IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

PARENTS DEFENDING EDUCATION, *Plaintiff*, v. WELLESLEY PUBLIC SCHOOLS, et al., *Defendants*.	Case No. 1:21-cv-11709

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION OF WELLESLEY'S RACIAL AFFINITY GROUP POLICY

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Wellesley desperately wants to make this case about something else. But contrary to Wellesley's opposition, PDE is not "inviting this Court to declare unconstitutional the use of non-exclusive affinity-based listening sessions in an educational setting." Opp. 1. PDE is not "asking this Court to prohibit the WPS from hosting meetings that may concern race and racial inequity." Opp. 3. PDE does not believe that holding sessions "on the topic of race/ethnicity . . . automatically equate[s] to discrimination or segregation." Opp. 8-9. PDE does not denigrate "efforts to support students in the face of tragedy." Opp. 9-10. And PDE is not "attempt[ing] to challenge WPS's curriculum around race and current events" or prevent Wellesley from "teach[ing] students about diversity, equity and inclusion." Opp. 10-11.

Instead, PDE is seeking to stop Wellesley from excluding students from affinity-group sessions because of their race. Wellesley does not deny (and actually confirms) the relevant facts. The affinity-group sessions were "for Black and Brown students" and "for Asian American students." Wellesley invited students only from certain racial groups to attend these sessions, and white students and a white teacher were told that they couldn't attend. Most telling, even after public reports of white students' exclusion and numerous parent complaints, Wellesley *never* said that all students could attend these sessions or took any steps to ensure that all students could attend in the future. To the contrary, Wellesley doubled down, releasing a statement affirming its commitment to racial affinity groups.

Only now, in the face of this litigation, does Wellesley promise that "any future listening sessions or affinity spaces" will be "open to all WPS students." Opp. 10. But this is insufficient. Wellesley still thinks that it did nothing wrong. Wellesley appears to believe that the Constitution permits race-based discouragements and invitations to students, so long as exceptions are made at the door for a brave student or two unwilling to abide by Wellesley's race-based sorting. Without a preliminary injunction, Wellesley will continue to violate the constitutional and legal rights of students (including

the children of PDE's members) by sponsoring events for students of only some races and sending the clearest of messages to others that they do not qualify for entry because of the color of their skin. The Court should grant PDE's motion for a preliminary injunction.

I. PDE has Article III standing

An association suing on behalf of its members has standing when "its members would otherwise have standing to sue in their own right," the "interests it seeks to protect are germane to the organization's purpose," and "neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Wellesley does not challenge the second and third requirements. Nor could it. This lawsuit is on all fours with PDE's mission to "prevent the politicization of K-12 education, including government attempts to force students into divisive identity groups." Neily Decl. ¶3. And this case does not require participation of individual members because PDE seeks only declaratory and injunctive relief. *See SFFA v. Harvard*, 980 F.3d 157, 179, 183 (1st Cir. 2020).

That leaves only the first prong of the *Hunt* test. Here, PDE's members have standing in their own right. First, they have suffered an "injury in fact" because their children were denied an opportunity to participate in a school activity on the basis of their race.[1] *See, e.g.*, Parent A Decl. ¶6 ("My middle-school aged child's class received a message from their teacher about the event that expressly stated that white students were not welcome at the event."); *id.* ¶13 ("I want my child to have the opportunity to attend, to participate in, and to learn from all school-sponsored events, regardless of race."); *see also* Parent B Decl. ¶¶6, 13 (same); Parent C Decl. ¶¶4, 6-7, 11 (same). These students also were subjected to racial segregation, which has an inherently "detrimental impact," fosters "a sense of inferiority," and inhibits "educational … development." *Brown v. Bd. of Education*, 347 U.S. 483, 494

[1] Parents A-E are members of PDE, *see* Neily Decl. ¶5, and are acting on behalf of their minor children, *see, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718-19 (2007). Parent C's oldest child (who is in high school) is also a member of PDE. Parent C Decl. ¶4.

(1954); *see, e.g.,* Parent A Decl. ¶8 (the Racial Affinity Group Policy has "harmed both of my children by making them highly conscious of race during their interactions with teachers and fellow classmates and making them feel like they were part of the 'problem' solely because of their skin color"); Parent B Decl. ¶8 (same); Parent C Decl. ¶10 ("My children have repeatedly told me that they want to go to school in an environment that does not categorize them—or their classmates—based on race."). Second, PDE's members' injuries are traceable to Wellesley's actions. *Infra* 3-4. Third, these injuries would be redressed by a favorable decision because all students (including the children of PDE's members) could participate in school activities going forward. *See, e.g., Mayorga Santamaria ex rel. Doe Child. 1-3 v. Dallas Indep. Sch. Dist.*, 2006 WL 3350194, at *29 (N.D. Tex. Nov. 16, 2006) (association of parents had standing to seek injunction against school's de facto policy of racial segregation).[2]

II. PDE is likely to prevail on the merits.

A. The material facts are undisputed.

WPS claims that it has never had a policy of excluding students by race from attending its affinity-group sessions. Opp. 2-3. The record shows otherwise. Consider the undisputed facts:

- In February 2021, Wellesley adopted its five-year "Equity Strategic Plan," under which it made "commitments" to address "bias and racism" by, among other things, "amplify[ing] the voices" of marginalized groups through "affinity spaces for students with shared identity." Strawbridge Decl., Ex. A at 1, 3, 5; Curry Decl. ¶10.
- Immediately after it adopted its Equity Strategic Plan, Wellesley began creating race-based affinity-group sessions. In announcing their creation, Director Curry and other Wellesley officials repeatedly said that the sessions were only for students of certain races:
  - "[W]e are hosting a listening session for our Black and Brown students." Strawbridge Decl., Ex C.
  - Wellesley is holding a "listening space for Black and Brown students." *Id..,* Ex. D.

[2] Wellesley asserts that PDE's members have suffered no "redressable injury" because Wellesley does not, in fact, exclude students from school activities based on their race. Opp. 5. But this argument "conflates two distinct inquiries." *City of Hope Nat. Med. Ctr. v. HealthPlus, Inc.*, 156 F.3d 223, 228 (1st Cir. 1998). The standing inquiry "focuses only on 'whether the litigant is entitled to have the court decide the merits of the dispute,'" *id.*, not whether the defendant believes it will ultimately prevail on the merits.

- "In Feb. we had [a session] for Black + Brown students." *Id.*, Ex. F.
- "We are aiming to host [a session] specifically for Asian American students." *Id.*
- Wellesley will be holding a "listening session for Asian American students." *Id.*
- "We are writing to invite you to join a listening session for Asian and Asian American students in WPS." *Id.*, Ex. G.
- Wellesley is holding a "listening session for Asian and Asian American Students." *Id.*
- "Dr. Curry is holding a healing session today for our Asian and Asian American students and faculty this afternoon." *Id.*, Ex. U.

- Director Curry asked teachers and the principals of schools to invite only students of certain races:
  - "Do you mind sharing the [details] with your Black + Brown students[?]" *Id.*, Ex. D.
  - "[We] hope you can share [this] with your Asian and Asian American students and encourage them to attend." *Id.*, Ex. J.
- Director Curry told Principal Ito and several teachers that she needed their help contacting students of certain races because she lacked access to student information "disaggregated by demographic data" and thus could not "hone in" on the right students. *Id.*, Ex. I at 2.
- Director Curry explicitly told a white teacher that she could not attend an affinity-group session: "we want to hold the space for the Asian and Asian American students and faculty/staff. I hope this makes sense." *Id.*, Ex. K.
- At least two Wellesley Middle School teachers, after communicating with Director Curry, *see id.*, Ex. I at 2, told all white students in their classes that they could not attend an affinity group session:
  - "This is a safe space for our Asian/Asian-American [Students] and Students of Color, *not* for students who identify only as White. If you identify as White, and need help to process recent events, please know I'm here for you as well as your guidance counselors. If you need to know more about why this is not for White students, please ask me." Neily Decl. ¶8(a), Ex. DD; ¶8(c), Ex. FF (same).
- One Wellesley teacher attached an "FAQ" document written by a third Wellesley teacher telling students that affinity-group sessions would be segregated by race:
  - Affinity groups are a "safe space for members of the same identity or community," such as "black students, BIPOC students, Asian American students," where the students can "share their experiences without risk of feeling like they will offend someone from another group, and *without another group's voices*[.]" Neily Decl. ¶8(b), Ex. EE (emphasis added); *see also* Strawbridge Decl., Ex. B
- When news of white students' exclusion was made public, Wellesley *never disputed* that the affinity-group sessions were not for white students or that all students could attend. *See*

Ito Decl., Ex. C (Wellesley public statement); Strawbridge Decl., Ex. M (same); *id.*, Ex. AA (email to concerned parent).

- Wellesley instead released an official statement—signed by all four individual defendants—"unequivocally affirm[ing] the importance of 'affinity spaces,' where members of historically-marginalized groups can come together in a spirit of mutual support and understanding of shared experiences" and discuss topics that "members of these groups might not otherwise feel comfortable sharing in broader dialogue sessions." Ito Decl., Ex. C.

Wellesley does not dispute any of this evidence. *See* Opp. 2-4. Indeed, Wellesley's declarations largely confirm the facts presented by PDE. These affinity-group sessions were "for Black and Brown students" and "for Asian American students." Curry Decl. ¶¶26, 29. And Wellesley invited (or "targeted") only students of certain racial groups to attend the sessions. *See, e.g.,* Curry Decl. ¶27 ("[M]y office targeted participation from . . . black and brown students"); *id.* ¶31 ("[M]y office targeted participation from students and staff who identified as Asian or Asian American and Pacific Islander"). Although Wellesley implies that all students were invited to attend, Opp. 3, Director Curry's emails actually did the opposite, explicitly stating that the first affinity-group session was "for our Black and Brown students and alumni," Curry Decl, Ex. D, and the second session was "for Asian and Asian American students . . . and others in the BIPOC community," *id.*, Ex. F. And the teachers' emails excluding white students, even if not an "authorized message," Opp. 4, were entirely consistent with the instructions the teachers had received from Wellesley officials. *Supra* 3-4; Strawbridge Decl., Ex. K (Director Curry telling white teacher that she could not attend because "we want to hold the space for the Asian and Asian American students and faculty/staff").

Wellesley claims that "no students were denied the opportunity to attend" the affinity-group sessions if they showed up, despite Wellesley's communications beforehand that the sessions were only for certain races. Opp. 8. (In other words, Wellesley's overarching defense is akin to saying that a "whites only" invitation to try out for a school play is constitutionally permissible, so long as the school doesn't turn away anyone who shows up to audition.) What Wellesley leaves out is that, leading

up to the events, white students (including the children of PDE's members) were told that they could not attend an affinity-group session. Exs. DD, EE; Parent A Decl. ¶6; Parent B Decl. ¶6. And others (including the children of PDE's members) were never even told that the sessions were happening. Parent A Decl. ¶10; Parent B Decl. ¶10; Parent C Decl. ¶7; *see also supra* 2-3. What matters is Wellesley's consistent efforts to exclude students of certain races from the sessions. It is ultimately irrelevant that some students outside of the "targeted" audience allegedly attended one affinity-group session.[3] Opp. 3-4. Wellesley refused to invite, openly discouraged, and actively prohibited students (including the children of PDE's members) from attending these sessions because of their race.

B. Wellesley violated the Equal Protection Clause.

Wellesley does not dispute that excluding students on the basis of race from affinity-group sessions would violate the Equal Protection Clause. *See* Opp. 8-9. That is a wise concession. PDE Br. 12. Wellesley instead disputes the facts and argues—without any factual basis—that no affinity-group sessions were "intended to exclude, have excluded, or will exclude the attendance of any students." Opp. 8. Nothing supports that statement. Every communication about the affinity groups points in exactly the opposite direction. Wellesley officials created the sessions only "for Black and Brown students" or "for Asian American students," they invited only students of certain races to attend the sessions by "target[ing]" only chosen races, and they specifically told white students and a white teacher that they could not participate. *Supra* 3-4. The message to students of certain races was unequivocal: you are not welcome.

[3] Tellingly, Wellesley never says outright that any white students attended any of the affinity-group sessions. According to Wellesley's declarations, it appears that no Asian-American or white students attended the February 10 event "for Black and Brown students." *See* Curry Decl. ¶28. For the March 18 event, which was "for Asian or Asian American and Pacific Islander students . . . and others in the . . . Black, Indigenous and People of Color community," Wellesley does not confirm whether any white *students* (as opposed to faculty) attended. *See id.* ¶32. And for the April 14 event, all Wellesley says is that at least two "students who did not identify as AAPI" attended the session billed "for Asian and Asian American students," with nothing further about those students. *Id.* ¶¶30-31.

Wellesley's only response is that it did not ultimately turn away any students, including an unidentified number of students who were of a different race. *See* Curry Decl. ¶35 ("No students were denied access to the Zoom session by the DE&I Office."); *id.* ¶¶30-31 (noting that "[s]tudents who did not identify as AAPI attended the session" that was "for Asian and Asian American students"). But courts have long rejected this excuse for discriminatory behavior. For example, in *Baldwin v. Morgan*, 287 F.2d 750 (5th Cir. 1961), a railroad terminal created two waiting rooms, with "signs [that] were posted marking one as the Negro waiting room and the other for whites." *Id.* at 752. The terminal claimed its actions were constitutional because the signs were "merely intended [to be] an invitation to each of the races to occupy these facilities separately" and the "segregated use or occupancy of such waiting rooms [was not] coercively compelled." *Id.* at 753-54. The Fifth Circuit properly rejected this defense. "What is forbidden is the state action in which color (i.e., race) is the determinant," and it is "simply beyond the constitutional competence of the state to command that any facility either shall be labeled as or reserved for the exclusive or preferred use of one rather than the other of the races." *Id.*; *see also Lewis v. Greyhound Corp.*, 199 F. Supp. 210, 214 (M.D. Ala. 1961) (Alabama bus carriers could not "maintain separate facilities in their terminals for the white and Negro races and [post] signs . . . in the terminals indicating which facilities are for the use of each race," even though the carriers were "not enforcing segregation in the separate facilities which they maintain or utilize").

So too here. Whether Wellesley actually turned away any student is irrelevant. The constitutional harm was done when Wellesley conceived of race-exclusive affinity groups, told students that the event was only "for" certain racial groups, invited (or "targeted") only students of certain races, and explicitly told groups of white students they could not attend. *Supra* 3-4. None of Wellesley's dozens of pages of declarations disputes those facts. At most, Wellesley's declarations allege that some unquantified number of students attended the event anyway, despite not belonging to the "targeted"

racial group. That a handful of students were unwilling to abide by Wellesley's race-based lines does not cure the Fourteenth Amendment violation.

Finally, Wellesley contends that it "never adopted a so-called 'Racial Affinity Group Policy.'" Opp. 2-3. But that is not correct either. In its Equity Plan, Wellesley made "commitments" to address "bias and racism" by, among other things, "amplify[ing] the voices" of marginalized groups through "affinity spaces for students with shared identity." Strawbridge Decl., Ex. A at 1, 3, 5. Moreover, Wellesley does not dispute that Director Curry is the "person with final policymaking authority" over affinity-group sessions. *Welch v. Ciampa*, 542 F.3d 927, 941-42 (1st Cir. 2008); *see* Curry Decl. ¶¶9-10; *see also About Us*, WPS Office of Diversity, Equity & Inclusion, bit.ly/302MlRW; PDE Br. 13. And in this policymaking role, Director Curry created the sessions only "for Black and Brown students" or "for Asian American students," invited only students of certain races to attend the sessions, and specifically excluded a white teacher from a session. *Supra* 4; Curry Decl. ¶¶26-31, Exs. D & E.

Superintendent Lussier, moreover, also had actual knowledge of the race-based events and "yet did nothing about it." *Bisbal-Ramos v. City of Mayaguez*, 467 F.3d 16, 23-24 (1st Cir. 2006). The "scope, duration, and openness" of Wellesley's actions "for [more than] a month" shows that Superintendent Lussier "had to have known what was happening," and he did nothing. *Id.* at 24; *supra* 3-4. Nor is there any evidence that he "meaningfully investigate[d]" the exclusion of students by race, *Wright v. City of Euclid*, 962 F.3d 852, 882 (6th Cir. 2020), "punish[ed]" those who had excluded students by race, *id.*, or "did [anything] to stop it" from happening again, *Bisbal-Ramos*, 467 F.3d at 24. To the contrary, Superintendent Lussier (along with the other individual defendants) released a statement defending and affirming the race-based affinity-group sessions. Strawbridge Decl., Ex. M; *see Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 184 (D. Mass. 2007) (denying the defendant summary judgment where the school superintendent had knowledge of the constitutional violations and subsequently ratified it). PDE is likely to succeed on its Equal Protection Claim.

C. Wellesley violated Title VI.

Wellesley's liability under Title VI is straightforward. PDE provided "direct evidence of discrimination" by Wellesley against students (including the children of PDE's members) on the ground of race. *JF v. Carmel Cent. Sch. Dist.*, 168 F. Supp. 3d 609, 623 (S.D.N.Y. 2016). Wellesley plainly violated Title VI. PDE Br. 14; *see also* 34 C.F.R. §100.3(b)(1) (Title VI prohibits schools from, "on the ground of race," "subject[ing] an individual to segregation or separate treatment" or "deny[ing] an individual an opportunity to participate in [a] program").

A decision from the Department of Education Office for Civil Rights during the Obama Administration is directly on point. *See* Letter to Oak Park & River Forest High School District 200, U.S. Dep't of Educ., Office for Civil Rights, No. 05-15-1180 (Sept. 29, 2015), https://bit.ly/3pvbbTc. In 2015, following "the police actions involving African American victims in Ferguson and New York and subsequent events," an Illinois school district held a "Black Lives Matter" assembly during Black History Month. *Id.* at 3. The assembly was convened "for African American students only" because the district wanted "to provide a comfortable forum for black students to express their frustrations." *Id.* Certain students "who self-identified as white were directed by District officials not to participate in the event as this assembly was designed for students who self-identify as black." *Id.* OCR found that the district violated the Equal Protection Clause and Title VI because the district's actions could not withstand strict scrutiny. *Id.* at 4. Specifically, the district failed to "assess fully whether there were workable race-neutral alternatives" and "did not conduct a flexible and individualized review of potential participants." *Id.* In a Resolution Agreement with OCR, the district agreed that its programs and activities would be "open to all students . . . regardless of their race" and to adopt policies and training to ensure the district's compliance. *Id.* OCR imposed these requirements even though the district had promised "not to hold such events in the future." *Id.* at 3.

The same is true here. Wellesley held events only for certain racial groups; Wellesley students were "directed by District officials not to participate in the event" because they were not the right race; and Wellesley never explored any race-neutral alternatives to race-based affinity groups. *Id.* at 3-4. PDE is likely to succeed on the merits of its Title VI claim.

III. PDE satisfies the remaining factors for a preliminary injunction.

Wellesley does not dispute that the remaining preliminary injunction factors are satisfied if PDE is likely to prevail on the merits. Opp. 10-11; *see* Br. 19-20. Nor could it. "The deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Dorce v. Wolf*, 506 F. Supp. 3d 142, 145 (D. Mass 2020) (quoting *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 217 (D.D.C. 2020)); *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) (same). And the balance of equities and the public interest always weigh in favor of "prevent[ing] the violation of a party's constitutional rights.'" *Dorce*, 506 F. Supp. 3d at 145; *see e.g., Alsaada v. City of Columbus*, 2021 WL 1725554, at *45-47 (S.D. Ohio Apr. 30, 2021). The same goes for protecting students' statutory rights to be free of discrimination. *See, e.g., Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 2016 WL 5239829, at *1-3 (E.D. Wis. Sept 22, 2016) (preliminarily enjoining school district from violating Title IX by denying a student access to a bathroom that correlates with the student's gender identity).

Wellesley's only argument (aside from rearguing the merits) is that no preliminary injunction is needed because Wellesley officials submitted declarations "affirming that any future listening sessions or affinity spaces will remain open to all WPS students." Opp. 10. But Wellesley "vigorously defends the constitutionality of its race-based program, and nowhere suggests that" it intends to cease its prior practices. *Parents Involved in Comm. Sch.*, 551 U.S. at 719. Voluntary cessation "does not moot a case or controversy unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," a "heavy burden that [Wellesley] has clearly not met." *Id.* (cleaned up); *see also Turn & Bank Holdings, LLC v. Avco Corp.*, 2020 WL 733831, at *3

(M.D.N.C. Feb. 13, 2020) ("Absent an injunction, nothing other than its own non-binding promises prevent [the defendant] from" harming the plaintiff). If these affinity-group sessions truly are open to all students, then Wellesley should have no objection to the injunction PDE seeks. The Court should "take Defendants at their word and . . . make official that which they have promised by enjoining them from" excluding students from affinity-group sessions on the basis of their race. *Jones v. Coleman*, 2017 WL 1397212, at *6 (M.D. Tenn. Apr. 19, 2017). PDE would be protected and Wellesley would "not be harmed by having to comply with what [it has] effectively agreed to do." *Id.*

Finally, even if Wellesley's promise to make affinity-group sessions "open to all WPS students" were binding, a preliminary injunction would still be necessary. Without a preliminary injunction, Wellesley will continue to perpetuate an unconstitutional policy of identifying affinity-group sessions as being only "for" certain racial groups and inviting only students of certain races to attend, thereby creating the unequivocal message that students of other racial groups cannot attend. Wellesley's silent promise that students of other races will not be turned away is meaningless. Worse, it depends on middle school and high school students to reject the race-based lines that their own school has drawn. What Black, white, or Hispanic student would believe he could attend a session that he was not invited to and that is specifically described as "for Asian Americans"? And how could the student even attend the session if he never learned the time, date, and place? Wellesley has made *no changes* to its policies to ensure that all students will actually learn of affinity-group sessions and feel welcome to attend.

CONCLUSION

For the foregoing reasons, the Court should grant PDE's motion and enjoin Wellesley from excluding students on the basis of race from affinity-group sessions or any other school-sponsored activities. In addition, the Court should enjoin Wellesley from (1) identifying affinity-group sessions or other school-sponsored activities as being only for certain racial groups, and (2) inviting students on the basis of race to attend affinity-group sessions or other school-sponsored activities.

Dated: December 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 8, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification to all counsel of record.

/s/ J. Michael Connolly