davis ex. Rel. LaShonda D. v. Monroe Cnty. Bd. of*

Educ., 526 U.S. 629, 642-643 (1999) (liability may be imputed to an educational entity premised on the actual knowledge of a school official who has authority to address the alleged discrimination and to institute corrective measures). *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 277 (1998) ("We conclude that damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.")

Ms. Roberts complained to Superintendent Hite about Principal Thomas' s harassment in 2009. Superintendent Hite did not investigate Ms. Roberts's complaint or take corrective action. Similarly, in 2008 and 2009, the Plaintiffs from Largo High School complained to Superintendent Hite both verbally and in writing about Principal Simpson Marcus' discriminatory and retaliatory behavior. Superintendent Hite did not investigate the complaints or take corrective action. Therefore, the complaints to Superintendent Hite from Ms. Roberts and the Largo High School Plaintiffs complement each other and establish a pattern of "actual knowledge" and "deliberate indifference" by Superintendent Hite from 2008 and beyond.

Ms. Roberts complaint to Superintendent Hite and his failure to respond occurred in 2009, well within Title VI 's three (3) year statute of limitations. Complaints from the Largo High School Plaintiffs occurred in 2008 and 2009, also within Title VI 's three year statute of limitations:

- In September 2008, Mr. Everhart began to complain to his union and other Largo High School teachers that Principal Simpson-Marcus was calling him racist names. One day, Principal Simpson-Marcus came to Mr. Everhart's classroom and called him into the hallway. She said to Mr. Everhart, "I don't like the idea that you're saying I'm making racist comments."

- Around October 2008, on Mr. Everhart's behalf, a group of Largo High School employees complained to school board officials, including Interim Superintendent William Hite, that Principal Simpson-Marcus was harassing Mr. Everhart and other white teachers. Interim Superintendent Hite met with the group once but never had contacted with them again. Later, the group complained to officials at the Maryland State Department of Education (MSDE) that Principal Simpson-Marcus was racially harassing Mr. Everhart and other white teachers.

- On October 22, 2008, a Largo High School guidance counselor named Ruth Johnson filed a 4170 "Discrimination or Harassment Incident Report" against Principal Simpson-Marcus with the PGCPS Equity Assurance office. Dr. Johnson complained that immediately after meeting with Interim Superintendent Hite, Principal Simpson Marcus began to retaliate against her.

- Mr. Everhart prepared a Rebuttal of Interim Evaluation dated November 13, 2008. In his rebuttal, Mr. Everhart wrote, "She [Principal Simpson Marcus] is going after all the white male teachers..."

- Mr. Everhart sent a letter to Superintendent Hite dated April 27, 2009. The letter stated, "I feel discriminated against being the only white teacher in the English Department. I am singled out for reasons I don't know. I am considering filing charges of discrimination and harassment against the principal."

- In 2009, John Finch, a lawyer retained by Jon Everhart and several other Largo High School staff members, complained to Superintendent Hite and other Board officials that Principal Angelique Simpson Marcus was harassing white teachers and several black staff members who supported Mr. Everhart.

- The PGCPS Equity Assurance office handles complaints of harassment and discrimination. In the spring of 2009, Mr. Everhart complained to Pamela Harris, director of the PGCPS Equity Assurance office, about Principal Simpson-Marcus' racial harassment.

- On May 20, 2009, Mr. Everhart filed a 4170 "Discrimination or Harassment Incident Report" against Principal Simpson-Marcus with the PGCPS Equity Assurance office. Mr. Everhart's 4170 complaint states, "Principal Simpson-

Marcus also called me racist names to my face and to other students and parents. …No teacher can be effective when the principal makes racial comments and epithets at a teacher."

- On June 9, 2009, Mr. Everhart sent a memorandum to Superintendent Hite, the Board of Education of Prince George's County and the PGCPS Human Resources department in which he says, "…Principal Simpson Marcus has expressed racial prejudice and personal bias against me."

- Jima Thomas-Gilbert, PGCEA UniServ Director, sent a letter, dated June 19, 2009, to Superintendent Hite in which she states, "Mr. Everhart has proof that he, along with other colleagues, are being targeted and discriminated against because of his [their] race and age."

4. On October 28, 2010, Ms. Roberts retained Respondent to represent her with respect to her claims against the Board of Education of Prince George's County (Board of Education) and the Union. Respondent agreed to represent Ms. Roberts for $300 per hour, and requested she pay an initial retainer of $3,000.

Respondent Agrees

Local Rules: United States District Court for the District of Maryland

According to Appendix B, Guidelines Regarding Hourly Rates: "Lawyers admitted to the bar for twenty (20) years or more: $300-475."

Over the course of a year, Ms. Roberts paid Respondent's $3000 retainer in 3-4 installments at her convenience.

Respondent represented Ms. Roberts from October 2010 until December 2011 and spent 149 hours working directly on her case.

5. Ms. Roberts paid the Respondent the initial retainer of $3,000 in installment payments with the last $500 payment made in August 2011.

Respondent Agrees

6. Respondent was aware that in order to pursue claims for race or national origin discrimination or retaliation under Title VII of the Civil Rights Act, Ms. Robert had to file a charge of discrimination or retaliation with the U.S. Equal Employment Opportunity Commission (EEOC) within 300 days of the last discriminatory or retaliatory act.

Respondent Agrees

If one wishes to file a workplace discrimination claim in federal court under Title VII, one must first file a discrimination claim with the Equal Employment Opportunity Commission (EEOC) within 300 days of the last discriminatory or retaliatory act.

However, the *Roberts's Complaint* was filed under Title VI, which allows one to file a workplace discrimination claim in federal court without having filed a discrimination claim with the EEOC as a prerequisite.

Respondent asked Ms. Roberts whether she had filed a claim with EEOC during our first meeting. Ms. Roberts responded that she had not filed a claim with EEOC. Respondent informed Ms. Roberts that filing a claim with EEOC within 300 days of the last incident of discrimination is a prerequisite under Title VII to filing a workplace discrimination claim in federal court. However, there are other ways of gaining access to a federal court besides Title VII, Respondent specifically mentioned 42 U.S.C. § 1981 as an example.

8. When Ms. Roberts hired Respondent in October 2010, Respondent knew that Ms. Roberts had not filed a discrimination complaint with EEOC.

Respondent Agrees

Ms. Roberts told Respondent that she had not filed a discrimination complaint with EEOC.

9. Respondent did not communicate to Ms. Roberts that her claims might be time-barred or dismissed for failure to exhaust administrative remedies.

Respondent Disagrees

The first meeting between Respondent and Ms. Roberts occurred on October 9, 2010 and lasted for almost four hours. Respondent asked Ms. Roberts whether she had filed an EEOC complaint and she responded "no". Respondent told Ms. Roberts that filing an EEOC complaint is generally a prerequisite to filing a workplace discrimination lawsuit in federal court. However, there are statutes that would allow her to file a discrimination claim in federal court without filing a complaint with EEOC.

10. At the time that Respondent took the $3,000 initial retainer fee from Ms. Roberts, although he knew that she had not filed a complaint with the EEOC and that her claims might be time-barred, he did not communicate to her that there was little to no chance that her claims would be successful.

Respondent Disagrees

Larson's Employment Discrimination by Lex K. Larson is a highly respected series on employment discrimination law. Larson's has sections on all of the federal statutes one can use to file a workplace discrimination claim in federal court. Title VII is the most commonly used statute and it requires filing a discrimination claim with EEOC as a prerequisite.

However, there are at least half a dozen other federal statutes that allow one to file a workplace discrimination claim in federal court without filing a discrimination claim with EEOC as a prerequisite, such as, Title VI, Title IX, 42 U.S.C. § 1981, 42 U.S.C. § 1983, 42 U.S.C. § 1985, and 42 U.S.C. § 1986.

Respondent practices employment discrimination law and has been aware of these statutes for many years. These statutes offer advantages over Title VII because there is generally no cap on damages and the statutes of limitation are longer. For instance, the statute of limitation for 42 U.S.C. § 1981 is four years and, in 2010, the statute of limitations for Title VI was three years.

A state's sovereign immunity bars 42 U.S.C. § 1981 claims, but Title VI and Title IX claims are not barred by sovereign immunity since a state agrees to waive its sovereign immunity when it accepts federal funds. Prince George's County Public School System is an arm of the State of

Maryland and enjoys sovereign immunity. However, PGCPSS does not have sovereign immunity against Title VI claims because it accepted federal funds ("Stimulus") for the primary purpose of maintaining or creating jobs. Therefore, Title VI was the ideal statute to use in Ms. Roberts' s case.

Ms. Roberts's claims were time-barred under Title VII, which requires that one file a discrimination complaint with EEOC within 300 days of the last discriminatory or retaliatory incident. However, Title VI prohibits discrimination based on race and national origin and does not require filing a discrimination claim with EEOC as a prerequisite to filing a workplace discrimination claim in federal court.

Due to the Great Recession of 2008, teachers were being laid off across the country. The American Recovery and Reinvestment Act of 2009 ("Stimulus") provided federal funds to school systems for the purpose of maintaining and creating jobs. In 2009, the Board publicized that it had received Stimulus funds and used the money to save and create jobs. Therefore, Respondent knew that Ms. Roberts and the Largo High School Plaintiffs could file a workplace discrimination claim in federal court against the Board under Title VI. Nonetheless, it would take time to demonstrate exactly how PGCPSS received its Stimulus funds.

To establish liability under Title VI, one must establish that a high level official was put on notice about discrimination ("actual knowledge") and deliberately failed to take corrective action ("deliberate indifference"). In 2009, similar to the Largo High School plaintiffs, Ms. Roberts complained directly to Superintendent William Hite who took no corrective action. Ms. Roberts's complaint to Superintendent Hite fell well within the three year statute of limitations

under Title VI. Ms. Roberts could establish "actual knowledge" and "deliberate indifference" which are prerequisites to establishing liability under Title VI. *Davis ex. Rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642-643 (1999) (liability may be imputed to an educational entity premised on the actual knowledge of a school official who has authority to address the alleged discrimination and to institute corrective measures).

Furthermore, under the continuing violations doctrine, incidents, such as, being removed from her classroom and students and having nothing to do during the 2006-2007 and part of the 2007-2008 school years can be included even if they fall outside of Title VI 's three (3) year statute of limitations. *Etefia v. East Baltimore Community Corp.*, 2 F. Supp. 2d 751, 757 (1998) ("The Fourth Circuit has long recognized that incidents outside of the statutory window are not time-barred if they relate to a 'timely incident as a 'series of separate but related acts' amounting to a continuing violation.'" *Beall v. Abbott Laboratories*, 130 F.3d 614, 620 (4th Cir.1997) citing *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 312 (4th Cir. 1980); *Beall v. Abbott Laboratories*, 130 F.3d 614, 620 (4th Cir.1997) ("Incidents outside of the statutory window are time-barred unless they can be related to a timely incident as a 'series of separate but related acts' amounting to a continuing violation." *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 312 (4th Cir.1980).); *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996) (Under the continuing violation theory, "[i]f one act in a continuous history of discriminatory conduct falls within the charge filing period, then acts that are plausibly or sufficiently related to that act, which fall outside the filing period, may be considered for purposes of liability.")

11. Respondent initially determined that the solution for Ms. Roberts's failure to exhaust administrative remedies and file a timely charge of discrimination with the EEOC was to employ the "single filing" or "piggybacking" rule which allows plaintiff who did not file charges of discrimination with EEOC to "piggyback" onto the charge of a named plaintiff. Respondent decided to join Ms. Roberts's discrimination claim in a lawsuit with a group of eleven current and former teachers from Largo High School whom he also represented, including one teacher who had filed a timely EEOC charge of discrimination.

Respondent Disagrees

Respondent never considered "piggybacking" a permanent solution for Ms. Roberts or any of the Plaintiffs who failed to file timely EEOC complaints. Jon Everhart, a Largo High School Plaintiff, had filed a timely EEOC complaint and had received a 90-day Notice of Right to Sue letter from the EEOC. Mr. Everhart's deadline to file a discrimination lawsuit in federal court was November 2010.

A combined complaint, identified as the *Johnson Complaint*, was compelling because the Plaintiffs collectively demonstrated that Superintendent Hite had "actual knowledge" of the discriminatory and retaliatory behavior of his principals and displayed "deliberate indifference" by failing to investigate complaints or take corrective action. "Actual knowledge" and "deliberate indifference" are essential in proving that the Board was liable under Title VI. Piggybacking could provide temporary justification for filling a combined complaint, the *Johnson Complaint*, in November 2010 until the combined complaint could be amended to include a Title VI claim at a later date.

12. Respondent did not discuss his legal strategy with Ms. Roberts, nor did he provide her sufficient information about his strategy for her to make an informed decision about the course of the representation.

Respondent Disagrees

In September 2010, Respondent agreed to bring a discrimination lawsuit in federal court on behalf of an initial group of approximately half a dozen former Largo High School employees. Within a week, Respondent began to email drafts of the pending lawsuit to the Plaintiffs for their review and comments. Respondent would later learn that these drafts were being circulated across the school district.

In October 2010, Ms. Roberts contacted Respondent. She left a voice mail message stating that she wanted to bring a class action lawsuit against the Board. Respondent met with Ms. Roberts who knew about the pending lawsuit, identified as the *Johnson Complaint*. Ms. Roberts was a long-time friend of one of the Largo High School Plaintiffs, she discussed the pending the lawsuit with a Largo High School Plaintiff who was also a union representative, and Ms. Roberts was mutually acquainted with several other Largo High School Plaintiffs.

During our initial meeting, Respondent and Ms. Roberts spoke for almost four (4) hours. Respondent listened to Ms. Roberts's complaint about Principal Charles Thomas's harassment, which began in 2005. Ms. Roberts described how she complained to but got no assistance from former Superintendent Deasy, current Superintendent Hite, or her own union (PGCEA).

Ms. Roberts, a veteran union representative, spoke about the role the union played in thwarting attempts by its members to file discrimination complaints, both internally and externally, against the Board. Based on information that Ms. Roberts provided, several Largo High School Plaintiffs insisted that the union (PGCEA) be added to the *Johnson Complaint* as a defendant.

Ms. Roberts repeatedly complained that being denied her own classroom and students was costing her opportunities for career advancement. Ms. Roberts explained that teachers are evaluated by the performance of their students. And, not having her own students prevented her from meeting the criteria of specific programs she wished to pursue.

Respondent documented the stories of discrimination and retaliation as told by Ms. Roberts and each Plaintiff in the pending lawsuit, identified as the *Johnson Complaint*. Respondent submitted multiple drafts of the pending lawsuit to Ms. Roberts and each Plaintiff for review and comments.

Respondent's expressed goal was to file the *Johnson Complaint* in federal court by November 2010, Mr. Everhart's filing deadline, and then to amend the *Johnson Complaint* at a later date to include a new claim, such as a Title VI claim, which did not require filing an EEOC complaint as a prerequisite.

All of the Plaintiffs, including Ms. Roberts, seemed satisfied with the pending *Johnson Complaint* and each Plaintiff was provided the opportunity to ask questions and make comments at any time. From the day the *Johnson Complaint* was filed in federal court, court

documents and other related documents were routinely posted on Respondent's website and circulated on Twitter so that all of the Plaintiffs had easy access to them.

The day after the lawsuit was filed in federal court, the Washington Post ran the first of half a dozen stories concerning the *Johnson Complaint*. That day, Ms. Roberts and several other Plaintiffs were interviewed about the *Johnson Complaint* at the local television station Fox 5. Weekly newspapers interviewed some of the Plaintiffs and ran regular stories about the progress of the *Johnson Complaint*. CTV, a public access television station, covered the *Johnson Complaint* and interviewed the Plaintiffs on camera in front of the Greenbelt Federal Courthouse. Ms. Roberts and all of the Plaintiffs seemed delighted. And, Ms. Roberts would later express gratitude for what Respondent was doing for the group in a personal note.

Respondent and Ms. Roberts discussed a discrimination case called *Fred Crouch v. Prince George's County Public School System*. In 2007, the Board settled a discrimination complaint, *Fred Crouch v. Prince George's County Public School System*, through the Maryland Commission on Human Relations (MCHR). In its annual report, the Maryland Commission on Human Relations (MCHR) stated:

> **Fred Crouch v. Prince George's County Public School System**
>
> Prince George's County Public School System (PGCPSS), which is the second largest school system in Maryland, transferred one of its teachers to another school in retaliation against him for filing a racial discrimination complaint. PGCPSS reached an agreement with the MCHR on the unlawful race discrimination case.

The most significant part of the agreement was that PGCPSS consented to reestablish and maintain with adequate staffing levels, it's Equity Assurance Office. The Equity Assurance Office is charged with investigating school system employee complaints of unlawful discrimination and harassment. In addition, PGCPSS will require its principals, administrators and other supervisory personnel to undergo sensitivity training surrounding anti-discrimination, anti-harassment and cultural competence.

Maryland Commission on Human Relations (MCHR)

2007 Annual Report, page 10

Fred Crouch v. Prince George's County Public School System **convinced Respondent that the Board had a history of condoning discriminatory and retaliatory behavior by supervisory personnel against subordinates.**

13. Respondent began collectively representing the group of eleven current and former teachers from Largo High School in September 2010 through May 2011 in an employment discrimination lawsuit against the Board of Education and the Union for alleged retaliatory actions taken against them by the principal at Largo High School, Ms. Angelique Simpson-Marcus, based on race.

Respondent Disagrees

The *Johnson Complaint* focused on how Superintendent William Hite and the teacher's union (PGCEA) thwarted discrimination complaints by teachers and other staff members against

principals, such as, Angelique Simpson Marcus and Charles Thomas. By thwarting discrimination complaints, Superintendent Hite and PGCEA fostered a work environment where principals and other supervisors could discriminate and retaliate against their subordinates at will.

14. On November 22, 2010, Respondent filed a lawsuit on behalf of the group and Ms. Roberts in the United States District Court for the District of Maryland styled *Johnson, et al v. Prince George's County School Board, et. al*, Civil Action No. 10_CV-3291-PJM. The *Johnson Complaint* demanded $50 million collectively, for the twelve plaintiffs, for lost pay and benefits, compensatory and punitive damages, attorneys' fees and costs. Respondent later amended the complaint on January 19, 2011, to include a Title VI of the Civil Rights Act of 1964 claim against the Defendants.

Respondent Agrees

15. In the *Johnson Complaint* Respondent recounted that Ms. Roberts was then a 61-year old black woman, born in the Virgin Islands, who spoke with a "distinct accent," and worked as a mathematics teacher at Crossland High School in Temple Hills Maryland for eleven years.

Respondent Agrees

16. The *Johnson Complaint* identified Ms. Roberts' age, race, and national origin, but failed to include facts asserting that Ms. Roberts' age, race, or national origin were a factor or in any way motivated the decisions made about her employment, or the alleged retaliation against her.

Respondent Disagrees

Employment discrimination complaints "must contain only a short and plain statement of the case showing that the pleader is entitled to relief."

In general, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). However, an employment discrimination complaint "must contain only a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 (2002). The Supreme Court has declined to revisit *Swierkiewicz* and has applied its standard as good law after *Twombly* and *Iqbal*. *Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 347 (2014) (citing *Swierkeiwicz* for the assertion that "imposing a 'heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)'")

> Federal Rules of Civil Procedure
>
> Rule 8. General Rules of Pleading
>
> (a) Claims for Relief.
>
> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief

the pleader seeks. Relief in the alternative or of several different types may be demanded.

National Origin Discrimination

Ms. Roberts's portion of the *Johnson Complaint* established a *prima facie* claim of national origin discrimination under the *McDonnell Douglas* test which relies on circumstantial evidence, instead of direct evidence. The elements of a *prima facie* national origin discrimination case are:

i. The employee is in a protected class (Ms. Roberts was born in the Virgin Islands).

ii. The employee was qualified for the position (Ms. Roberts is a certified high school mathematics teacher who had consistently received satisfactory job performance evaluations).

iii. The employee was removed from her position (Ms. Roberts has been removed from her classroom and students beginning in 2005 and continuing to present).

iv. An employee outside of the protected class was selected for the position (Ms. Roberts, who was born in the Virgin Islands, was replaced by an American born teacher).

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)

17. Ms. Roberts's claims in the *Johnson Complaint* did not have any connection to the facts asserted on behalf of the other plaintiffs as she did not work at the same school as the other plaintiffs and her dispute involved a different principal. Additionally, Ms. Roberts's claim

focused on national origin discrimination and not age or race discrimination as the other plaintiffs.

Respondent Disagrees

The *Johnson Complaint* was filed on November 22, 2010 in order to meet the deadline on Jon Everhart's EEOC Right to Sue letter. However, Respondent anticipated a later amendment that would include a Title VI claim.

Under Title VI, the Board cannot be held liable for the misconduct of its principals. The Board can only be held liable for damages only where Superintendent William Hite intentionally acted in clear violation of Title VI by remaining deliberately indifferent to acts of principal-teacher harassment of which he had actual knowledge.

Ms. Roberts and the Largo High School Plaintiffs separately complained directly to Superintendent William Hite that their principals were harassing them. Nonetheless, in neither case did Superintendent Hite conduct and investigation or take corrective action. In both cases, Superintendent Hite had "actual knowledge" of principal-teacher harassment and displayed "deliberate indifference" which laid the groundwork for the Board's liability under Title VI. *Davis ex. Rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642-643 (1999) (liability may be imputed to an educational entity premised on the actual knowledge of a school official who has authority to address the alleged discrimination and to institute corrective measures).

> Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining

deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge. *Id.*, at 290. Contrary to the dissent's suggestion, the misconduct of the teacher in *Gebser* was not "treated as the grant recipient's actions." Post, at 661 (opinion of Kennedy, J.). Liability arose, rather, from "an official decision by the recipient not to remedy the violation." *Gebser v. Lago Vista Independent School Dist.*, supra, at 290.

The requirements for establishing a school board's liability are different under Title VI (including Title IX) and Title VII. Under Title VI and Title IX, in exchange for providing a public or private entity with federal funds, the federal government demands that these entities waive Sovereign Immunity (if applicable) and accept the government's definition of how and when liability is establish due to discrimination.

For instance, the contractual agreement between a school board and the U.S. Department of Education states that a school board cannot be held liable for the discriminatory behavior of its principals. To establish liability against a school board, it must be demonstrated that a high leveled board official, such as, a superintendent, had "actual knowledge" of the discriminatory behavior and displayed "deliberate indifference". The purpose of this contractual agreement is to prevent federal funds from being squandered due to the everyday misconduct of principals and teachers.

18. On January 10, 2011, the Board of Education filed a motion to dismiss the complaint contending, *inter alia*, that Ms. Roberts failed to: 1) adequately state a claim under federal law; 2) exhausted her administrative remedies before asserting her claim under Title VII of the Civil

Rights Act of 1964; 3) make a prima facie case of retaliation as no adverse employment action had been taken against her since she did not experience a decrease in compensation or a loss of a tangible employment benefit and received satisfactory job evaluations, and 4) properly plead a hostile work environment claim.

Respondent Agrees

19. On January 12, 2011, the Union filed a motion to dismiss Ms. Roberts's complaint on grounds, *inter alia*, that Ms. Roberts: 1) failed to set forth facts sufficient to establish any actionable claims; 2) failed to allege a claim of discrimination against the Union under federal law; 3) failed to exhaust her administrative remedies before asserting her claim under Title VII; 4) failed to allege a claim of harassment or retaliation by the Union; and 5) improperly made a claim for breach of duty of fair representation for state employees when the law protects only private sector employees.

Respondent Agrees

20. On January 25, 2011, Respondent filed an Opposition to Defendant Union's Motion to Dismiss. On February 19, 2011, Respondent filed an Opposition to Defendant Board of Education's Motion to Dismiss. In his opposition, Respondent conceded several of the Defendant's arguments and abandoned the 42 U.S.C. §§§ 1981, 1983, and 1985 claims, leaving only the Title VI claim (national origin disparate treatment) and Title VII claim (national origin disparate treatment).

Respondent Agrees

21. On April 28, 2011, the court heard oral arguments on the Defendants' motion to dismiss. That same day, the Court issued an Order dismissing the entire action without prejudice, instructing the Plaintiffs to refile individual complaints within 30 days.

Respondent Agrees in part and Disagrees in part

The April 28, 2011 hearing was attended by the local media and hundreds of predominately black citizens. They sat on the Plaintiffs' side of the courtroom with almost no one sitting on the Board's side of the courtroom.

Upon entering the courtroom, Judge Messitte briefly listened to comments by attorneys on both sides, and then ordered the attorneys into his chambers. Counsel for the Board, Abby Hairston, who seemed to be very familiar with Judge Messitte, asked the judge to dismiss the *Johnson Complaint* because it could be very costly to the school system. Judge Messitte was sympathetic to Ms. Hairton's request and offered to break the *Johnson Complaint* into individual complaints.

Judge Messitte then returned to the bench and ordered the Plaintiffs to do the following: 1) to refile their complaints individually within 30 days, 2) to pay a separate $400 filing fee at the time they refiled their complaints, and 3) to file an EEOC complaint.

Judge Messitte sternly warned the Plaintiffs that the only way they could precede in his court was by way of filing a complaint with EEOC. Judge Messitte said nothing about the Title VI claim that had been filed in January 2011. Title VI allows a plaintiff to file a workplace

discrimination claim in federal court without filing a discrimination complaint with EEOC as a prerequisite.

22. During the *Johnson Complaint* litigation, on January 11, 2011, Respondent requested that Ms. Roberts file a complaint with EEOC. Ms. Roberts filed a complaint with the EEOC on March 16, 2011. The facts Ms. Roberts provided in the complaint dated back to 2005 and 2008.

Respondent Disagrees

Respondent instructed Ms. Roberts to file a discrimination complaint with EEOC during his first meeting with her in October 2010. Respondent told Ms. Roberts that one is required to file an EEOC complaint within 300 days of becoming aware of an incident of discrimination in the state of Maryland. Ms. Roberts was well outside of the 300 day statute of limitations, but having at least filed an EEOC complaint would be a gesture to the court. The goal was to use Jon Everhart's timely EEOC complaint to cover all of the Plaintiffs in a process called "piggybacking" until the *Johnson Complaint* could be amended with the addition of a Title VI claim. Ms. Roberts never confirmed that she followed Respondent's instructions.

Respondent did not request that Ms. Roberts file a complaint with EEOC on January 11, 2011. Respondent was preparing to amend the *Johnson Complaint* to include a Title VI claim that made a Title VII claim moot. And, Respondent, did in fact, formally amended the *Johnson Complaint* to include a Title VI claim a week later. If Ms. Roberts filed an EEOC complaint on March 16, 2011, she did so without informing Respondent.

23. Respondent did not assist or provide Ms. Roberts guidance on filing her complaint with the EEOC.

Respondent Disagrees

Respondent instructed Ms. Roberts to file a complaint with EEOC during our first meeting in October 2010. Respondent told Ms. Roberts that she would have to visit the Baltimore Field Office of EEOC in Baltimore, MD. Respondent told Ms. Roberts that she would fill out a simple form and check the boxes corresponding to national origin discrimination and retaliation to initiate the EEOC complaint process. However, since a lawsuit was pending, as soon as possible, Ms. Roberts should request a Notice of Right to Sue letter which would allow her to file a workplace discrimination claim in federal court within 90-days. Ms. Roberts' EEOC complaint would be untimely, but having received a Notice of Right to Sue letter from EEOC would be a gesture to the court. The goal was to use Jon Everhart's timely EEOC complaint to cover all of the Plaintiffs in a process called "piggybacking".

Ms. Roberts never confirmed that she followed Respondent's instructions from October 2010. If Ms. Roberts filed an EEOC complaint on March 16, 2011, she did so without informing the Respondent.

24. Respondent did not explain to Ms. Roberts that to state a timely claim to the EEOC the alleged acts of discrimination or retaliation had to occur within 300 days of her complaint or by no later than May 14, 2010.

Respondent Disagrees

Respondent asked Ms. Roberts whether she had file a complaint with EEOC during the first meeting with her in October 2010. Ms. Roberts answer no. She had never filed an EEOC complaint. Respondent immediately explained to Ms. Roberts that filing an EEOC complaint within 300 days of alleged act of discrimination was a prerequisite to filing a workplace discrimination claim in federal court under Title VII. However, there are ways to file a workplace discrimination claim in federal court without filing an EEOC complaint, for instance, 42 U.S.C. § 1981 allows one to file a workplace discrimination complaint in federal court without filing a discrimination complaint with EEOC as prerequisite. Unlike Title VII, 42 U.S.C. § 1981 has a statute of limitation of four years and no cap on damages.

25. On March 17, 2011, the EEOC issued a Notice of Right to Sue to Ms. Roberts.

Respondent neither Agrees nor Disagrees

Ms. Roberts did not inform Respondent that she had filed a complaint with EEOC on March 16, 2011 nor did she inform Respondent that she had received a Notice of Right to Sue on March 17, 2011.

Ms. Roberts informed Respondent that she had filed a complaint with EEOC after Judge Messitte ordered the Plaintiffs to do so in May 2011. Sometime in May 2011, Ms. Roberts informed Respondent that she filed an EEOC complaint at the EEOC Baltimore Field Office and was issue a Notice of Right to Sue letter on the same day. Respondent congratulated Ms. Roberts because it seemed remarkable that she could file an EEOC complaint and received a Notice of Right to Sue letter on the same day. Respondent assumed that Ms. Roberts had recently filed her discrimination complaint with the EEOC.

26. On May 23, 2011, based on the court's directive in the *Johnson Complaint* litigation, Respondent filed a separate individual complaint on behalf of Ms. Roberts in the United States District Court for the District of Maryland styled *Roberts v. Prince George's County School Board, et. al.* Civil Action No. 11-CV-1397-PJM. The facts assert in Ms. Roberts's individual complaint were virtually identical to those asserted in the *Johnson* complaint. The Roberts complaint alleged a Title VI claim and a Title VII claim against the Board of Education, and a Section 1981 claim against the Union.

Respondent Agrees

The *Johnson Complaint* was drafted with the intention of eventually adding a Title VI claim to each Plaintiff's complaint. Therefore, the *Roberts Complaint* was similar to the Roberts's portion of the *Johnson Complaint*.

27. On June 24, 2011, the Union filed a motion to dismiss Ms. Roberts' complaint for failure to state a claim. On June 30, 2011, the Board of Education also filed a motion to dismiss Ms. Roberts' complaint for failure to state a claim.

Respondent Agrees

28. In July 2011, the parties filed several motions. On December 7, 2011, the Court heard oral argument on the Defendants' motion to dismiss.

Respondent Agrees

However, prior to hearing oral argument on the Defendant's motion to dismiss. Judge Messitte stated that the availability of Title VI would be determined at a separate hearing. The Title VI

hearing occurred in February 2012 and Judge Messitte issued his decision on April 9, 2012, approximately four months after he dismissed Ms. Roberts's Title VI claim.

Ms. Roberts brought her national origin discrimination claim under Title VI, which provided a three (3) year statute of limitations. In *Rogers v. Board of Educ. Of Prince George's County*, 859 F. Supp. 2d 742, 744, 752 (2012), Judge Peter Messitte ruled that **"the Court FINDS that Plaintiffs' are entitled to assert claims pursuant to Title VI and the Board is not entitled to summary judgment at this juncture."**

> "To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). a complaint need only contain sufficient well-pled facts to 'state a claim to relief that is plausible on its face.' *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plaintiffs have done just that with respect to the 'primary objective' element. Rather than merely rehash the statutory language, each Plaintiff alleges in his or her Complaint that Maryland's public school have secured more than $1 billion in federal funding and that PGCPS has received this money 'for the express purpose of creating jobs and maintaining existing ones.'"

29. During the motions hearing on December 7, 2011, the Court said to Respondent, "I think you've really encouraged some of your clients to come forth with lawsuits that have no basis."

Respondent Agrees in part and Disagrees in part

Respondent agrees that Judge Messitte made the comment. However, Judge Messitte's comment was incorrect.

Respondent does not know who Judge Messitte was talking about. However, if Judge Messitte as talking about Ms. Roberts he was incorrect.

Ms. Roberts had a basis for her lawsuit. In 2005, Principal Charles Thomas removed her from her classroom and students. During the 2006-2007 and part of the 2007-2008 school years, Ms. Roberts reported to work each day, but was given nothing to do. In 2009, Ms. Roberts complained to Superintendent Hite about not having her own classroom or students. Superintendent Hite did not conduct an investigation or take corrective action.

A transfer that results in a radical change in one's work can constitute an adverse action, even if there is no loss in pay. *Fordyce v. Prince George's County Maryland*, 43 F. Supp. 3d 537, 548 (2014) ("courts have found that a new job assignment with reduced supervisory duties or diminished responsibility can constitute an adverse employment action."); *Czekalski v. Peters*, 475 F.3d 360, 364 (D.C.Cir.2007) (noting that a lateral transfer can constitute an adverse employment action if it results in the withdrawal of an employee's "supervisory duties" or "reassignment with significantly different responsibilities"); *Kessler v. Westchester Cnty. Dep't of Soc. Servs.*, 461 F.3d 199, 206-07 (2d Cir.2006) (stating that a transfer is an adverse employment action if it causes a "radical change in nature of the [plaintiff's] work")

National Origin Discrimination

At the time Judge Messitte dismissed her Title VI national origin discrimination claim, Ms. Roberts's complaint had established a *prima facie* claim of national origin discrimination under the *McDonnell Douglas* test, which relies on circumstantial evidence as opposed to direct evidence. The elements of a *prima facie* national origin discrimination case are:

i. The employee is in a protected class (Ms. Roberts was born in the Virgin Islands).

ii. The employee was qualified for the position (Ms. Roberts is a certified high school mathematics teacher who had consistently received satisfactory job performance evaluations).

iii. The employee was removed from her position (Ms. Roberts has been removed from her classroom and students beginning in 2005 and continuing to present).

iv. An employee outside of the protected class was selected for the position (Ms. Roberts, who was born in the Virgin Islands, was replaced by an American born teacher).

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973):

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. In the instant case, we agree with the Court of Appeals that respondent proved a prima facie case."

In 2011, Title VI had a three (3) year statute of limitations in the State of Maryland.

In 2011, the statute of limitations for Title VI in Maryland was equivalent to Maryland's personal injury statute of limitations, which was three (3) years. In 2009, Ms. Roberts complained directly to Superintendent Hite about Principal Thomas's harassment. In 2009,

Principal Thomas was in his fourth year of depriving Ms. Roberts of her own classroom and students. During the 2006-2007 and part of the 2007-2008 school years, Principal Thomas had Ms. Roberts report to work each day but gave her absolutely nothing to do. Superintendent Hite did not investigate Ms. Roberts's complaint and did not take corrective action. These events, involving Superintendent Hite, all occurred within the three (3) year statute of limitations provided by Ms. Roberts's Title VI claim.

Continuing Violations

Furthermore, Ms. Roberts should have been able to proceed with her Title VI claim, which included Principal Thomas' pattern of discriminatory behavior that began in 2005 and continued to the present, under the doctrine of Continuing Violations. *Etefia v. East Baltimore Community Corp.*, 2 F. Supp. 2d 751, 757 (1998) ("The Fourth Circuit has long recognized that incidents outside of the statutory window are not time-barred if they relate to a 'timely incident as a `series of separate but related acts' amounting to a continuing violation.'" *Beall v. Abbott Laboratories* 130 F.3d 614, 620 (4th Cir.1997) citing *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 312 (4th Cir. 1980); *Beall v. Abbott Laboratories*, 130 F.3d 614, 620 (4th Cir.1997) ("Incidents outside of the statutory window are time-barred unless they can be related to a timely incident as a 'series of separate but related acts' amounting to a continuing violation." *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 312 (4th Cir.1980).); *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996) (Under the continuing violation theory, "[i]f one act in a continuous history of discriminatory conduct falls within the charge filing period, then acts that are

plausibly or sufficiently related to that act, which fall outside the filing period, may be considered for purposes of liability.")

30. During the hearing, the Court informed the Respondent, *inter alia*, that Ms. Roberts' complaint of national origin discrimination did not apply to Section 1981. The Court also noted that Ms. Roberts' complaint did not state a cause of action for national origin discrimination and that her complaint was barred because the statute of limitations had run by the time Ms. Roberts filed her EEOC complaint.

Respondent Agrees in part and Disagrees in part

Respondent agrees that Judge Messitte make the statements. However, each element of Judge Messitte's statement was incorrect.

First, Ms. Roberts's national origin claim against the Board was brought under Title VI not Section 1981. Title VI includes claims for race and national origin. Section 1981 includes claims for race, ethnicity, and ancestry. Prior to the hearing, Judge Messitte informed the parties that the applicability of Title VI would be determined at a separate hearing in 2012. Nonetheless, it is obvious that Judge Messitte dismissed Ms. Roberts's Title VI claim at the December 2011 hearing.

Second, Judge Messitte stated that Ms. Roberts did not state a cause of action for national origin discrimination. Ms. Roberts's complaint did not provide direct evidence of national origin discrimination. However, few discrimination claims provide direct evidence of discrimination. Most employers are not stupid enough to tell an employee that they are being discriminated

against because of their national origin. When direct evidence of discrimination is not available, which is generally the case, one can apply the *McDonnell Douglas* test, which allows one to establish a *prima facie* case of discrimination without providing direct evidence of discrimination. Ms. Roberts met the requirements of *the McDonnell Douglas* test:

i. The employee is in a protected class (Ms. Roberts was born in the Virgin Islands).

ii. The employee was qualified for the position (Ms. Roberts is a certified high school mathematics teacher who had consistently received satisfactory job performance evaluations).

iii. The employee was removed from her position (Ms. Roberts has been removed from her classroom and students beginning in 2005 and continuing to present).

iv. An employee outside of the protected class was selected for the position (Ms. Roberts, who was born in the Virgin Islands, was replaced by an American born teacher).

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)

Third, Judge Messitte stated that Ms. Roberts's complaint was barred because the statute of limitations had run by the time Ms. Roberts filed her EEOC complaint. However, Ms. Roberts's Title VI claim did not require that Ms. Roberts file an EEOC complaint as a prerequisite to filing a workplace discrimination claim in federal court. In addition, the statute of limitations on Ms. Roberts Title VI claim was three (3) years which included incidents concerning Superintendent Hite's "actual knowledge" and "deliberate indifference". Other incidents of harassment that fell outside of Title VI 's three (3) year statute of limitations could be included for the purpose of liability under the Continuing Violations doctrine.

31. The next day, on December 8, 2011, the Court issued an Order granting the Defendants' motions to dismiss and dismissed Ms. Roberts's claims with prejudice.

Respondent Agrees

32. Under D.C. Rule of Professional Conduct 8.5(b)(2)(i) (Choice of Law), the Maryland Attorney's Rules of Professional Conduct apply. Respondent's conduct set forth above violated the following provisions of the Maryland Attorney's Rules of Professional Conduct:

(a) Rule 19-301, in that he failed to provide competent representation with the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation;

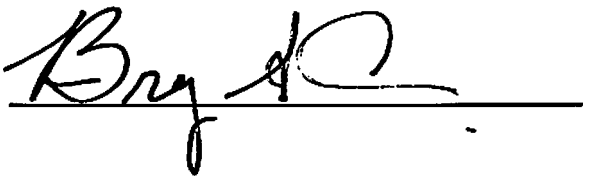
(b) Rule 19-301.2(a), in that he failed to consult with the client as to the means he would employ in fulfilling the client's objectives of the representation;

(c) Rule 19-301.4(b), in that he failed to explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation; and

(d) Rule 19.303.1, in that Respondent filed an action when there was no basis in law or fact for doing so.

Respondent disagrees with all charges

Respectfully submitted,



Bryan A. Chapman, Esquire

Respondent

Respectfully submitted,

Steven A. Sherman, Esquire

[illegible]

859 F.Supp.2d 742 (2012)

Sally ROGERS, Plaintiff,
v.
BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, Defendant.
Ruth Johnson, Plaintiff,
v.
Board of Education of Prince George's County, Defendant.
Jon Everhart, Plaintiff,
v.
Board of Education of Prince George's County, Defendant.
Vallie Dean, Plaintiff,
v.
Board of Education of Prince George's County, Defendant.
Josephat Mua, Plaintiff,
v.
Board of Education of Prince George's County, Defendant.
Sandra Williams, Plaintiff,
v.
Board of Education of Prince George's County, Defendant.
Venida Marshall, Plaintiff,
v.
Board of Education of Prince George's County, Defendant.
Loretta Jarmon, Plaintiff,
v.
Board of Education of Prince George's County, Defendant.
Nicole Turner, Plaintiff,
v.
Board of Education of Prince George's County, Defendant.
Tracy Allison, Plaintiff,
v.
Board of Education of Prince George's County, Defendant.
Darlene Ball-Rice, Plaintiff,
v.
Board of Education of Prince George's County, Defendant.

Civil Nos. PJM 11-1194, PJM 11-1195, PJM 11-1196, PJM 11-1197, PJM 11-1198, PJM 11-1231, PJM 11-1232, PJM 11-1276, PJM 11-1278, PJM 11-1329, PJM 11-1398.

United States District Court, D. Maryland.

April 9, 2012.

744 *744 Bryan A. Chapman, Washington, DC, Raouf Muhammad Abdullah, Abdullah & Associates, LLC, Robert Elmer Cappell, for Plaintiffs.

Abbey Gail Hairston, Linda Hitt Thatcher, Sarah Martin Burton, Robert Judah Baror, Thatcher Law Firm, LLC, Greenbelt, MD, Christopher M. Felderman, Jeffrey E. Rockman, Semmes, Rockman & Wescott, PA, Towson, MD, for Defendants.

MEMORANDUM OPINION

PETER J. MESSITTE, District Judge.

Plaintiffs in these cases are current or former employees of Defendant Board of Education of Prince George's County, Maryland ("the Board"). Plaintiffs have sued the Board alleging discrimination based on violation of various federal statutes, including Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d *et seq.* The Board has filed motions to dismiss, or in the alternative, motions for summary judgment, some of which have been addressed, others of which will be addressed at a later time. The Court's present concern is solely with the claims tied to Title VI. The Board has argued that Plaintiffs' Title VI claims fail as a matter of law. The Court deferred ruling on whether Plaintiffs could pursue their Title VI claims, and requested additional briefing and argument from the parties, which the Court has now considered. For the reasons that follow, the Court FINDS that Plaintiffs' are entitled to assert claims pursuant to Title VI and the Board is not entitled to summary judgment at this juncture.

I.

The critical issue is whether the Board, in some meaningful measure, receives federal funds for the purpose of providing employment. If so, then Title VI authorizes individual actions for employment-related discrimination. 42 U.S.C. §§ 2000d, -3.

In seeking relief under Title VI, Plaintiffs allege in their Complaints that the United States Department of Education ("DOE") has provided Maryland public schools with more than $1 billion through the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub.L. No. 111-5, 123 Stat. 115, and that Prince George's County Public Schools ("PGCPS") have received such funds "for the express purpose of creating jobs and maintaining existing ones."

The stated "purposes" of ARRA, which Congress passed in early 2009, are:

> (1) To preserve and create jobs and promote economic recovery.
>
> (2) To assist those most impacted by the recession.
>
> (3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health.
>
> (4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.
>
> (5) To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.

Id. at 116. Congress directed the President and heads of federal departments to expend the funds made available under ARRA "so as to achieve the purposes specified...." *Id.*

*745 *745 ARRA created the State Fiscal Stabilization Fund, administered by the DOE, and directed the Department's Secretary to make grants to each state from the Fund. *Id.* at 279. Over eighty percent of that money was aimed at restoring state support for primary and secondary education. *Id.* at 280. In April 2009, the DOE issued a document entitled "Guidance on the State Fiscal Stabilization Fund Program," which addressed the question, "[w]hat overarching principles guide the distribution and use of all ARRA funds that the Department administers?" The first of four principles outlined was: "Spend funds quickly to save and create jobs." The document went on to state that "[t]he Department is distributing ARRA funds quickly to avert layoffs and create jobs." "States, local educational agencies (LEAs), and IHEs [institutions of higher education] are urged to move rapidly to develop plans for using the funds, consistent with the ARRA's reporting and accountability requirements, and promptly to begin spending funds to help drive the nation's economic recovery." Additionally, the DOE issued a press release in which Secretary Arne Duncan declared that billions of dollars in ARRA funding was available to "lay the foundation for a generation of education reform and help save hundreds of thousands of teaching jobs at risk of state and local budget cuts." Indeed, under the State Fiscal Stabilization Fund, states must submit a report to the Secretary each year that describes "the number of jobs that the Governor estimates were saved or created with funds the State received under this title." *Id.* at 285.

In August 2010, Congress passed a law creating the Education Jobs Fund. Pub.L. No. 111-226, 124 Stat. 2389. The Education Jobs Fund allocated money to states to be awarded to local educational agencies for the creation and retention of education jobs. *Id.* at 2390. Specifically, federal monies were to be "used only for compensation and benefits and other expenses, such as support services, necessary to retain existing employees, to recall or rehire former employees, and to hire new employees, in order to provide early childhood, elementary, or secondary educational and related services." *Id.*

The Maryland State Board of Education accepts federal funding on behalf of the State. That money is then distributed from the State Treasury to county boards of education, including the Board of Education of Prince George's County. Between the State Fiscal Stabilization Fund and the Education Jobs Fund, Board of Education of Prince George's County received over $100 million from 2009 to 2011.

The Board has filed motions to dismiss, or in the alternative, motions for summary judgment in every one of the captioned cases, arguing that Plaintiffs cannot state valid claims under Title VI. In support of its position, the Board has submitted the affidavit of Matthew Stanski, who has served as Chief Financial Officer for PGCPS since December 2008. One of Stanski's responsibilities is to track funding provided to the school system and expenditure of that money. Stanski avers that "[a]ll federal grants received by the school system are for the primary purpose of increasing student achievement," including ARRA funded grants in 2009. With respect to the Education Jobs Fund, Stanski states that PGCPS were initially awarded $31 million, but the Maryland State Department of Education reduced the one-time grant to $6 million. The school system used the money to establish "70 new teaching positions" during the 2010-2011 school year. However, because PGCPS did not receive any additional funding, those 70 positions have been eliminated.

746 In a spreadsheet attached to his affidavit, Stanski indicates that PGCPS secured *746 State Fiscal Stabilization Fund grants from July 1, 2009 to September 30, 2010 and from July 1, 2010 to September 30, 2011, which he describes as supporting "district-wide utility costs, textbooks, and other LEA instructional materials." The spreadsheet also shows that PGCPS received Education Jobs Fund money from August 10, 2010 to September 30, 2012. That assistance, he submits, supported "additional classroom positions in schools and applicable district-wide fringe benefits for school-based instructional personnel."

II.

A.

In evaluating a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the "court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff...." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir.2009) (citations omitted). The court, however, need not accept as true "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement." *Id.* There must be "more than an unadorned, [redacted] accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The complaint must contain sufficient well-pled facts to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. The factual allegations must "permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 129 S.Ct. at 1950. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955).

B.

Pursuant to Fed.R.Civ.P. 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "The party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [his] pleadings,' but rather must 'set forth specific facts showing that there is a genuine issue for trial.'" *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 525 (4th Cir.2003) (alteration in original) (quoting Fed.R.Civ.P. 56(e)). The court should "view the evidence in the light most favorable to ... the nonmovant, and draw all reasonable inferences in her favor without weighing the evidence or assessing the witnesses' credibility." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 644-45 (4th Cir.2002). The court, however, must also abide by the "affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial." *Bouchat*, 346 F.3d at 526 (internal quotation marks omitted) (quoting *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir.1993), and citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Summary judgment is appropriate where a party fails to make a showing sufficient to establish the elements essential to the party's claim and on which the party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). There must be sufficient evidence for a reasonable jury to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and a "mere scintilla of proof ... will not suffice to prevent summary judgment." *Peters v. Jenney*, 327 F.3d 307, 314 (4th Cir.2003).

747 *747 C.

Section 601 of Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. A "program or activity" is defined to include a "local educational agency," which is "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State...." 42 U.S.C. § 2000d-4a(2)(B); 20 U.S.C. § 7801(26)(A). Title VI directs each federal department and agency that extends federal funding to any program or activity to effectuate § 601's prohibition on discrimination. 42 U.S.C. § 2000d-1. The statute, however, limits government enforcement in one important respect. Section 604 states:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3. This requirement ensures that Title VI is not transformed into an avenue for pursuing all employment discrimination claims. *See Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 627 n. 6, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) (noting Congress's concern that the reach of Title VI be kept distinct from Title VII). Rather, there must be a "logical nexus" between the alleged discriminatory practices targeted by agency action and the use of federal funds — i.e., both must relate to employment. *Ass'n Against Discrimination in Emp't, Inc. v. City of Bridgeport*, 647 F.2d 256, 276 (2d Cir.1981).

The case law regarding enforcement of Title VI's provisions is developing. Section 601 "prohibits only intentional discrimination," including retaliation, but does not comprehend practices that have a disparate discriminatory impact. *Alexander v. Sandoval*, 532 U.S. 275, 280, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001); *Peters v. Jenney*, 327 F.3d 307, 318-19 (4th Cir. 2003). "[P]rivate individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages." *Sandoval*, 532 U.S. at 279, 121 S.Ct. 1511. Courts have also made clear that the employment limitation in § 604 applies to private suits, notwithstanding the language referring to "actions ... by any department or agency." *Reynolds v. School Dist. No. 1, Denver, Colo.*, 69 F.3d 1523, 1531 n. 8 (10th Cir.1995) (collecting cases); *Ingram v. Morgan State Univ.*, No. 95-2314, 1996 WL 13861, at *1 (4th Cir. Jan. 16, 1996); *Trageser v. Libbie Rehab. Ctr., Inc.*, 590 F.2d 87, 89 (4th Cir.1978).

What is somewhat less evident is the extent to which § 604 limits access to the courts in private suits. A minority of cases have characterized this limitation as a "standing" requirement. *See, e.g., Commodari v. Long Island Univ.*, 89 F.Supp.2d 353, 378 (E.D.N.Y.2000); *Murphy v. Middletown Enlarged City School Dist.*, 525 F.Supp. 678, 708-09 (E.D.N.Y. 1981). That label, however, may be
748 misleading. Courts tend to analyze standing as an issue of subject-matter jurisdiction.[1] *See, e.g., Taubman Realty Grp. Ltd. P'ship v. Mineta*, 320 F.3d 475, 480 (4th Cir.2003); *Doe v. Sebelius*, 676 F.Supp.2d 423, 428 (D.Md.2009); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 102-04, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The Supreme Court has articulated a "bright line" rule to determine whether a "statutory limitation on coverage" — such as that found in § 604 — restricts a federal court's jurisdiction: When Congress has not "clearly" stated that "a

threshold limitation on a statute's scope" is jurisdictional, "courts should treat the restriction as nonjurisdictional in character."[2] *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). In the present case, § 604 does not speak in express jurisdictional terms. The statutory language does not clearly restrict a federal court's power to entertain a Title VI action where providing employment was not a primary objective of federal funding received by the defendant. Section 604 refers to authorization of enforcement activity; it never suggests that courts should, *sua sponte*, determine whether the "primary objective" requirement is satisfied for purposes of subject-matter jurisdiction. *Cf. Pettinaton v. American Int'l Specialty Lines Insur. Co.*, 443 F.3d 334, 339 (4th Cir.2006) (holding that provision of the Securities Act of 1933 requiring plaintiff to show she qualified as a "person purchasing" securities was not jurisdictional because Congress did not clearly characterize it as jurisdictional). Accordingly, the Court finds that § 604 sets forth a nonjurisdictional condition and is not a matter of standing.[3]

749 Rather than being a standing requirement,[4] the limitation of § 604 is more properly understood as an element of a *749 litigant's cause of action.[5] *See Arbaugh*, 546 U.S. at 516, 126 S.Ct. 1235 (holding that Title VII's employee-numerosity requirement, 42 U.S.C. § 2000e(b), was an element of a plaintiff's claim for relief and not jurisdictional). The Fourth Circuit treats § 604 in precisely this fashion. *See Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 420-21 (4th Cir.2005) (noting that plaintiff failed to allege that "providing employment is a primary objective of the federal aid" defendant received); *Ingram v. Morgan State Univ.*, No. 95-2314, 1996 WL 13881, at *1 (4th Cir. Jan. 16, 1996) (affirming dismissal of Title VI claim where plaintiff-appellant did not allege that defendant received federal financial assistance for the primary purpose of employment or that she was the intended beneficiary of any such assistance); *Trageser v. Libbie Rehab. Ctr., Inc.*, 590 F.2d 87, 89 (4th Cir.1978) (stating that § 604 curtails private suits under Title VI and requires litigants to show that providing employment is a primary objective of the federal aid defendants receive, or that the employment discrimination complained of necessarily causes discrimination against the primary beneficiaries of the federal aid). District courts in the Fourth Circuit have similarly viewed the "primary objective" requirement as one of the elements of a Title VI claim. In *Allen v. College of William & Mary*, for example, the court dismissed plaintiff's Title VI cause of action for failure to state a claim because she had not sufficiently alleged that a primary objective of the federal funding defendant received was to provide employment, or that the employment discrimination plaintiff allegedly suffered necessarily discriminated against primary beneficiaries of the federal aid. 245 F.Supp.2d 777, 785 (E.D.Va.2003); *see also Keeshan v. Eau Claire Coop. Health Ctrs., Inc.*, No. 3:05-3801-MBS, 2007 WL 2903962, at *19-20 (D.S.C. Oct. 2, 2007) (granting summary judgment to defendant where plaintiff failed to present sufficient evidence for a reasonable jury to conclude that the primary purpose of the funding defendant received was to provide employment).

Several other courts have also treated § 604 as an element of a Title VI cause of action. In *Reynolds v. School District No. 1, Denver, Colorado*, the Tenth Circuit found that because plaintiff failed to show that the federal funding at issue "was intended primarily to provide employment and not simply to fund various school programs or enrichment activities," she failed to carry "her burden of proving her Title VI claim." 69 F.3d 1523, 1532 (10th Cir. 1995); *see also Middlebrooks v. Godwin Corp.*, 722 F.Supp.2d 82, 91-93 (D.D.C. 2010) (dismissing plaintiff's Title VI claim because she never alleged that the primary purpose of the federal funding at issue was to provide employment or that the intended beneficiaries of those funds were employees like her); *Goo v. Hawaii Dep't of the Attorney Gen.*, Civ. No. 09-00478 DAE/BMK, 2010 WL 99365, at *5-6 (D.Haw. Jan. 12, 2010) (granting motion to dismiss where plaintiff failed to claim that his former employer received federal financial assistance the primary objective of which was to provide employment and that the funds went to discriminatory programs or activities); *Johnson v. Comm. College of Allegheny Cnty.*, 586
750 F.Supp.2d 405, 457-58 (W.D.Penn.2008) (granting summary judgment to defendant where plaintiff did not adduce sufficient evidence for a reasonable jury to conclude that the primary *750 purpose of the federal funding defendant received was for employment); *Sims v. Unified Gov't of Wyandotte Cnty./Kansas City*, 120 F.Supp.2d 938, 955-56 (D.Kan. 2000) (denying motion to dismiss because plaintiff adequately pled that the federal funding was "provided for the purpose of facilitating employment"). Courts have analyzed § 604 as an element of a plaintiff's cause of action even when describing it as a "threshold" requirement. *See, e.g., Ass'n Against Discrimination in Emp't, Inc. v. City of Bridgeport*, 647 F.2d 256, 276 (2d Cir.1981) (finding that plaintiffs failed to prove "all the elements of their Title VI claim," including the "threshold requirement ... that the employer be a recipient of federal funds aimed primarily at providing employment").

Treating § 604 as supplying one of several components of a Title VI claim is consistent with how most courts evaluate § 601's basic requirement that the program or activity under which a plaintiff was allegedly subjected to discrimination received federal financial assistance. Federal funding is deemed an element of the cause of action. *See Nat'l Ass'n of Gov't Emp. v. City Pub. Serv. Bd. of San Antonio, Texas*, 40 F.3d 698, 706 n. 9 (5th Cir.1994); *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994), *overruled on other grounds by Davidson v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir.2001); *Baker v. Bd. of Regents of Kansas*, 991 F.2d 628, 631 (10th Cir.1993); *Scanlan v. School of Ozarks, Inc.*, 780 F.Supp.2d 924, 933-34 (W.D.Mo.2011); *Bishop v. Lewis*, No. WMN-10-3840, 2011 WL 1704755, at *3 (D.Md. May 4, 2011); *White v. Engler*, 188 F.Supp.2d 730, 745-46 (E.D.Mich.2001); *D.J. Miller & Assocs., Inc. v. Ohio Dep't of Admin. Servs.*, 115 F.Supp.2d 872, 878 (S.D.Ohio 2000); *Wrenn v. Kansas*, 561 F.Supp. 1216, 1221 (D.Kan.1983). Some courts, as with § 604, describe the federal funding condition as a "threshold" requirement, but nevertheless analyze it as an element a plaintiff must allege to avoid dismissal and then adduce evidence to prove. *See, e.g., Buchanan v. City of Bolivar*, 99 F.3d 1352, 1356 (6th Cir.1996); *Carmody v. Village of Rockville Ctr.*, 661 F.Supp.2d 299, 337 (E.D.N.Y.2009).[6]

Having determined that § 604 does not impose a standing requirement, constituting instead an element of a cause of action under Title VI, the Court considers what a plaintiff must show to satisfy this element. Under Fourth Circuit precedent, a plaintiff must show either (1) that a primary objective of the federal funding defendant receives is to provide employment, or (2) that the employment
751 discrimination complained of necessarily causes discrimination against the intended beneficiaries of the federal funding.[7] *See Trageser*, *751 *v. Libbie Rehab. Ctr., Inc.*, 590 F.2d 87, 89 (4th Cir.1978); *Allen v. College of William & Mary*, 245 F.Supp.2d 777, 785 (E.D.Va.2003).

Plaintiffs in these cases focus on the first prong to satisfy § 604's requirement, i.e., that a primary objective of the federal funding is to provide employment. The statute is clear that this objective need not be exclusive; providing employment need only be a primary goal. *See Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 421 (4th Cir.2005) (citing *Trageser*, 590 F.2d at 88-89). Nonetheless, courts have strictly interpreted the word "primary." Federal funding aimed at improving education in general, for instance, does not meet the standard. *See, e.g., Johnson v. Comm. College of Allegheny Cnty.*, 586 F.Supp.2d 405, 457-58 (W.D.Penn.2008). The fact that federal aid distributed for non-employment purposes might require hiring individuals to carry out those goals is too attenuated as well. Such "'extended logic'" would render § 604's limitation meaningless and vastly expand liability under Title VI.[8] *Middlebrooks v. Godwin Corp.*, 722 F.Supp.2d 82, 93 (D.D.C.2010) (quoting *Temenoff v. Trust Territory of Pacific Islands*, 681 F.2d 647, 653 (9th Cir.1989)); *see also Keeshan v. Eau Claire Co-op. Health Ctrs., Inc.*, No. 3:05-3801-MBS, 2007 WL 2903962, at *20 (D.S.C. Oct. 2, 2007).[9]

Having found that § 604's "primary objective" requirement is a component of Plaintiffs' Title VI claims, it is for a jury, not the Court, to ultimately decide whether each Plaintiff has established this among other elements of their Title VI claims.[10] *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) ("If satisfaction of an essential element of a claim for relief is at issue, ... the jury is the proper trier of contested facts." (citing *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150-51, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000))).

III.

A.

752 The Board argues that Plaintiffs' Title VI claims should be dismissed with prejudice because the primary purpose of the *752 federal funding it receives has been to support educational programs for students, not create or retain jobs. In other words, the Board contends that Plaintiffs have not adequately adduced evidence of the "primary objective" element. 42 U.S.C. § 2000d-3. The Court disagrees.

To survive a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), a complaint need only contain sufficient well-pled facts to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Plaintiffs have done just that with respect to the "primary objective" element. Rather than merely rehash the statutory language, each Plaintiff alleges in his or her Complaint that Maryland's public schools have secured more than $1 billion in federal funding and that PGCPS has received this money "for the express purpose of creating jobs and maintaining existing ones." These factual allegations suffice to state a claim that a primary purpose of the federal financial assistance was to provide employment. *Cf. Sims v. Unified Gov't of Wyandotte Cnty./Kansas City*, 120 F.Supp.2d 938, 956 (D.Kan.2000) (holding that plaintiff who alleged in her complaint that federal funds "were provided for the purpose of facilitating employment" had "adequately pled facts to support her Title VI claim").

The Complaints also sufficiently allege Title VI's "any program or activity receiving Federal financial assistance" requirement. 42 U.S.C. § 2000d. The Board of Education of Prince George's County is a "public board of education," which qualifies as a "local educational agency," which in turn constitutes a "program or activity" under Title VI. *Id.* § 2000d-4a(2)(B); 20 U.S.C. § 7801(26)(A). In addition, between the State Fiscal Stabilization Fund and the Education Jobs Fund, Plaintiffs assert that the Board of Education of Prince George's County received over $100 million in federal aid from 2009 to 2011.[11]

Whether Plaintiffs have pled sufficient facts to establish any other element of their Title VI claims is of course a different question — one the Court does not reach at this juncture. The Board remains free to argue that Plaintiffs have otherwise failed to make out prima facie cases of hostile work environment discrimination or retaliation.

B.

To the extent the Board contends that summary judgment should be granted in its favor on *Plaintiffs'* Title VI claims, the Court again disagrees. Plaintiffs have presented sufficient evidence to create a genuine dispute as to whether a primary purpose of the federal funds the Board received was to provide employment. As a result, the Board is not entitled to judgment as a matter of law.

In the first place, the Board concedes that it secured federal financial assistance from the ARRA State Fiscal Stabilization Fund and the Education Jobs Fund, even while it maintains that it "has not received any federal grants where the primary purpose of the funding is to create employment." The Board relies exclusively on the affidavit of PGCPS Chief Financial Officer Matthew Stanski, who
753 avers that the federal monies were distributed for the purpose of improving student achievement, *753 not providing jobs. The State Fiscal Stabilization Fund, Stanski insists, supported "district-wide utility costs, textbooks and other ... instructional materials." But at the same time, with respect to the Education Jobs Fund, Stanski admits that the Board received $8 million, which was used to hire 70 new teachers during the 2010-2011 school year. In addition, the spreadsheet he prepared states that this assistance supported "additional classroom positions in schools and applicable district-wide fringe benefits for school-based instructional personnel." Stanski attempts to minimize the significance of this funding by pointing out that the Board received far less than the $31 million it was originally slated to secure under the Education Jobs Fund and that the teachers hired with the money were eventually let go due to a lack of additional aid.

Plaintiffs submit that at a minimum there is a genuine dispute as to whether a primary objective of the federal assistance the Board received was to provide employment. They underscore the fact that the State Fiscal Stabilization Fund was created under ARRA, a statute whose first enumerated goal is "[t]o preserve and create jobs and promote economic recovery." The Fund sought to restore states' support for primary and secondary education. In an advisory document, the DOE explained that the first "overarching" principle guiding distribution of ARRA assistance was to "[s]pend funds quickly to save and create jobs." The DOE urged local educational agencies like the Board to "move rapidly to develop plans for using the funds." This money, DOE Secretary Arne Duncan emphasized, was available to "help save hundreds of thousands of teaching jobs at risk of state and local budget cuts." States that accepted State Fiscal Stabilization Fund grants were obliged to submit a report to the Secretary each year outlining "the number of jobs that the Governor estimates were saved or created with funds the State received under this title."

As for the Education Jobs Fund, say Plaintiffs, it does precisely what the title indicates, i.e., allocates money to the State to be awarded to the Board and other local educational agencies for the creation and retention of education jobs. The law that created the Fund makes this purpose even more clear: federal money "may be used only for compensation and benefits and other expenses, such as support services, necessary to retain existing employees, to recall or rehire former employees, and to hire new employees, in order to provide early childhood, elementary, or secondary educational and related services." Pub.L. No. 111-226, 124 Stat. 2389, at 2390.

The Court finds that a reasonable jury could conclude from Plaintiffs' evidence that a primary objective of the federal financial assistance the Board received through the State Fiscal Stabilization Fund
754 and Education Jobs Fund was to provide employment.[12] *Cf.* Johnson v. Comm. College of Allegheny Cnty., 566 F.Supp.2d 405, 457-59 (W.D.Penn.2008) *754 (holding that plaintiff did not adduce sufficient evidence for a reasonable jury to conclude that the primary purpose of the Fund for the Improvement of Post Secondary Education grant defendant received was for employment; the record showed that the primary purpose of the federal aid was education). On this record, a genuine issue for trial exists and the Board is not entitled summary judgment.

IV.

For the foregoing reasons, the Court FINDS that Plaintiffs have adequately stated causes of action under Title VI insofar as the Board may be found to have received federal assistance under the State Fiscal Stabilization Fund and Education Jobs Fund, a primary purpose of which was to fund employment of teachers. Further, Plaintiffs have adduced evidence of the Board's receipt of funds for the primary purpose of employment sufficient to generate a genuine issue of material fact. The Board's collective motions to dismiss and motions for summary judgment will be DENIED as to Plaintiffs' Title VI claims.

A separate Order will issue.

[1] The "question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

[2] As the Supreme Court has observed, "'[j]urisdiction' is "a word of many, too many, meanings."" Arbaugh v. Y & H Corp., 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (quoting Steel Co. v. Citizens for a Better Environ., 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)).

[3] This view is reinforced by the fact that the "absence of a valid (as opposed to arguable) cause of action does *not* implicate subject-matter jurisdiction...." Steel Co., 523 U.S. at 89, 118 S.Ct. 1003 (emphasis added).

[4] Standing becomes a critical issue when, for example, a litigant is attempting to bring a Title VI claim on behalf of another person or entity. *See, e.g., Mansel v. America's Second Harvest,* No. 6:08-CIV-RBH, 2008 WL 4200298, at *4 (D.S.C. Sept. 5, 2008). In this case, Plaintiffs have satisfied the "irreducible constitutional minimum of standing." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). They have alleged concrete injuries (various forms of employment discrimination), which, if proven, are arguably traceable to the Board's conduct and are redressable by a court. With respect to prudential limitations, Plaintiffs are asserting their own legal rights and are not raising generalized grievances. Additionally, the interests sought to be protected by Plaintiffs are "arguably" within the zone of interests protected by Title VI, *see* Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 492, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998), which was enacted to prevent the use of federal monies to support discriminatory practices and to provide citizens with effective protection against those practices. Cannon v. Univ. of Chicago, 441 U.S. 677, 704, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). As one district court has explained, the "interests arguably to be protected by Title VI ... are those of persons against whom federally funded programs discriminate." Bryant v. New Jersey Dep't of Transp., 998 F.Supp. 438, 445 (D.N.J.1998); *see also* Maryland State Conf. of NAACP Branches v. Maryland Dep't of State Police, 72 F.Supp.2d 560, 567 (D.Md.1999). Here, Plaintiffs allege in their Complaints that they suffered employment-related discrimination by a local educational agency that received federal financial assistance.

[5] As the Supreme Court noted, "'[s]ubject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief — a merits-related determination.'" Arbaugh, 546 U.S. at 511, 126 S.Ct. 1235 (quoting 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[1] (3d ed.2005)).

[6] Courts interpret § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which closely parallels the language of § 601 of Title VI, in a similar way. To state a claim under the Rehabilitation Act, a plaintiff must allege, *inter alia*, exclusion from participation in, denial of benefits of, or discrimination under, any program or activity receiving federal financial assistance. *See, e.g.,* Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 274-75 (2d Cir. 2009); Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir.2002); Johnson v. Thompson, 971 F.2d 1487, 1492 (10th Cir.1992); Proctor v. Prince George's Hosp. Ctr., 32 F.Supp.2d 820, 826 (D.Md.1998); Armstead v. Becton Dickinson Primary Care Diagnostics, Inc., 919 F.Supp. 186, 192 (D.Md.1996); *but see* Doe v. Region 13 Mental Health-Mental Retardation Comm., 704 F.2d 1402, 1407-08 (5th Cir. 1983) (describing federal funding as a "jurisdictional prerequisite").

[7] To the extent the Board argues that Plaintiffs' claims depend on whether they are "intended beneficiaries" of the federal funding, that argument fails. "[T]here is no requirement that a plaintiff plead that he was an intended beneficiary of the federally-funded program in which defendants are alleged to have participated." Grimes v. Superior Home Health Care of Middle Tenn., Inc., 929 F.Supp. 1088, 1092 (M.D.Tenn.1996) (citing Fobbs v. Holy Cross Health Sys. Corp., 29 F.3d 1439, 1447 (9th Cir.1994)).

[8] That the "primary objective" element is not easily established tends to diminish any concern that Title VI will be used to circumvent Title VII and its requirements.

[9] Josephat Mua is the only Plaintiff who invokes the second prong for satisfying § 604, arguing that the employment discrimination he suffered necessarily caused discrimination against students in the public school who were the intended beneficiaries of federal funding aimed at improving student learning and performance. His bold assertion is too implausible to come within the second prong. See Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949-50, 173 L.Ed.2d 868 (2009). In any event, the Court finds it unnecessary to further analyze the issue because Mua (along with the other Plaintiffs) has stated claims and marshaled sufficient evidence under the first "primary objective" prong to create a genuine dispute of material fact. The Court would note, however, an apparent inconsistency in the Fourth Circuit's definition of the second prong, *compare* Trageser v. Libbie Rehab. Ctr. Inc., 590 F.2d 87, 89 (4th Cir.1978) (stating that a plaintiff must show that "discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid") *with* Ingram v. Morgan State Univer., No. 95-2314, 1996 WL 13881, at *1 (4th Cir. Jan. 16, 1996) (stating that a plaintiff must show that "*she* was the intended beneficiary" of federal aid) (emphasis added), and the fact that its foundation has been criticized. *See Carter-Miller v. Washington,* No. C07-1825RAJ, 2008 WL 4542372, at *7-8 (W.D.Wash. Oct. 8, 2008).

[10] Each Plaintiff herein has demanded a jury trial.

[11] The fact that the Board received this money as a disbursement from the State of Maryland, rather than directly from the federal government, does not defeat Plaintiffs' Title VI claims. The reach of Title VI does not depend on whether a state receives federal funding and then distributes it to local educational agencies and others, or instead allows the aid to go more directly to the ultimate recipients.

[12] At oral argument, Plaintiff Mua asserted that the Board received a third source of federal money — the Teacher Incentive Fund — which was aimed primarily at providing employment. Mua bases this argument solely on the spreadsheet PGCPS Chief Financial Officer Matthew Stanski had attached to his affidavit. The spreadsheet indicates that the Board received approximately $10,112,218 in Fund grants from July 1, 2007 through October 1, 2012, and that the purpose of the money was to "[p]ay teachers and supervisors for increased student achievement, professional development, and evaluations." Incentive compensation to teachers, however, does not "provide" employment to them; it merely compensates teachers already employed. As such, this third source of funds in no way supports a cause of action, but since it is cumulative in any case, the Court will simply disregard the argument.

PRESS RELEASE

Prince George's County Public Schools • www.pgcps.org
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MARCH 16, 2009
FOR IMMEDIATE RELEASE

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PGCPS Communications, 301-952-6001

STIMULUS FUNDING USED TO PROTECT JOBS, AND CONTINUE DRIVING SCHOOL REFORMS

Congresswoman Edwards, Lt. Governor Brown Visit Seat Pleasant ES to Discuss Support for Employees, and Children Challenged by Poverty and Special Needs

The Prince George's County Board of Education and Interim Superintendent Dr. William R. Hite, Jr. applauded Congresswoman Donna F. Edwards (D-4th) and Maryland's Lieutenant Governor, Anthony G. Brown, today for their quick action to save jobs and continue driving academic reforms in Prince George's County Public Schools (PGCPS). Congresswoman Edwards and Lt. Governor Brown visited with some of the beneficiaries of the federal stimulus funding this morning at Seat Pleasant Elementary School, where both read to students and discussed the American Recovery and Reinvestment Act.

"When school districts like ours were facing disastrous budget cuts that threatened to disrupt student learning, a lifeline was extended to our schools by President Barack Obama, Congresswoman Edwards, and our other federal and state partners," said Board Chair Verjeana M. Jacobs, Esq. "While these continue to be extraordinarily difficult financial times, the quick action of the O'Malley-Brown Administration and our state legislature has enabled us to use stimulus funding to reduce job losses and restore support for programs that help our most vulnerable children."

Following Governor Martin O'Malley's announcement on February 20 that federal stimulus funds for public education were coming to Maryland, the Prince George's County Board of Education was able to make significant changes to its Fiscal Year 2010 Requested Operating Budget. Because of aid from President Obama's economic recovery and reinvestment plan, PGCPS employees were not furloughed and more than 300 jobs were restored, including 106 teaching positions. The Board of Education used stimulus funds to provide 21 new positions for special educators to help a growing number of students with autism in Prince George's County public schools.

"In Prince George's County public schools, student achievement has risen dramatically in every subgroup over the last two years. It is imperative that we keep effective teachers teaching and support even higher levels of student achievement," said Interim Superintendent Dr. William R. Hite, Jr. "With stimulus funding, budget cuts are not as severe and we are better able to sustain the phenomenal progress being made by our teachers and students."

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PGCPS anticipates more than $142 million in total state aid restored for Fiscal Years 2010 and 2011, including $82.8 million in non-restrictive funds allowing Governor O'Malley to fully fund the Geographic Cost of Education Index at $39 million for each fiscal year. Supplemental grant funding will be restored to $19 million each year, and the formula for non-public placements of students will be returned to an 80/20 ratio, meaning PGCPS will continue to fund only 20 percent of the overall costs for students requiring special accommodations outside of the PGCPS school district ($10.8 million each year).

Additionally, $60.4 million will be received as restricted funds for the next two fiscal years, when approximately $14 million will be used to support students with special needs. Additionally, $15 million will be used to support schools with large numbers of children who qualify for federal Title I support to help overcome the challenges of poverty, and PGCPS will receive $600,000 for Education Technology grants each year.

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UNITED STATES
DEPARTMENT OF EDUCATION NEWS

FOR RELEASE: Wednesday, April 1, 2009

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$44 BILLION IN STIMULUS FUNDS AVAILABLE TO DRIVE EDUCATION REFORMS AND SAVE TEACHING JOBS
Applications and Guidelines Available Today

CAPITOL HEIGHTS, Md. -- Secretary of Education Arne Duncan today announced that $44 billion for states and schools is now available under the American Recovery and Reinvestment Act (ARRA) of 2009. This funding will lay the foundation for a generation of education reform and help save hundreds of thousands of teaching jobs at risk of state and local budget cuts.

"Given our economic circumstances, it's critical that money go out quickly but it's even more important that it be spent wisely," said Duncan. "The first step toward real and lasting reform that will ensure our student's competitiveness begins with absolute transparency and accountability in how we invest our dollars, educate our children, evaluate our teachers, and measure our success. We must be much more open and honest about what works in the classroom and what doesn't."

Duncan made his announcement at Doswell Brooks Elementary School in Capitol Heights, Md. He was joined by Maryland Governor Martin O'Malley, Congresswoman Donna Edwards (D-Md.), Maryland State School Superintendent Nancy Grasmick, Interim Superintendent of Prince George's County Public Schools, William Hite, Jr, County Executive Jack B. Johnson, Maryland State Teacher's Association President Clara Floyd and Prince George's County Education Association President Donald Briscoe.

The Prince George's County School District is facing a $155 million budget gap for next year. School officials estimate the district will receive at least $142 million from the stimulus package over the next two years.

Governor O'Malley saluted the administration for the reform elements of the package saying, "President Obama and Secretary Duncan have put a bold education reform plan in place that will invest in our schools, our students and our teachers. But each State must play their part to show how these dollars will be spent, and to move forward on a path to progress in our schools."

Today's announcement includes applications and guidelines for $32.6 billion under the State Stabilization Fund, representing two-thirds of the total dollars in the Fund. This includes $26.6 billion to save jobs and improve K-12 and higher education and a separate $6 billion in a Government Services Fund to pay for education, public safety or other government services.

Funds in the first round will be released within two weeks of an application's approval. A second round of stabilization funds will be released later in the year. A third round of funding, the Race to the Top competitive grant program will reward states that have made the most progress on reforms.

The guidelines released today promote comprehensive education reform by receiving commitments from states that they will collect, publish, analyze and act on basic information regarding the quality of classroom teachers, annual student improvements, college readiness, the effectiveness of state standards and assessments, progress on removing charter caps, and interventions in turning around underperforming schools. Specifically, the law requires states to show:

- Improvements in teacher effectiveness and ensuring that all schools have highly qualified teachers;
- Progress toward college and career-ready standards and rigorous assessments that will improve both teaching and learning;
- Improvements in achievement in low-performing schools, by providing intensive support and effective interventions in those schools.
- That they can gather information to improve student learning, teacher performance, and college and career-readiness through enhanced data systems that track progress.

In a letter to governors (attached), Secretary Duncan outlines a set of proposed measurements that states would report on their progress toward the education reforms spelled out in the law. The Department will release these metrics for public comment in the Federal Register in April and then issue a final version.

The guidelines also require states to report the number of jobs saved through Recovery Act funding, the amount of state and local tax increases averted, and how funds are used. It further requires that the bulk of the federal dollars be spent on education.

Part 2 of the State Stabilization Fund Application, available later this year, will allow states to apply for the last third of the stabilization funds, which includes $13.1 billion for education and $2.9 billion designated for the Government Services Fund. Guidelines for Part 2 require states to submit the required data or provide an explanation of why the data is currently unavailable and a plan for collecting the data by 2011.

Finally, $5 billion in competitive grants, the "Race to the Top" fund, will be awarded to states that are most aggressively pursuing reforms. In order to ensure that Recovery Act funds are driving classroom improvements, states competing for Race to the Top funds will be judged on how well they are using the first round of stabilization and Title I funds to advance education reforms.

"Every dollar we spend must advance reforms and improve learning. We are putting real money on the line to challenge every state to push harder and do more for its children," Duncan said.

In addition to the stabilization funds, $11.4 billion is available immediately under the Title I, IDEA, Vocational Rehabilitation and Independent Living programs. Title I programs serve schools with large concentrations of low-income students. IDEA funds serve students with disabilities. A second round of Title I and IDEA funds will be available later in the year.

To receive State Stabilization Funds, states must also meet maintenance-of-effort (MOE) requirements of the law by showing that 2009 state education budgets at least meet 2006 state education budget levels. If they cannot meet the maintenance of effort requirements, states can

receive a waiver if they can show that their education budgets are not being disproportionally reduced.

"Under the law passed by Congress, the top priority for these dollars is to do right by our schools and our kids. If states play games with these funds, the second round of stabilization funds could be in jeopardy and they could eliminate their state from competitive grant money. This money must be spent in the best interests of children," Duncan said.

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The Commission

The Maryland Commission on Human Relations (MCHR) represents the interest of the State to ensure equal opportunity for all through the enforcement of Article 49B of the Annotated Code of Maryland and the State's Commercial Non-Discrimination Policy. The MCHR investigates complaints of discrimination in employment, housing, public accommodations and commercial discrimination from members of protected classes that are covered under those laws.

The Maryland Commission is governed by a nine-member Commission appointed by the Governor and confirmed by the Maryland State Senate. Commission members are appointed to serve six-year terms. The Commission meets once a month to set policy and review programmatic initiatives.

The Commission is an independent agency that serves individuals, businesses, and communities throughout the State. Its mandate is to protect against discrimination based on race, color, religion, sex, age, national origin, marital status, physical or mental disability, sexual orientation and genetic information. In housing cases, discrimination based on familial status is also unlawful.

In addition, the Commission assists employers in developing bias-free selection, hiring, retention, promotion and contracting procedures; increases equal housing opportunities to all groups in Maryland; ensures equal access to public accommodations and services; and promotes knowledge and understanding of anti-discrimination laws and help to improve human relations within the State.

SIGNIFICANT CASES

EMPLOYMENT

Gail Sterling v. Atlantic Automotive Corporation

Work place sexual harassment continues to be an ever present portion of all discrimination cases filed in Maryland courts. An important aspect of such cases, neither fully litigated nor adopted by the Maryland Court of Appeals, is what is known as the *Faragher-Ellerth* affirmative defense. In such a defense, based on companion Supreme Court Title VII decisions in 1998, an employer may absolve itself of liability for sexual harassment, if the employer had an avenue for employees to address sexual harassment and if the victim did not avail her or himself to said avenue. The federal and many state courts accept this defense as an affirmative bar to liability. The Maryland Court of Appeals heard arguments, in the spring of 2007, dealing directly with the applicability of the *Faragher-Ellerth* defense to cases based on violation of the State's anti-discrimination law in the above cited case.

In light of the identity between Article 49B and Title VII, and the MCHR's expertise on interpreting Article 49B, the MCHR filed an *amicus curie* (friend of the court) brief supporting the State courts' adoption of the standard. The Court of Appeals ruled only on a procedural aspect of the case before it. The Commission however, continues to apply the Faragher-Ellerth standard to its education, investigation and litigation programs.

Fred Crouch v. Prince George's County Public School System

Prince George's County Public School System (PGCPSS), which is the second largest school system in Maryland, transferred one of its teachers to another school in retaliation against him for filing a racial discrimination complaint. PGCPSS reached an agreement with the MCHR on the unlawful race discrimination case.

The most significant part of the agreement was that PGCPSS consented to reestablish and maintain with adequate staffing levels, it's Equity Assurance Office. The Equity Assurance Office is charged with investigating school system employee complaints of unlawful discrimination and harassment. In addition, PGCPSS will require its principals, administrators and other supervisory personnel to undergo sensitivity training surrounding anti-discrimination, anti-harassment and cultural competence.

PART XXIX

RECIPIENTS OF GOVERNMENTAL FINANCIAL ASSISTANCE

CHAPTER 117

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Title VI prohibits discrimination based on race, color, or national origin in programs receiving grants or other financial assistance from the federal government. Although the statute itself forbids only intentional discrimination, regulations reaching unintentional discrimination have been upheld as reasonably related to Title VI's purpose. Enforcement of Title VI is by and large the province of the agency that extends the federal funding. Although private parties may also sue under Title VI, claims for employment discrimination are strictly limited.

SYNOPSIS

§ 117.01 Introduction

Title VI of the Civil Rights Act of 1964[1] prohibits discrimination on the basis of race, color, or national origin in any federally assisted program. Section 601 provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[2] Section 602[3] directs every federal agency which extends

[1] 42 U.S.C. § 2000d, reprinted in Appendix 47, Vol. 7 *infra*.

[2] 42 U.S.C. § 2000d.

See Cobb v. U.S. Merchant Marine Academy, 592 F. Supp. 640, 38 FEP 1257 (E.D.N.Y. 1984). Title VI does not apply to a claim of sex discrimination, nor to agencies of the federal government, as opposed to programs receiving federal assistance.

[3] 42 U.S.C. § 2000d-1.

federal financial assistance to promulgate regulations in order to implement and enforce Section 601.[4]

Because Title VI served as a model for Title IX of the Education Amendments of 1972,[5] many of the principles discussed here with regard to Title VI are applicable to Title IX. Unlike Title IX, however, Title VI contains an express limitation on employment-related actions, allowing relief for employment discrimination only "where a primary objective of the federal financial assistance is to provide employment."[6] Moreover, Title VI attaches to all federal financial assistance; it is not limited to education programs as is Title IX.

After the Supreme Court handed down its 1978 decision in *Regents of the University of California v. Bakke*,[7] Title VI became a more frequent source of employment discrimination litigation.[8] Case law under Title VI has been governed in large part by the 1983 Supreme Court's decision in *Guardians Ass'n of N.Y. City Police Department, Inc. v. Civil Service Commission*.[9] In a confusing array of opinions, the Court addressed several major issues respecting Title VI. Although sorting out the meaning of the decision as a whole is difficult, it is possible to discern the following:

1. There is an implied private right of action under Title VI;
2. Title VI, like the Equal Protection Clause, reaches only intentional discrimination;
3. An agency regulation issued pursuant to Title VI that proscribes unintentional discrimination is valid;
4. A private party may enforce the regulation, at least against a state actor; and
5. Only prospective remedies are available for unintentional discrimination.

The apparent inconsistency of the above statements is discussed in more detail below.[10]

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[4] A list of agencies that have issued regulations under Title VI appears at § 117.06 n.2 *infra*.

[5] 20 U.S.C. §§ 1681–1688. *See* Ch. 118 *infra*.

[6] 42 U.S.C. § 2000d-3. *See* discussion at § 117.04 *infra*.

[7] 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750, 17 FEP 1000 (1978). *See* § 62.02[2] *supra*.

[8] Title VI has also been used to challenge state and municipal employers as to alleged discrimination taking place prior to March 24, 1972, the effective date of applicability of Title VII to such employers. *See, e.g.*, Guardians Ass'n of N.Y. City Police Department, Inc. v. Civil Service Commission, 633 F.2d 232, 23 FEP 677 (2d Cir. 1980), *aff'd*, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866, 32 FEP 250, *cert. denied*, 463 U.S. 1228, 103 S. Ct. 3568, 77 L. Ed. 2d 1410, 32 FEP 359 (1983). The Court considered the plaintiffs' Title VI claim to determine whether additional relief was warranted, because relief under Title VII could not take into account conduct before March 24, 1972. 23 FEP at 681.

[9] 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866, 32 FEP 250, *cert. denied*, 463 U.S. 1228, 103 S. Ct. 3568, 77 L. Ed. 2d 1410, 32 FEP 359 (1983).

[10] *See* § 117.05 *infra*.

A question not definitively answered by the *Guardians* Court was addressed in the 2001 Supreme Court case *Alexander v. Sandoval.*[11] In *Sandoval*, the Court clarified the circumstances under which an individual may enforce Title VI, holding that there is no implied private right of action to enforce the § 602 regulations prohibiting unintentional discrimination.

§ 117.02 Private Right of Action

In *Guardians Association v. Civil Service Commission of New York,*[1] at least seven members of the Supreme Court found that an implied private right of action exists under Title VI for intentional discriminatio. In so doing, the Court settled any remaining confusion left by *Bakke*[2] and *Cannon v. University of Chicago*[3] as to whether such a right exists.[4] However, the Supreme Court in *Guardians* did not explicitly determine whether a cause of action was available directly under the regulations promulgated under § 602 or through a 42 U.S.C. § 1983 (1988) claim.[5] The distinction is significant where a defendant is not a state actor within the purview of section 1983. Moreover, while the States enjoy Eleventh Amendment immunity under section 1983, Congress has abrogated this immunity for Title VI purposes.[6]

Also unanswered by *Guardians* was the question of whether an implied private right of action exists under Title VI to enforce the § 602 regulations prohibiting unintentional discrimination. This was the question presented in *Alexander v. Sandoval,*[7] in which a five-Member majority of the Supreme Court held that there is no private right of action to enforce disparate-impact regulations enacted under Title VI.

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[11] 532 U.S. 275 (2001).

[1] 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866, 32 FEP 250 (1983).

[2] 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750, 17 FEP 1000 (1978).

[3] 441 U.S. 677, 99 S. Ct. 1946 (1979). Specifically, five of the Justices in *Guardians* (Justices White, Rehnquist, Stevens, Brennan, and Blackmun) explicitly upheld a private right of action, one (Justice Marshall) assumed its availability, two (Justice Powell and Chief Justice Burger) stated unequivocally that it could not be asserted, and one (Justice O'Connor) felt that the issue need not be reached.

[4] Although both prior decisions had addressed the private right of action issue, *Bakke* contained a tangle of different opinions, and *Cannon* was a Title IX case in which the statements about Title VI were dicta.

[5] Chief Justice Burger and Justice Powell believed the regulation could be enforced only via § 1983, thereby foreclosing actions against private defendants. *Guardians*, 463 U.S. at 608 n.1, 32 FEP at 260 n.1 (Powell, J., joined by Burger, C.J., concurring). Justices Stevens, Blackmun, and Brennan found the regulations valid and enforceable under § 1983. Because the plaintiff had sued under § 1983, the three Justices explicitly declined to address whether a private party could also be sued for violating the regulations. *Id.* at 645 n.18, 32 FEP at 275 n.18 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting).

[6] 42 U.S.C. § 2000d-7.

[7] 532 U.S. 275 (2001).

The Alabama Department of Public Safety (Department) was a funding recipient of the United States Department of Justice. Pursuant to § 602 of Title VI, the Department of Justice enacted a regulation which forbade recipients of financial assistance from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. . . ."[8] After the Department began administering state driver's license examinations only in English, the plaintiff, Sandoval, as part of a class, brought an action under Title VI to enjoin the Department's English-only policy. Sandoval argued that the policy discriminated against non-English speakers based on their national origin.

The Supreme Court looked to its prior case law and to the language of Title VI to reach its conclusion that the statute does not create a private right of action to enforce the disparate impact regulations enacted under Title VI. Writing for the majority, Justice Scalia rejected Sandoval's argument that *Guardians* provided for a private right of action to enforce disparate-impact regulations and noted that the *Guardians* Court held that an individual has a private right of action to recover compensatory damages under Title VI only for intentional discrimination. Justice Scalia also noted that in the fragmented *Guardians* opinion, "only two Justices had cause to reach the issue that [Sandoval] say[s] the 'actual language' of *Guardians* resolves."[9]

Explaining why the private right of action implied by § 601 does not extend to the disparate-impact regulations, the Court further noted: "It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations."[10]

Finding no authority in § 601 for a private right of action to enforce the regulations prohibiting unintentional discrimination, the Court examined the statutory language of § 602 and saw no evidence of congressional intent to create a private right of action under this provision. Indeed, according to the the majority, rather than expressing this intent, the methods set forth under § 602 for enforcing regulations promulgated under the section "suggest the opposite." The enforcement mechanisms include, for example, cutting off federal funding or employing other methods "authorized by law"; however, before such mechanisms may be used, the funding department or agency must attempt to negotiate compliance with the regulations at issue. Stating that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others,"[11] the Court concluded that the nature of the enforcement

[8] 28 C.F.R. § 42.104(b)(2) (1999).

[9] 532 U.S. at 283.

[10] *Id.* at 286.

[11] *Id.* at 290.

methods set forth in § 602 did not indicate that Congress intended to provide a private remedy.

In his dissent, Justice Stevens maintained that the majority presented a "muddled account" of the Court's prior case law that negated the disparity between the reasoning of those cases and the *Sandoval* decision. Discussing the *Guardians* opinion, Justice Stevens noted: "While the various opinions in that case took different views as to the spectrum of relief available to plaintiffs in Title VI cases, a clear majority of the Court expressly stated that private parties may seek injunctive relief against governmental practices that have the effect of discriminating against racial and ethnic minorities."[12] Discussing the majority's statutory interpretation, Justice Stevens claimed that the majority's analysis "does violence to both the text and the structure of Title VI."[13] Justice Stevens commented that § 602 was enacted "for the sole purpose of forwarding the antidiscrimination ideals laid out in § 601," and that the "majority's persistent belief that the two sections somehow forward different agendas finds no support in the statute."[14]

§ 117.03 Entire Entity Covered

Prior to the Civil Rights Restoration Act of 1987,[1] it appeared that the agency's ability to investigate and remedy violations of Title VI was limited to the particular program or activity receiving federal assistance within the larger entity. In three cases, the Supreme Court had limited the enforcement of Title IX[2] and section 504 of the Rehabilitation Act of 1973[3] to the specific program which received the federal funds. In *Grove City College v. Bell*,[4] for example, the Court held that federal grants and loans to college students did not subject the college as a whole to Title IX enforcement; rather, Title IX applied only to the defendant college's student aid program. Because of the Court's perception of the similarities between Title IX and Title VI,[5] it was assumed that the program-specific limitation would apply to Title VI as well.

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[12] *Id.* at 298-99 (Stevens, J., dissenting).

[13] *Id.* at 304 (Stevens, J., dissenting).

[14] *Id.* at 304 (Stevens, J., dissenting).

[1] *See* § 118.05[2] *infra*.

[2] Grove City College v. Bell, 465 U.S. 555 (1984).

North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 28 FEP 1393 (1982).

[3] Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 34 FEP 79 (1984).

[4] 465 U.S. 555 (1984).

[5] In *North Haven*, n.2 *supra*, the Court extended Title IX coverage to employees, but held that the coverage applied only to the program actually receiving federal funding. The Court noted that Title IX was modeled on Title VI and that sections 601 and 602 of Title VI were virtually identical to sections 901 and 902 of Title IX. Thus, the Court indicated that Title VI was program-specific. *See* 456 U.S. at 538, 28 FEP at 1404.

However, Congress overturned the *Grove City* rule by enacting the Civil Rights Restoration Act, which amended Title VI as well as other federal laws.[6] Under the amended section 606,[7] "program or activity" now generally refers to the entire entity, not merely the specific program receiving federal funds. Obviously, this amendment results in a much broader application of Title VI's anti-discrimination mandate.

§ 117.04 Applicability to Employment: the "Primary Objective" Limitation; the "Primary Beneficiaries" Limitation

Section 604[1] of Title VI provides that sections 601–605 are not to "be construed to authorize action . . . by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the federal financial assistance is to provide employment." This establishes a threshold requirement that must be met before a plaintiff claiming employment discrimination can invoke the nondiscrimination provision of Title VI against a recipient of federal financial assistance. The primary objective limitation applies to employment discrimination suits under Title VI, whether brought by an individual plaintiff or by the government.[2]

Title VI claims have been dismissed in a number of reported cases because no evidence was presented that the creation of employment opportunities was a primary objective of the federal assistance.[3] It has been held that employment was

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[6] § 118.05[2] *infra.*

[7] *See* text of Civil Right Restoration Act of 1987 set out in Appendix 49, Vol. 7 *infra.*

[1] 42 U.S.C. § 2000d-3.

[2] Trageser v. Libbie Rehabilitation Ctr., Inc., 590 F.2d 87, 18 FEP 1141 (4th Cir. 1978), *overruled in part on other grounds by* CONRAIL v. Darrone, 465 U.S. 624, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (1984), *superseded by statute in part on other grounds as stated in* Butts v. New York Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 61 FEP 579 (2d Cir. 1993).

See Barbero v. Catawba Valley Legal Servs., 69 FEP 460 (W.D.N.C. 1995). In dismissing the plaintiff's claim against her former employer, the court stated: "The plaintiff does not dispute that the primary objective of both Legal Services and Catawba is to provide legal services to the poor, not to provide employment thereto. Thus, she has not stated a [Title VI] claim." 69 FEP at 462 (footnote omitted).

[3] *See, e.g.:*

Association Against Discrimination v. City of Bridgeport, 647 F.2d 256, 25 FEP 1013 (2d Cir. 1981).

Johnson v. County of Nassau, 411 F. Supp. 2d 171 (E.D.N.Y. 2006). The plaintiff, who ran an Office of Diversity at a university hospital, could not sue the hospital for discrimination under Title

not a primary objective of federal instructional and research grants given to individual professors,[4] that faculty employment was not a primary object of federal assistance to a state university,[5] and that federal financial assistance provided to a trust territory was not aimed primarily at providing employment.[6]

In *Guardians Ass'n of N.Y. City Police Department, Inc. v. Civil Service*

VI. No employment discrimination action was available under Title VI because, although the hospital received federal funding to implement diversity programs, the funding was not primarily aimed at providing employment.

Rosario-Olmedo v. Community Sch. Bd., 756 F. Supp. 95, 97, 55 FEP 98, 99 (E.D.N.Y. 1991), dismissing the plaintiff's Title VI claim, with leave to replead, for failure "to allege the receipt of federal funds, their use, and whether their primary purpose is employment."

Richards v. New York Dep't of Correctional Serv., 572 F. Supp. 1168, 46 FEP 763 (S.D.N.Y. 1983). The court dismissed Title VI claim, with leave to replead. The plaintiff had failed to allege that the primary purpose of the federal funding was to provide employment, or to state when the funds were received by the defendant and how they were used.

But cf. Fobbs v. Holy Cross Health Sys. Corp., 29 F.3d 1439, 65 FEP 750 (9th Cir. 1994), *overruled in part on other grounds by* Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131 (9th Cir. 2001). The Ninth Circuit reversed the district court's Fed. R. 12(b)(6) dismissal of an African-American physician's Title VI action. The district court had granted the defendant hospital's motion to dismiss, based upon the plaintiff's failure to plead in his complaint that he was an intended beneficiary of the hospital's federal funding. The Ninth Circuit held that a Title VI plaintiff may initially plead only that "(1) the entity involved is engaging in racial discrimination and (2) the entity involved is receiving federal financial assistance." 65 FEP at 756 (citing Wrenn v. Kansas, 561 F. Supp. 1216, 42 FEP 1818 (D. Kan. 1983) (citing Jackson v. Conway, 476 F. Supp. 896, 903 (E.D. Mo. 1979), *aff'd.* 620 F.2d 680 (8th Cir. 1980)). The court, noted, however, that Fobbs would ultimately have to prove the intent of the federal funding, implying that his suit may be subject to summary judgment on this basis.

See Case Digest § 117D.04 Note 3 for additional cases.

[4] Meyerson v. State of Arizona, 507 F. Supp. 859, 26 FEP 866 (D. Ariz.), *reh'g denied*, 526 F. Supp. 129, 28 FEP 366 (1981), *aff'd.* 709 F.2d 1235, 31 FEP 1183 (1983), *vacated and remanded*, 465 U.S. 1095, 104 S. Ct. 1584, 80 L. Ed. 2d 118, 34 FEP 416 (1984). The suit was brought under § 504 of the Rehabilitation Act before the Supreme Court's decision in Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 104 S. Ct. 1248, 34 FEP 79 (1984), which held that the primary objective limitation for employment discrimination suits brought under Title VI did not apply to the Rehabilitation Act. The case was subsequently vacated in light of *Darrone*.

[5] Valentine v. Smith, 654 F.2d 503, 26 FEP 518 (8th Cir.), *cert. denied*, 454 U.S. 1124, 102 S. Ct. 972, 71 L. Ed. 2d 111, 27 FEP 720 (1981).

See Case Digest § 117D.04 Note 5 for additional cases.

[6] Temengil v. Trust Territory, 33 FEP 1027 (D. N. Mar. I. 1983), *aff'd in pertinent part*, 881 F.2d 647, 50 FEP 714 (9th Cir. 1989).

Commission,[7] the district court ruled that the "primary objective" test had been satisfied because the New York police department had used, and continued to use, federal funds to pay the salaries of police officers and trainees and to finance recruitment programs.[8] Although *Guardians* was later reversed on the subject of compensatory relief, the basic holding on its coverage of employment discrimination was not questioned on appeal.

Courts have fashioned a narrow way around the "primary objective" limitation. In *Trageser v. Libbie Rehabilitation Center, Inc.*,[9] the Fourth Circuit stated that, "Title VI does not provide a judicial remedy for employment discrimination by institutions receiving federal funds unless (1) providing employment is a primary

(Text continued on page 117-9)

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[7] 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866, 32 FEP 250 (1983), § 117.01 n.9 *supra*.

[8] 466 F. Supp. 1273, 19 FEP 121 (S.D.N.Y. 1979), *rev'd on other grounds*, 633 F.2d 232, 23 FEP 677 (2d Cir. 1980).

[9] 590 F.2d 87, 18 FEP 1141 (4th Cir. 1978), *overruled in part on other grounds by* CONRAIL v. Darrone, 465 U.S. 624, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (1984), *superseded by statute in part on other grounds as stated in* Butts v. New York Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 61 FEP 579 (2d Cir. 1993).

objective of the federal aid, *or* (2) discrimination in employment necessarily causes discrimination against the *primary beneficiaries* of the federal aid."[10] Several circuits have adopted a "beneficiaries" test, but are divided in their interpretation thereof. The Second and Fourth Circuits require a showing that the alleged employment discrimination against the plaintiff necessarily results in discrimination against the primary or intended beneficiaries of the federal funding.[11] In effect, the plaintiff sues on behalf of the primary beneficiaries. Other circuits require the plaintiff to show that he or she is a primary or intended beneficiary of the federal assistance.[12]

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[10] 590 F.2d at 89, 18 FEP at 1142–43 (emphasis added).

[11] *See*:

Caulfield v. Board of Educ., 486 F. Supp. 862, 24 FEP 1418, *aff'd*, 632 F.2d 999, 26 FEP 553 (2d Cir. 1980). The court upheld HEW's authority under Title VI to investigate employment practices of a school board receiving federal education aid to the extent that the school system's discrimination in hiring of teachers or supervisors would result in discrimination against students, who receive the primary benefits of federal financial assistance.

Trageser v. Libbie Rehabilitation Ctr., Inc., 590 F.2d 87, 18 FEP 1141 (4th Cir. 1978), *overruled in part on other grounds by* CONRAIL v. Darrone, 465 U.S. 624 (1984), *superseded by statute in part on other grounds as stated in* Butts v. New York Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 61 FEP 579 (2d Cir. 1993).

Mosley v. Clarksville Mem'l Hosp., 574 F. Supp. 224, 34 FEP 1480 (M.D. Tenn. 1983). According to the court, the plaintiffs had failed to show that they were the intended beneficiaries of any federal funds or that the alleged discrimination had harmed an intended beneficiary. The plaintiffs also did not show that the defendant received federal funds primarily intended to provide employment.

[12] *See, e.g.:*

Seventh Circuit: Doe v. St. Joseph's Hosp. of Fort Wayne, 788 F.2d 411, 420, 40 FEP 820 (7th Cir. 1986), *overruled on other grounds by* Alexander v. Rush N. Shore Med. Ctr., 101 F.3d 487, 72 FEP 742 (7th Cir. 1996). "The plaintiff does not allege that she is an intended beneficiary of any federally funded program in which the hospital participates; therefore we must affirm the dismissal of her Title VI claim."

Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1235, 23 FEP 868 (7th Cir. 1980). "Congress did not intend to extend protection under Title VI to any person other than an intended beneficiary of federal financial assistance."

N.D. Illinois: Vakharia v. Swedish Covenant Hosp., 61 FEP 1065, *recons. granted, in part, on other grounds*, 65 FEP 1387 (N.D. Ill. 1993). "Here, as in *Doe*, the defendant hospital received federal funds, but, as in *Doe*, there is no claim that hospital staff members were the intended beneficiaries of those funds."

Maloney v. Washington, 584 F. Supp. 1263, 1266, 35 FEP 878 (N.D. Ill. 1984). "In the case at bar, plaintiff alleges that the Chicago Police Department is a federally funded program. However, he does not allege that he is among the intended beneficiaries of such funding. Having failed to make such an allegation, plaintiff cannot bring a claim under § 2000d."

Ninth Circuit: Fobbs v. Holy Cross Health Sys. Corp., 29 F. 3d 1439, 65 FEP 750 (9th Cir. 1994), *overruled in part on other grounds by* Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131 (9th Cir. 2001). The court rejected an African-American physician's argument that he was an intended beneficiary of programs designed to improve his patients' health care. In addition,

§ 117.05 Disparate Impact and Title VI

The Court in *Guardians*,[1] addressed the question of the standards a court should apply in evaluating allegations of discriminatory employment practices under Title VI. Justice White, who wrote the *Guardians* opinion, and Justice Marshall, who wrote a dissenting opinion, believed that Title VI, in and of itself, prohibits the unintended effects of discrimination, and therefore Title VII standards should apply without modification. The other seven justices, in various opinions, expressed the opposite view: namely, that the Title VI statute does not proscribe unintended discrimination.[2]

This did not end the question of actionability, however. Justice White, assuming, *arguendo*, that Title VI did not itself prohibit disparate impact discrimination, nevertheless concluded that the enforcement regulations, which clearly prohibited the use of "criteria or methods of administration which have the effect of subjecting individuals to discrimination,"[3] were valid. Four Justices,[4] in two separate dissenting opinions, agreed with Justice White on this point. Thus, a five-Member majority of the Court found that unintentional discrimination, if not prohibited by Title VI itself, is actionable under valid departmental regulations by way of a section 1983 action. Although this point was not essential to the Court's central holding in *Guardians*, federal courts have followed the Justices' conclusion that disparate impact claims are cognizable under Title VI regulations which forbid actions by the recipient having a racially discriminatory effect.[5] The Court later clarified the issue of actionability in

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the court refused to allow Fobbs to sue on behalf of his patients, noting, "Dr. Fobbs has not explained why *he*, rather than his patients, should receive money damages for injury inflicted on his patients." *Id.* at 1448, 65 FEP at 756–57.

[1] 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866, 32 FEP 250 (1983), § 117.01 n.9 *supra*.

[2] On this point, the Court's decision overruled Lau v. Nichols, 414 U.S. 563, 94 S. Ct. 786, 39 L. Ed. 2d 1 (1974). *Lau* was a Title VI case in which non-English speaking Chinese students successfully asserted a private right of action against the San Francisco school district, claiming that they should be taught the English language, that instruction should be available in Chinese, or that some other way should be provided to afford them equal educational opportunity. The Supreme Court held in *Lau* that Title VI forbids the use of federal funds not only in endeavors which intentionally discriminate on the grounds of race or national origin, but also in those endeavors which have a disparate impact on racial or national minorities. Four members of the Court, Justices Powell, Rehnquist, O'Connor, and Marshall, stated in *Guardians* that they considered *Lau* to be *overruled* by *Bakke*, which upheld a Constitutional standard of review for private Title VI actions, meaning that Title VI required proof of intentional discrimination. Justice White distinguished *Bakke* because there the issue was not whether Title VI prohibits unintentional discrimination.

[3] 45 C.F.R. § 80.3(b)(2) (1964). This former HEW regulation is now administered by the Department of Health and Human Services.

[4] Dissenting Justices Stevens, Brennan, Blackmun, and Marshall adopted this view.

[5] *See* Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999). The Third Circuit held that Title VI disparate-impact regulations may be enforced via a § 1983 action.

Alexander v. Sandoval.[6] In *Sandoval*, the Court concluded that the plaintiff, who brought his claim directly under Title VI and not under 1983, did not have a private right of action to enforce departmental regulations.

Five of the Justices in *Guardians* were of the opinion that an administrative regulation implementing the statute is held valid even though it prohibits an action—unintentional discrimination—which the Court has ruled is not proscribed by the statute itself. Justice Stevens, in his dissenting opinion, attempted to explain this curious result. According to Justice Stevens, an administrative regulation is valid so long as it is "reasonably related to the purposes of the enabling legislation," and the prohibition of unintentional discrimination is related in this fashion to Title VI. Justice Stevens' rationale is unsatisfying because it would seem to leave the door open to almost unlimited extensions of statutory proscriptions. In *Sandoval* the Court noted the "considerable tension" of this view with its holdings in *Bakke* and in *Guardians* that only intentional discrimination is prohibited by Title VI, but because the petitioners did not challenge the validity of these regulations, and the Court had to assume their validity for purposes of its decision.[7]

In *United States v. Fordice*,[8] the Court addressed a contention that a state public university system violated Title VI. This claim was based on a regulation enacted under Title VI which required states to "take affirmative action to

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See also the following cases interpreting Guardians to provide for an implied private right of action for disparate-impact regulations:

United States: Alexander v. Choate, 469 U.S. 287, 105 S. Ct. 712, L. Ed. 2d 661 (1985). A unanimous Supreme Court described *Guardians* as holding "that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." 469 U.S. at 293, 105 S. Ct. at 716.

Second Circuit: D. New York: Scelsa v. Cuny, 806 F. Supp. 1126, 67 FEP 41 (S.D.N.Y. 1992). The court found unintentional discrimination actionable under Title VI.

Sixth Circuit: D. Tennessee: Linton v. Carney, 779 F. Supp. 925 (M.D. Tenn. 1990), recognizing that a disparate impact claim may be brought directly under Title VI.

D. Ohio: Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110 (S.D. Ohio. 1984).

Seventh Circuit: Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987).

Craft v. Board of Trustees, 793 F.2d 140, *cert. denied*, 479 U.S. 829 (7th Cir. 1986).

Ninth Circuit: Larry P. by Lucille P. v. Riles, 793 F.2d 969 (9th Cir. 1984).

Eleventh Circuit: Georgia State Conference of Branches of the NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985).

D. Alabama: Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991). The district court felt "compelled" to follow the holding in *Guardians* and permit a disparate impact claim under regulations implementing Title VI.

[6] 532 U.S. 275 (2001). *Sandoval* is discussed *supra* § 117.02.

[7] *Id.* at 282.

[8] 505 U.S. 717, 112 S. Ct. 2727, 120 L. Ed. 2d at 575 (1992).

overcome the effects of prior discrimination."[9] Citing *Bakke* and *Guardians*, the Court stated that "[o]ur cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment."[10] The Court went on to analyze the case under Constitutional standards, with no hint that broader standards might apply because a regulation was at issue. Accordingly, *Fordice* casts doubt on this facet of *Guardians* insofar as it simply ignored the point.[11]

§ 117.06 Administrative Enforcement Procedures

Section 602 of Title VI[1] vests enforcement authority in the various federal agencies extending financial assistance to recipient programs or activities. Each agency is directed to adopt and enforce rules and regulations implementing the statutory prohibition against discrimination based on race, color, or national origin.[2] Prior to instituting revocation or other enforcement proceedings, the

[9] 505 U.S. at 731 n.7, 112 S. Ct. at 2738 n.7, *quoting* 34 C.F.R. § 100.3(b)(6)(i).

[10] 505 U.S. at 731 n.7, 112 S. Ct. at 2738 n.7.

[11] Only intentional discrimination is actionable under the Equal Protection Clause of the Fourteenth Amendment. *See* §§ 102.05[1] and 102.08[1] *supra*.

[1] 42 U.S.C. § 2000d-1.

[2] A list of some of the larger departments having promulgated such regulations follows. Unless otherwise noted, all cites are to the 1995 and 1996 Code of Federal Regulations.

Agency for International Development, International Cooperation Agency, 22 C.F.R. pt. 209.

Agriculture, Department of, Office of the Secretary, 7 C.F.R. pt. 15, subpt. A.

Commerce, Department of, Economic Development Administration, 13 C.F.R. § 317.1, incorporating by reference, 15 C.F.R. pt. 8.

Commerce, Department of, Office of Secretary, 15 C.F.R. pt. 8.

Defense, Department of, 32 C.F.R. pt. 195.

Education, Department of, Office of Civil Rights, 34 C.F.R. pts. 100, 104, and 106. *See* Appendix 50, Vol. 7 *infra*.

Energy, Department of, 10 C.F.R. pt. 1040 (1993).

Environmental Protection Agency, 40 C.F.R. pt. 7.

Federal Emergency Management Agency, 44 C.F.R. pt. 7.

Health and Human Services, Department of, 45 C.F.R. pts. 80, 83, 84, 86.

Housing and Urban Development, Department of, 24 C.F.R. pt. 1.

Interior, Department of the, 43 C.F.R. pt. 17.

Interior, Department of the, U.S. Fish and Wildlife Service, 50 C.F.R. pt. 3 (1991).

Justice, Department of, 28 C.F.R. pt. 42. Labor, Department of, Office of Secretary, 29 C.F.R. pt. 31.

NASA, 14 C.F.R. pts. 1250–1252.

National Foundation on the Arts and the Humanities, 45 C.F.R. pt. 1110.

National Science Foundation, 45 C.F.R. pts. 605, 611.

Nuclear Regulatory Commission, 10 C.F.R. pt. 4.

Office of Personnel Management, 5 C.F.R. pt. 900

agency must notify the appropriate persons of the noncompliance and must attempt to secure voluntary compliance. Only after the agency determines that voluntary compliance cannot be obtained may enforcement proceedings begin. The recipient is entitled to a hearing, and funding may be refused or revoked only after an express finding of noncompliance on the record. In addition, the enforcing agency must file a written report of the grounds for termination or refusal to fund with both the House and Senate committees having jurisdiction over the program involved. Thirty days after filing, the action becomes effective.[3]

In some instances, an agency may defer funding pending its investigation of an entity's compliance with Title VI.[4] According to the Fifth Circuit, however, the Act does not authorize recapture of federal funds previously paid to a recipient upon a showing of discrimination in the federal program.[5]

[1]—Agency Coordination: Attorney General's Title VI Guidelines

Executive Order 12250[6] authorizes the United States Attorney General to ensure the consistent and effective enforcement of Title VI and other nondiscrimination statutes by federal agencies. To that end, the Attorney General requires agencies to publish and disseminate Title VI compliance guidelines, to collect and exchange compliance-related data, and to develop written enforcement plans. In addition, each federal agency must submit its regulations implementing Title VI to the Assistant Attorney General for Civil Rights for approval.[7] The Attorney General has also published general guidelines for enforcement of Title VI, including a list of alternative means to remedy noncompliance.[8]

Small Business Administration, 13 C.F.R. pts. 112, 113.

State, Department of, 22 C.F.R. pt. 141.

Tennessee Valley Authority, 18 C.F.R. pt. 1302.

Transportation, Department of, Federal Highway Administration, 23 C.F.R. pt. 200.

Transportation, Department of, Federal Railroad Administration, 49 C.F.R. pt. 265.

Transportation, Department of, Office of Secretary, 49 C.F.R. pt. 21 and 14 C.F.R. pt. 379.

Treasury, Department of, Office of Thrift Supervision, 12 C.F.R. pt. 528.

Veterans Administration, 38 C.F.R. pts. 18, 18a.

Water Resources Council, 18 C.F.R. pt. 705.

[3] 42 U.S.C. § 2000d-1.

[4] 42 U.S.C. § 2000d-5.

[5] Drayden v. Needville Indep. Sch. Dist., 642 F.2d 129, 27 FEP 266 (5th Cir. 1981). Black female teachers were alleged to have been discriminatorily discharged by a school district which received federal funds.

[6] 45 Fed. Reg. 72,995 (Nov. 4, 1980).

[7] 28 C.F.R. §§ 42.401–42.415. *See* text of Title VI and Title IX Procedural Regulations set out in Appendix 52, Vol. 7 *infra*.

[8] 28 C.F.R. § 50.3. *See* text of Title VI and Title IX Procedural Regulations set out in Appendix 52, Vol. 7 *infra*.

[2]—Agency Coordination: EEOC Procedural Regulations

Executive Order 12067[9] gives the EEOC authority to coordinate enforcement of all federal laws governing equal employment opportunity. Accordingly, the EEOC has promulgated procedural regulations for complaints of employment discrimination brought under Title VI of the Civil Rights Act and Title IX of the Education Amendments.[10] These regulations provide for the confidential exchange of information regarding employment policies and practices of recipients of federal financial assistance between the EEOC and the agencies charged with responsibility under Title VI and Title IX. In order to minimize duplication of effort, they also call for interagency consultation between the EEOC and the agency before the agency begins investigative or enforcement procedures. And, as described below, they set forth certain procedures for processing complaints by private parties.[11]

[3]—Complaints of Employment Discrimination under Title VI and Title VII

Within thirty days of receiving a complaint of employment discrimination, the federal agency is directed to determine whether it has jurisdiction over the complaint under Title VI or Title IX. The agency must transfer any complaint over which it does not have jurisdiction to the EEOC, if the EEOC may have jurisdiction. When both the EEOC and the agency have jurisdiction over a complaint, the agency will transfer a complaint of individual discrimination to the EEOC and will retain a pattern and practice complaint for agency investigation, absent special circumstances.[12]

A referral of a complaint by an agency to the EEOC is deemed to be an EEOC charge, and the date the complaint was received by an agency is considered the date it was received by the EEOC for all purposes under Title VII and the Equal Pay Act. The agency must notify the complainant and the recipient of the referral.[13]

In determining, within thirty days, if any agency action should be taken, the agency is directed to give due weight to an EEOC dismissal of the Title VII allegations of a complaint and issuance of a right to sue letter. When the EEOC finds reasonable cause after investigation of a joint complaint, it may request the referring agency to participate in conciliation negotiations. If the parties enter into a negotiated settlement, the referring agency shall take no further action on

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[9] 43 Fed. Reg. 28,967 (June 30, 1978).

[10] 29 C.F.R. Part 1691 *et seq.* These regulations are the source of definitions of "Federal financial assistance" and "recipient" for Title VI and Title IX. *See* § 118.04 ns.2, 3 *infra*.

[11] 29 C.F.R. §§ 1691.2–1691.3.

[12] 29 C.F.R. § 1691.5 (1992).

[13] 29 C.F.R. § 1691.6.

the complaint. If informal conciliation fails, the EEOC may bring suit under Title VII.[14]

Upon the EEOC's transmittal of a reasonable cause determination and notice of failure of conciliation, the referring agency has thirty days to decide whether the recipient has violated any applicable civil rights provisions within its enforcement authority and whether further efforts to obtain voluntary compliance are warranted, taking into account the failure of the EEOC's efforts. If voluntary efforts are unwarranted or fail, the agency is directed to initiate enforcement proceedings under its own regulations.[15]

§ 117.07 Judicial Review

For any administrative enforcement action taken under Title VI, section 603 provides for judicial review as prescribed by law for any similar action taken by the agency on other grounds. Where an action for termination or denial of financial assistance is not otherwise subject to judicial review, the injured party may obtain judicial review of the action under the Administrative Procedure Act.[1]

Because the private right of action under Title VI is implied, there is no administrative scheme designed to afford relief to private parties. Therefore, it is not necessary for an aggrieved individual to exhaust administrative remedies before seeking judicial review of his or her complaint.[2]

§ 117.08 Title VI Remedies

The administrative remedy for noncompliance with Title VI is the termination or denial of federal funding. However, an agency must make a concerted effort to secure voluntary compliance by the program or activity before seeking this remedy. Regulations also authorize civil suits for specific performance or to otherwise enforce compliance with Title VI in lieu of administrative proceedings which would result in the termination of assistance.[1]

In private causes of action brought under Title VI, the remedies available may depend on whether the discrimination by the defendant was intentional. In *Guardians Association v. Civil Service Commission*,[2] a majority of the Supreme Court, in a fragmented decision that included three concurring opinions and two

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[14] 29 C.F.R. §§ 1691.7–1691.9, 1691.11.

[15] 29 C.F.R. § 1691.10.

[1] 5 U.S.C. §§ 701–706.

[2] *Cf.* Cannon v. University of Chicago, 441 U.S. at 707 n.41 (discussing implied right of action under Title IX).

[1] 28 C.F.R. § 50.3. *See* text of Title VI and Title IX Procedural Regulations set out in Appendix 52, Vol. 7 *infra*.

[2] 463 U.S. 582, 32 FEP 250 (1983). *See supra* § 117.05 for a discussion of the Court's holding with respect to disparate impact and Title VI.

dissenting opinions, held that the plaintiffs did not need to prove intentional discrimination to be entitled to injunctive relief under Title VI. Compensatory damages, however, were not permitted in the absence of proof of intentional discrimination.

Because *Guardians* did not expressly decide whether compensatory relief is available under Title VI even if a plaintiff can prove intentional discrimination, subsequent Supreme Court opinions have continued to explore the issue of what remedies other than injunctive relief are available. In *Consolidated Rail Corp. v. Darrone*,[3] the Supreme Court observed that a majority of the *Guardians* Court "expressed the view that a private plaintiff under Title VI could recover backpay; and no member of [that] Court contended that backpay was unavailable, at least as a remedy for intentional discrimination."[4] Similarly, in *Franklin v. Gwinnett County Public Schools*,[5] a case brought under Title IX, the Court noted that, in *Guardians*, "no Justice challenged the traditional presumption in favor of a federal court's power to award appropriate relief in a cognizable cause of action."[6]

Later, in *Barnes v. Gorman*,[7] a case in which the issue was punitive damages, the Supreme Court explained the theory underlying remedies for violations of Title VI and other financial assistance legislation:

> When a federal-funds recipient violates conditions of Spending Clause legislation [such as Title VI], the wrong done is the failure to provide what the contractual obligation requires; and that wrong is "made good" when the recipient compensates the Federal Government or a third-party beneficiary . . . for the loss caused by that failure.[8]

If damages are not compensatory in nature, as is the case for punitive damages, they do not fall within this rule. Accordingly, punitive damages are not available under Title VI.

Lower courts have held that Title VI allows compensatory relief for claims of intentional discrimination.[9]

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[3] 465 U.S. 624, 34 FEP 79 (1984), *superseded by statute on other grounds as stated in* Butts v. New York Dep't of Hous. Preservation & Dev., 990 F.2d 1397, 61 FEP 579 (2d Cir. 1993).

[4] 465 U.S. at 630, 34 FEP at 82.

[5] 503 U.S. 60, 59 FEP 213 (1992).

[6] 503 U.S. at 70, 59 FEP at 217.

[7] 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002).

[8] 122 S. Ct. at 2102.

[9] *First Circuit:*

D. Maine: Singh v. Superintending Sch. Comm., 601 F. Supp. 865 (D. Me. 1985). The court permitted a demand of compensatory damages under Title VI.

Third Circuit: Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 787 (3d Cir. 1990). The court found that compensatory relief available under Title VI is also available under Title IX.

The Supreme Court's decision in *Gebser v. Lago Vista Independent School District*,[10] a Title IX case, may have implications for private actions for damages under Title IV. In *Gebser* the Court held that a school district will be held liable for a teacher's sexual harassment of a student only when an appropriate official of the district had actual notice of the discrimination and showed deliberate indifference in failing to address the problem. The Court adopted this standard of actual notice and deliberate indifference to ensure against the risk that a recipient would be held liable for the independent actions of its employees, thereby "diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures."[11]

The Court noted the parallels between Title VI and Title IX, which "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds."[12] In addition, the administrative enforcement schemes of the two statutes are similar in providing that the government agency may not begin enforcement proceedings until it has notified the federal recipient of any alleged violations and attempted to secure voluntary compliance. Given the importance of these two features of Title IX to the Court's formulation of an institutional liability standard more restrictive than the standard adopted for Title VII cases, courts may determine that the standard announced in *Gebser* applies to private actions under Title VI.

As for attorneys' fees, 42 U.S.C. § 1988 provides that a fee may be awarded to a prevailing party in any action or proceeding to enforce a provision of Title VI of the Civil Rights Act of 1964.[13]

Seventh Circuit:

D. Illinois: Organization of Minority Vendors v. Illinois Cent. Gulf R.R., 579 F. Supp. 574 (N.D. Ill. 1983). The court noted that six members of the Supreme Court in Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 32 FEP 250 (1983), found that damages are available as a remedy for intentional violations of Title VI.

Eleventh Circuit:

D. Georgia: Kraft v. Memorial Med. Ctr., Inc., 807 F. Supp. 785, 2 AD Cases 592 (S.D. Ga. 1992). Compensatory damages are available under Title VI for intentional discrimination.

[10] 524 U.S. 274 (1998).

[11] 524 U.S. at 289.

[12] 66 U.S.L.W. at 4505.

[13] West Virginia Univ. Hosp. v. Casey, 499 U.S. 83, 111 S. Ct. 1138, 113 L. Ed. 2d 68, 55 FEP 353, 353 n.1 (1991), *quoting* 42 U.S.C. § 1988, *superseded by statute in part on other grounds as stated in* Landgraf v. USI Film Prods., 511 U.S. 244, 64 FEP 820 (1994).

§ 117D.01 Reserved

§ 117D.02 Reserved

§ 117D.03 Reserved

§ 117D.04 Digest of Additional Cases for § 117.04

Note 3— Title VI claims will be dismissed when the creation of employment opportunities was not the primary objective of the federal assistance.

Sixth Circuit:

D. Tennessee: Grimes v. Superior Home Health Care, 929 F. Supp. 1088, 74 FEP 1539 (D. Tenn. 1996).

Eleventh Circuit:

D. Georgia: Scott v. Underground Festival, Inc., 77 FEP 1269 (N.D. Ga. 1998). The plaintiff had no standing to sue.

Note 5— It has been held that faculty employment was not the primary objective of federal assistance to a university.

Eleventh Circuit:

D. Georgia: Schwartz v. Berry Coll., Inc., 74 FEP 999 (N.D. Ga. 1997).

§ 117D.05 Reserved

§ 117D.06 Reserved

§ 117D.07 Reserved

§ 117D.08 Reserved

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MYRNA ROBERTS
6900 GLENN DALE ROAD
GLENN DALE, MD 20769,

Civil Action No.

Plaintiff,

v.

BOARD OF EDUCATION OF
PRINCE GEORGE'S COUNTY
14201 SCHOOL LANE
UPPER MARLBORO, MD 20772,

and

PRINCE GEORGE'S COUNTY
EDUCATOR'S ASSOCIATION
8008 MARLBORO PIKE
FORESTVILLE, MD 20747,

Defendants.

COMPLAINT

COMES NOW Plaintiff through undersigned counsel states as follows:

JURISDICTION AND VENUE

1. This is an action for declaratory relief; injunctive relief, damages and to secure protection of and to redress deprivation of equal protection rights secured by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

2. This is an action for declaratory relief; injunctive relief, damages and to secure protection of and to redress deprivation of rights secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

3. This is an action for declaratory relief; injunctive relief, damages and to secure protection of and to redress deprivation of rights secured by Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-7 et seq. The U.S. Department of Education has provided Maryland public schools with more than $1 billion under the American Recovery and Reinvestment Act of 2009. Prince George's County Public Schools are receiving stimulus funds for the express purpose of creating jobs and maintaining existing ones. Title VI requires the recipients of federal funds to waive Eleventh Amendment sovereign immunity.

4. This is an action for declaratory relief; injunctive relief, damages and to secure protection of and to redress deprivation of rights secured by the 42 U.S.C § 1981.

5. Venue lies in this District pursuant to 42 U.S.C. § 2000e-5(f)(3) and because the events and occurrences giving rise to this action occurred within this judicial district.

Pendant Claims

6. This is an action for declaratory relief; injunctive relief, damages and to secure protection of and to redress deprivation of rights secured by Maryland's Negligent Supervision and Retention laws.

7. This is an action for declaratory relief; injunctive relief, damages and to secure protection of and to redress deprivation of rights secured by Maryland's Civil Conspiracy laws.

PARTIES

8. Myrna Roberts is a current employee of Prince George's County Public Schools.

9. The Prince George's County Public Schools and the Prince George's County Educator's Association are located in Prince George's County, Maryland.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

10. Plaintiff Myrna Roberts filed a timely complaint with the Equal Employment Opportunity Commission, Charge No. 531201100988. On March 10, 2011, EEOC issued a Notice of Right to Sue letter to Ms. Roberts.

STATEMENT OF CLAIM

Myrna Roberts

Introduction

11. Myrna Roberts is a sixty one (61) year old black woman from the U.S. Virgin Islands.
12. Ms. Roberts speaks with a distinct accent.
13. Ms. Roberts is a mathematics teacher with the Prince George's County Public Schools.
14. Ms. Roberts possesses a Master's degree in Mathematics and is currently working on her doctorate in mathematics education.
15. Ms. Roberts has been teaching mathematics for four decades.
16. Ms. Roberts possesses an Advanced Professional Certificate (APC) which is certified for grades 6^{th} to 12^{th}.
17. Ms. Roberts also possesses a Highly Qualified Designation under the No Child Left Behind Act of 2001.

Disparate Treatment

18. Eleven years ago, Ms. Roberts was hired as a mathematics teacher at Crossland High School in Temple Hills, Maryland.
19. Ms. Roberts has consistently received satisfactory job performance evaluations.
20. In 2004, Charles Thomas became the principal of Crossland High School.
21. Principal Thomas is an African American man.

22. Ms. Roberts was the only Caribbean mathematics teacher at Crossland High School.

23. Principal Thomas immediately took Ms. Roberts away from her classroom and assigned her to proposed mathematics computer lab.

24. In August 2005, Principal Thomas removed Ms. Roberts from the mathematics computer lab.

25. In November 2005, Principal Thomas took away Ms. Roberts' classes

26. For the entire 2006 – 2007 school year, Ms. Roberts did not have a teaching assignment.

27. Ms. Roberts was so humiliated that she avoided the teacher's lounge.

28. In May 2007, Ms. Roberts complained directly to Superintendent John Deasy about not having a teaching assignment.

29. Superintendent Deasy responded "this is a personnel matter"

30. Prince George's County Public Schools did not conduct an investigation or take prompt corrective action.

31. At the conclusion of the 2006 – 2007 school year, Principal Thomas placed a "N/A" in each category of her job performance evaluation.

32. In March 2008, Principal Thomas made Ms. Roberts a designated co-teacher.

33. Ms. Roberts has no classroom or students of her own, instead she floats from classroom to classroom assisting regular mathematics teachers.

34. Unlike other teachers, Ms. Roberts had no place to store her personal belongings.

35. Ms. Roberts had been denied equipment that is routinely provided to other teachers, such as, a desktop computer, a LCD projector, and a white board.

36. Ms. Roberts' name did not even appear in the graduation program.

37. Today, Principal Thomas continues to assign Ms. Roberts to the subservient role of co-teacher.

38. All American born mathematics teachers are assigned their own classroom and students.

39. Ms. Roberts is the only mathematics teacher at Crossland High School with a "co-teacher" designation.

40. In December 2009, Ms. Roberts complained directly to Superintendent William Hite.

41. Once again, Prince George's County Public Schools did not conduct an investigation or take prompt corrective action.

PGCEA Breached Its Duty of Fair Representation

42. Ms. Roberts complained to PGCEA about not having a teaching assignment.

43. PGCEA merely recommended to Ms. Roberts that she transfer to another school.

Count I – Title VII (Disparate Treatment)

44. Ms. Roberts incorporates by reference all of the preceding paragraphs.

45. Ms. Roberts was born in the Virgin Islands and speaks with a Caribbean accent.

46. Ms. Roberts' job performance has consistently been rated "satisfactory".

47. For more than six years, Ms. Roberts has not been allowed to teach mathematics in her own classroom.

48. American born teachers have been assigned their own mathematics classes.

49. Ms. Roberts has been treated less favorably by Principal Thomas than similarly situated teachers who were not born in the Caribbean.

Count II – Title VI (Disparate Treatment)

50. Ms. Roberts incorporates by reference all the preceding paragraphs.

51. Ms. Roberts has been treated less favorably by Principal Thomas than similarly situated teachers who were not born in the Caribbean.

Count III – 42 U.S.C. § 1981

52. Ms. Roberts incorporates by reference all of the preceding paragraphs.

53. The Prince George's County Educator's Association breached its duty of fair representation.

54. In 2009, Ms. Roberts attempted to file a grievance, based on national origin discrimination, with PGCEA against Principal Thomas.

55. However, the PGCEA Uniserv director, refused to provide Ms. Roberts with a grievance form.

Count IV - Negligent Supervision and Retention (Prince George's County Public Schools)

56. Ms. Roberts incorporates by reference all of the preceding paragraphs.

57. Principal Charles Thomas' conduct was malicious.

58. Principal Charles Thomas's malicious conduct caused Ms. Roberts severe emotional distress.

59. Prince George's County Public Schools breached its duty to protect Ms. Roberts from Principal Charles Thomas' malicious conduct.

Count V - Civil Conspiracy (Prince George's County Public Schools and Prince George's County Educator's Association)

60. Ms. Roberts incorporates by reference all of the preceding paragraphs.

61. Prince George's County Public Schools and the Prince George's County Educator's Association are co-conspirators.

62. Prince George's County Public Schools allowed Principal Charles Thomas to harass Ms. Roberts.

63. The Prince George's County Educator's Association refused to pursue discrimination complaints against Principal Charles Thomas.

64. Ms. Roberts suffered harm because of the Prince George's County Educator's Association's refusal to pursue her discrimination complaint against Principal Charles Thomas.

Emotional Pain and Suffering

65. Ms. Roberts continues to experience emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other pecuniary and non pecuniary losses.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays this court:

(a) Issue a declaratory judgment that Defendants' acts, polices, practices and procedures complained of herein-violated Plaintiff's rights as secured by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; Title VII of CRA; Title VI of CRA; 42 U.S.C. § 1981; Negligent Supervision and Retention; Civil Conspiracy laws; and, Order Defendants to make whole Plaintiff who has been adversely affected by the policies and practices described herein in an amount to be shown at trial and other affirmative relief;

(b) Compensate the Plaintiff for loss pay and benefits, with interest;

(c) Retain jurisdiction over this action to assure full compliance with the orders of the court and with applicable law and require defendants to file such reports as the court deems necessary to evaluate compliance;

(d) To award them reasonable attorney's fees and costs of this action;

(e) Award Plaintiff compensatory and punitive damages; and,

(f) Grant such additional relief as the court deems just and proper; and

WHEREFORE, the premises considered, the Plaintiff demands judgment against the Defendant(s) in the amount of five million dollars ($5,000,000).

JURY DEMAND

Plaintiff demands a trial by jury.

Respectfully submitted,

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DESEGREGATION ON TRIAL

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Judge Ends Busing in Prince George's

By Lisa Frazier
Washington Post Staff Writer
Wednesday, September 2, 1998; Page A01

A Dream Unrealized

Children play outside Ridgecrest Elementary, one of the schools the superintendent reorganized.
(By Carol Guzy – The Washington Post)
(Enter Photo Gallery)

A federal judge in Greenbelt yesterday ordered the end to mandatory busing in Prince George's County, concluding a 26-year-old government effort to desegregate the schools and closing one of the most divisive chapters in the county's history.

During the next six years, busing will be phased out as the county begins building 13 neighborhood schools and refurbishing older ones. Under a settlement to end busing, the school system also will focus on boosting the academic achievement of all students and closing the achievement gap between African American students and their peers.

In his 37-page opinion, U.S. District Judge Peter J. Messitte approved the agreement reached in March by representatives of the school system, county government and NAACP, the parties in the lawsuit filed in 1972 that prompted the only federal school desegregation order in the Washington area.

Messitte called the agreement "a fitting denouement to one of the most serious dramas of modern America."

His ruling will change little for county students this school year. But next year, students will begin going to neighborhood schools as attendance boundaries are redrawn and facilities are built, though parents will have the option of allowing their children to stay in their current schools.

County Executive Wayne K. Curry and schools Chairman Alvin Thornton testified this spring at state hearing on school funding.
(File Photo)

"These are exciting times for Prince George's County," School Superintendent Jerome Clark said. "You're going to see new schools being built in communities. You're going to see the academic performance of our youngsters going up, simply because we can focus our energies and not be divided by this thing we call court-ordered desegregation."

At the height of the Prince George's desegregation effort, 33,277 children were reassigned to schools to achieve racial balance, and the burden of busing fell evenly among white and black students. But by 1996, nearly 92 percent of the 11,332 students mandatorily bused were African American, many of them sent to predominantly black schools outside their neighborhoods.

School board Chairman Alvin Thornton (Suitland) said parents and the community must remain vigilant to assure that the terms of the agreement are kept.

"It really is up to the board and other fiscal authorities, as well as parents and the larger community, to take full advantage of the opportunities created by today's decision," he said.

As part of the agreement, school officials must develop extensive academic progress reports, with performance data broken down by

Post Series

In June, a Post concluded that a glut of uncertified teachers, crowded classrooms and poorly executed reform plans were severely undermining the quality of the Prince George's schools.

Part 1: Sunday, June 21
A threat to progress
Part 2: Monday, June 22
Profile of Superintendent Clark
Part 3: Tuesday, June 23
~~Inside a Prince George's~~ school
Part 4: Wednesday, June 24
Big letdown at Kingsford Elementary

school, race and poverty levels.

If the neighborhood schools are built on schedule and the government maintains its commitment to county schools, Messitte said, he will close the suit completely in 2002.

Although the judge's decision effectively eliminates integration as the panacea for a quality education for African American students, officials say improvements will take time.

"They're telling me they're going to have improvements, but are they?" asked Minerva Sanders, president of the Prince George's County Council of PTAs. "The key to this is that the quality of education has to be raised, so parents will be comforted in knowing their children will get the education they need."

School officials said they won't abandon their attempts to make classrooms more racially diverse as they search for proven ways to boost the academic achievement of students at all schools.

State and county leaders hailed the judge's decision as an opportunity for the state's largest school system to move ahead.

"This is good news," said Del. Howard P. Rawlings (D-Baltimore), chairman of the House Appropriations Committee. "The debate and emotion surrounding the busing debate were detracting from the main purpose of the schools -- educating students."

Commitments from the county and state to finance the school construction projects made the lawsuit settlement possible. The Maryland General Assembly earlier this year agreed to provide $35 million a year over the next four years for new school construction.

"It's a tremendous step forward for Prince George's County and the entire state of Maryland to get that ugly chapter in our history behind us," House Speaker Casper R. Taylor Jr. said.

The three litigants began negotiating toward a settlement after a trial on the desegregation lawsuit ended in December.

Both the school board and county government, co-defendants in the lawsuit, agreed that court-ordered busing in a school system that is now predominantly black is no longer useful. The NAACP, however, had asked Messitte to maintain busing in instances where it improved the racial balance at schools.

Superintendent Jerome Clark (By Dudley M. Brooks – The Washington Post)

The litigants resolved their differences with a settlement that will end court-ordered busing while the schools work to improve academic instruction. And the school system no longer has to submit regular reports to Messitte on the racial makeup of its schools and teaching staff.

If by 2002 the three parties agree that the terms of the settlement have been met, Messitte automatically will lift the order and declare the school system "unitary," meaning there are no vestiges of the old, separate system that provided unequal educations for black and white children.

"I just think that's a good resolution," said Patricia Brannan, a lawyer who has represented the NAACP in the case since the mid-1980s. "It think it's taken a lot of effort to get there, but it was well worth it."

Nathaniel Thomas, 17, a Suitland High School student and president of the Maryland Association of Student Councils, said returning students to neighborhood schools will spark more parent involvement.

"I think it's good because it's building the whole concept of communities committed to children," Thomas said. "When a large portion of the school student body doesn't live in the community, it means less participation in the community."

Now, he said, the system can get down to the business of "opportunities and programs and getting the students ready for high school improvement tests."

Staff writers Amy Argetsinger, Desson Howe and Daniel LeDuc contributed to this report.

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