VIRGINIA:

IN THE FAIRFAX CIRCUIT COURT

K.C., a minor, by and through her parent and next friend, HANNING CHEN, et. al.,	)	
Plaintiffs,	)	
vs.	)	Case No. CL 2020-0017283
THE FAIRFAX COUNTY SCHOOL BOARD, *et. al.*,	)	
Defendants.	)	

ORDER

THIS MATTER came before the Court on Tuesday, January 26, 2021, for an evidentiary hearing on Plaintiffs' Motion for a Preliminary Injunction. The hearing included sworn testimony, documents admitted into evidence or offered as demonstrative aids at closing, affidavits accompanied by the appearance of the authors for cross-examination, and arguments of counsel. After the parties completed closing arguments the following morning, the Court took the matter under advisement to study documents that were admitted and to consider the evidence presented.

Standards Applied at a Preliminary Injunction Hearing

Previously, when hearing the demurrer, the allegations of fact in the Complaint were taken in the light most favorable to Plaintiffs, including fair inferences drawn from the allegations. When deciding whether to grant a preliminary injunction, the standard shifts to placing the burden upon Plaintiffs to clearly show[1] that the equities favor granting the extraordinary remedy of a preliminary injunction. *See Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008).

[1] Decisions addressing preliminary injunctions often refer to whether a factor has been shown rather than proven. This decision therefore avoids using the word "proven." A preliminary injunction hearing is not a

The Court's authority to issue injunctions arises from its equitable powers, as shaped by common law. The common law, if it is not found repugnant to constitutional rights or has not been abrogated by statute, continues to guide the decisions of this Court. *See* Va. Code § 1-200. In Virginia, the circuit courts retain the general jurisdiction to award injunctions. *See* Va. Code § 8.01-620. When called upon to decide whether to grant a temporary injunction, the Court must be satisfied of the plaintiff's equity. *See* Va. Code § 8.01-628; *see also May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 18 (2019). The Supreme Court of Virginia has not defined a standard that the circuit courts must apply when deciding whether a party seeking an injunction has met the burden of proof required under equity. Instead, Virginia courts often rely upon the four factors expressed under the United States Supreme Court's decision in *Winter v. NRDC, Inc.*, 555 U.S 7 (2008). The parties agreed that the Court should apply the following *Winter* factors to this case: [2]

(1) A clear showing that Plaintiffs will likely succeed on the merits;

(2) A clear showing that Plaintiffs are likely to be irreparably harmed absent relief;

(3) The balance of equities tips in Plaintiffs' favor; and

(4) The relief is in the public interest.

---

final hearing on the merits. Facts found and legal conclusions become final only after a final hearing, not after a preliminary injunction.

[2] The application of a standard that has not been defined by statute or a Virginia appellate court by any one judge in the 19th Judicial Circuit does not bind any other judges in the 19th Judicial Circuit. When the parties agree to apply a standard, that agreement provides helpful guidelines and not rules. After the case concludes, the standards become the "law of the case" as between these parties in this case. The application of equity, historically criticized as a proceeding where "equity is as long as the Chancellor's foot," may be difficult to accept for students immersed in the studies of science, technology, engineering, and math.

All four factors must be satisfied before the Court may grant a preliminary injunction.[3] Plaintiffs are not, however, required to prove their case in full. *See Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981). The factors do not have to be considered in a particular order. When, however, a party seeks an injunction against a political entity that is afforded deference in its decision making, the public interest factor is often considered first.

For example, *Winter* reversed a preliminary injunction that interrupted the United States Navy's ability to conduct training exercises. *See Winter,* 555 U.S at 33. The Supreme Court concluded that the trial court failed to consider the public interest in maintaining a strong national defense and that the appropriate deference accorded the professional judgment of the military. *See id.* After finding that the public interest heavily favored the Navy's position, the Court vacated the preliminary injunction and declined to consider the merits of the underlying claims. *See id.*

Here, the decision of the School Board with respect to educational policy is accorded judicial deference. The development of educational policies starts with the General Assembly, is expressed by rules the Virginia Department of Education ("VDOE") promulgates, and is implemented by the school board operating a school division. Without constitutional or statutory restraint, school board decisions concerning educational policies are beyond judicial review.

---

[3] The United States Court of Appeals for the Tenth Circuit requires a plaintiff to satisfy a heightened burden on three types of disfavored injunctions: (1) preliminary injunctions that alter the status quo; (2) mandatory (as opposed to prohibitory) preliminary injunctions; and (3) preliminary injunctions that would grant the plaintiffs all relief recoverable after a full trial on the merits. *See O Centro Espirata Beneficiente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973, 975 (10th Cir. 2004); *aff'd sub nom Gonzales v. O'Centro Espirata Beneficiente Unaio Do Vegetal,* 546 U.S. 418 (2006); *but see United Food & Commercial Workers Un. v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 348 (6th Cir. 1998) (rejecting a heightened burden for mandatory injunctive relief). When balancing the equities, a Virginia court does not observe a "heightened" standard beyond a "clear showing." Nonetheless, when considering equities in granting a preliminary injunction that changes the status quo or is a mandatory, rather than prohibitory, injunction, the impact on the other party will often appear more severe.

The application of evidentiary rules at a preliminary injunction are more relaxed than what is applied at trial. At the start of the hearing, Plaintiffs raised a motion in limine to bar consideration of inadmissible evidence contained in sworn affidavits. Although the Court held the motion in limine under advisement until it could address the specific portion of the affidavit and rule on evidentiary objections raised during the hearing, the proceedings of a preliminary injunction are not strictly governed by evidentiary rules. Some federal courts have persuasively observed that evidence at a preliminary injunction hearing can be based on information and belief, hearsay, and personal knowledge. *See Levi Strauss & Co. v. Sunrise Intl'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *see also Fed. Sav. & Loan, Ins. Corp. v. Dixon,* 835 F.2d 554, 558 (5th Cir. 1987); *Asseo v. Pan Am. Grain Co.* 805 F.2d 23, 26 (1st Cir. 1986). This Court agrees.

Adoption of a relaxed application of evidentiary rules is consistent with Va. Code § 8.01-628 and its authorization of the use of affidavits in support of, or in opposition to, a motion for a preliminary injunction. The statute does not require the affidavits to be based solely on personal knowledge and admissible evidence. Within its four corners, the persuasiveness of an affidavit or evidence depends on the information conveyed and the premise upon which the information is formed. When considering the evidence as a whole, the Court must carefully guard the due process rights of defendants who have not had an opportunity to engage in discovery, or who must confront expert testimony without the benefit of advanced disclosures or a chance to call rebuttal experts.

Evidence Received Under the Standards Cited Above

The overarching question at the hearing was whether the School Board's decision to eliminate standardized testing for admission to the Thomas Jefferson High School for Science and

Technology ("TJ"), a Governor's School, violated regulations the VDOE promulgated for the identification of gifted students and services for such students. The evidence led to the following.[4]

TJ, a Governor's School, is a Program for Gifted Students

TJ is an Academic-Year Governor's School Program that provides what Defendants credibly describe as an "alternate service option" for gifted students. The debate over whether admission to TJ is restricted solely to students who have been identified as "gifted" is misdirected. Under the standard of demurrer, the Court determined that TJ, as a Governor's School, is a school solely for gifted students. The evidence, as a whole, presented at the hearing does not alter this determination. Some may complain that the existence of Governor's Schools promote elitism. Regardless of such complaints, Defendants' curious insistence that TJ is not a school solely for gifted students continues to be unpersuasive. As explained under Plaintiffs' Exhibit #5-K:

> The Virginia Governor's School Program began in 1973 when Governor Linwood Holton established the first summer residential programs for 400 gifted students from across the Commonwealth . . . Virginia Governor's Schools provide some of the state's most able students academically and artistically challenging programs beyond those offered in their home school . . . The years since 1973 have brought refinement and change to the programs, yet one aspect, the student, has remained constant. Each year hundreds of outstanding young people come to one of the different Governor's Schools in search of knowledge and eager to accept the challenge of acquiring advanced skills. Each group makes the Virginia Governor's School Program a special experience by creating a community of learners who demonstrate their remarkable talents in diverse and meaningful ways.

---

[4] The parties should not consider any findings of fact to be final. The findings of fact and conclusions of law remain interlocutory and may be reconsidered at any time until the Court is deprived of jurisdiction, which is twenty-one days after the entry of a final order following a final hearing. *See* Va. Sup. Ct. Rule 1:1. The proceedings to date are not final.

There may be some findings or conclusions of law that are incontrovertible. The parties can remind the Court of its earlier findings and conclusions of which they have confidence but should not present prior findings and conclusions as *res judicata*.

The defendants' brief opposing the issuance of a preliminary injunction highlights the mission of TJ to be a program for students with "exceptional quantitative skills," stating:

> From its inception, TJ was intended to be "a high school for science and technology where students with exceptional quantitative skills and interest in science and technology, engineering, or mathematics, can pursue higher levels of academic achievement in those subjects in preparation for a pursuit of a science, technology, engineering, or mathematics focused profession." School Board Policy 3355.4(I) (revised Sept 12, 2013). TJ continues to serve that purpose today.

TJ is identified under the Fairfax County Public Schools Local Plan for the Gifted. It is regularly reported to the VDOE as a program option that Fairfax provides for gifted students. Although TJ is a Regional Governor's School, it began as a Fairfax County public high school and still operates primarily as a Fairfax County public school. TJ received designation by the VDOE as an Academic-Year Regional Governor's School and accepts students from participating schools. As a Governor's School, TJ receives additional funding. *See* Regulation 3355.13 (effective July 18, 2018) (Def. Ex. 1A). TJ is also subject to a full-site evaluation by the VDOE every six (6) years. The last evaluation was in April 2017. Plaintiffs' Exhibit #5J. One evaluation category is, "Governor's School Standard." The Standard considers whether the school meets "students exceptionalities or potential through appropriate instructional accommodations and modifications." Notably, testing was part of the admissions standard in 2017, and was found to be an appropriate non-biased measure providing "qualitative and quantitative information."

However, not every student who applies can be admitted and the decision to admit triggers the application of additional standards beyond the basic requirements of eligibility. The admissions standards and procedures for TJ are published under Regulation 3355.13 (Def. Ex. 1A). Section V – Student Selection and Admissions Procedure, states:

2. **Selection Criteria**

Applicants will be selected using the following criteria:

a. Aptitude for successful study of science, technology, engineering, and mathematics;

b. A record of exceptional academic achievement;

c. Commitment, intellectual curiosity, passion, and creativity in the study of science, technology, engineering and mathematics;

d. Background, skills or experiences that promote the School Board's goal of providing diversity in the student body to enhance a unique learning experience and to develop future leaders.

3. **Methods and Instruments of Measurement**

a. Exceptional quantitative skills, interest and aptitude for successful study of science, technology, engineering and mathematics will be measured by admissions criteria;

b. Prior exceptional academic achievement will be determined by the grade point average (GPA), which is an average of final marks earned in English, social studies, mathematics, science, and foreign language, if taken for high school credit, in grade eight, for determination of the semifinalist pool. After the semifinalist pool is reestablished, final marks in grade seven, and first and second quarter in mathematics and science in grade eight, will be calculated for inclusion in the holistic review.

The testing and test scores that are at the heart of these proceedings were used as a means of elimination and not a guarantee of admission. By combining a required minimum test score with the minimum GPA, the admissions committee eliminated thousands of applicants from being considered as "semi-finalists." Given that TJ accommodated 480 students for each incoming class and now has raised that number to 550, eliminating thousands of applications is reasonably necessary to enable a thoughtful selection of the finalists. Admission is based on a holistic review with a focus on academic achievement. *See* Regulation 3355.13 (V)(A)(5)(c)(2) and (c)(7).

In addition to the entering ninth grade class, the school also considers tenth and 11th grade applicants. The abbreviated standards of admission for tenth and 11th graders describe a successful applicant as demonstrating an "aptitude, achievement, and interest in the study of science, mathematics, computer science, and related technology fields evidenced by . . . [high] marks in mathematics, science, computer science, English, social studies, foreign language, and technology . . . . " To remain at TJ, an enrolled student must maintain a cumulative B average (unweighted 3.0 GPA) by the end of each school year. When the terms "aptitude" and "achievement" are used together in a standard of admission, they mean more than the average student.

Because TJ is a school for gifted students, the Court was unconvinced by the testimony the Plaintiffs' expert offered in stating that eliminating a nationally norm-referenced student achievement and aptitude test diminishes educational quality. The expert premised her opinion on the universally accepted belief that teachers teach for the bottom third of the class. It is speculative to suggest that the quality of education is lessened when teaching to the "bottom third of the class" under the circumstances of this case. Common sense suggests that the overall characteristics of the students will redefine what is pejoratively referred to as "the bottom third" of a class.

For example, the incoming student body at TJ arrives with a minimum GPA of 3.0 (and now 3.5), must carry an unweighted 3.0 GPA when at school, and if the other criteria of past performance remain, he or she will likely meet the definition of a gifted student, whether labeled as gifted or not. In examining the exceptional accomplishments of the 17 student plaintiffs here, it is speculative to state that the educational quality would suffer because a teacher taught to the bottom third of this group of extraordinarily accomplished and highly motivated students.

The Court remains convinced that TJ is a school solely for gifted students as long as it remains a Governor's School. As shown by Plaintiffs' Exhibit #5N – a briefing by the VDOE to the Joint Subcommittee Studying Science, Mathematics, and Technology Education on December 4, 2006 – a Governor's School program is "beyond the scope and sequence of the regular schools' program for gifted students." The briefing goes on to identify TJ as a Governor's School and references the requirements that groups who develop Governor's Schools must satisfy, such as forming a planning group with "proposals [that] offer[] services for its gifted students beyond those provided in area high schools and . . . will support these (gifted) students' educational needs." A Governor's School must submit a statement that assures adherence to the Administrative Procedures Guide. The Guide for the Establishment of an Academic-Year Governor's School requires the Regional Governor's School planning committee to engage with local plans. The coordinators for gifted programs are expected to actively participate in program planning and implementation at the Governor's School.

While guidance documents do not carry the force of law,[5] the documents rebut the defendants' insistence that a Governor's School is not solely for gifted students. It is the essence of a Governor's School to admit only gifted students. It is arguably educational malpractice – an arbitrary and capricious decision – to admit a student who lacks the capacity to survive the rigors of the program. Governor's Schools were designed to host academically advanced classes for an entire community of gifted students consistent with a service option that allows the students to spend "instructional time with their intellectual and academic peers" and "to learn and grow in an environment that nurtures the unique abilities and needs for gifted learners." Plaintiffs' Exhibit

[5] *See Davenport v. Summit Contractors, Inc.*, 45 Va. App. 526, 532-33 (2005).

#5N at 15. At TJ, "all students work toward a 26-credit advanced diploma of gifted, honors, AP, dual enrollment (college level courses), and post-AP level courses. *See* Plaintiffs' Exhibit #5J at 1. This is not a program for the average student or one gifted in other areas.

Consequently, Fairfax County Public Schools' Local Plan for the Education of the Gifted (2016-2021) identifies TJ as a service option for the gifted. The other local school divisions that send students to TJ also characterize it as a service option for gifted students in grades nine through 12. *See* Arlington County Local Plan for the Education of the Gifted (2017-2022); *see also* Loudoun County Local Plan for the Education of the Gifted (2019-2020); Prince William County School Local Plan for the Education of the Gifted (2017-2022); Stafford County Local Plan for the Education of the Gifted (2017-2022). Reporting student participation in an Academic-Year Governor's School is part of the accreditation standards pursuant to Va. Code § 22.1-253.13(B).

Gifted students are defined as students who "demonstrate high levels of accomplishment or who show the potential for higher levels of accomplishment when compared to others of the same age, experience, or environment. Their aptitudes and potential for accomplishment are so outstanding that they require special programs to meet their educational needs. These students will be identified by professionally qualified persons, through the use of multiple criteria, as having potential or demonstrated aptitudes in one or more of the following areas: [general intellectual aptitude and specific academic aptitude]." 8 VAC 20-40-20 (Definitions).

Characterizing a school as one solely for gifted students is not the same as saying that only students identified as "gifted" are eligible to attend. The fact that an admitted student may not be predefined as gifted is irrelevant because giftedness is not a label without which a student cannot demonstrate sufficient academic competence to be placed in a program for the gifted. The label of

giftedness conferred by a school division should never be dispositive. School systems label a child as "gifted" in the first few years of schooling and will not remove the label if the child attends school in the school division and chooses not to leave the gifted program. Children should have confidence knowing their capabilities are neither immutable nor permanently defined by circumstances of their early years. The operational guidelines of a school division do not enjoy a monopoly over the determination of whether a student is, in fact, gifted. At the same time, given the competitiveness and rigors of admission into a program for gifted students, the student body at TJ or at any Governor's School will likely be by default a student body comprised of the gifted.

Plaintiffs here are parents of gifted children. The children are all eligible to apply to TJ. The parents have standing to challenge the admissions process because, as parents of gifted students, they are entitled to a lawful admission process. The children are aggrieved if the admissions process violates regulation and that violation fails to provide a meaningful opportunity to attend TJ. Asking students to wait for an adverse admission decision before filing a complaint is an offer of an illusory remedy. Standing and irreparable harm alone do not compel a remedy.

The Fairfax Local Plan for the Gifted Met the Standards Under a Board of Education Technical Review of a Plan Governing the Educational Program for Gifted Students

Plaintiffs' claims falter due to the lack of regulation specifically governing the admission of students to a Governor's School. Regulations the VDOE promulgated do not specifically address Governor's Schools. Instead, the school divisions are required to create local plans to "establish uniform procedures for screening, referring, identifying, and serving students in kindergarten through 12th grade who are gifted." 8 VAC 20-40-40(A). The Fairfax County Public School's process for identifying students to receive special education may not and do not rely on

a single criterion to determine students' eligibility. 8 VAC 20-40-40(D)(3). Identification of a gifted student includes a nationally norm-referenced aptitude test. 8 VAC 20-40-40(D)(4); (D)(5).

Determining eligibility does not equate to selecting applicants for admission into every program that is available for a gifted student. Therefore, even though TJ is a program for gifted students, the school had to create admission criteria to select the incoming class from thousands of students who apply each year for admission. The processes for identifying a gifted student appears fundamentally different than the acceptance criteria for admitting a student into a program with more gifted students applying than there are spots available. Unlike the identification process, the eligibility for admission to a Governor's School may turn on a single criterion, such as GPA or, in the recent past, a minimum test score.

The VDOE's 2016 review found that the Fairfax local plan for the education of the gifted had met the standards required of a school division. The Fairfax local plan treated admission to TJ as a separate procedure. Addressing the screening, referral, identification, and service procedures, the review found that the plan met the standard despite concluding that "more information is needed to clarify the various levels of programs available within the school division and the screening process." Defendants' Exhibit #2B at Page 8. Evidence that the VDOE did not challenge the planned admissions process to TJ as a separate procedure weakens Plaintiffs' position.

Furthermore, following the April 2017 full-site evaluation of TJ as a Governor's School, the November 2020 Mid-Term report included the announcement of eliminating standardized testing. The Mid-Term report has not yet drawn a negative response from the VDOE. *See* Plaintiffs' Exhibit #8. Absence of a negative response is relevant in deciding whether the "No-Testing" decision violates promulgated regulation.

No VDOE Regulation Requires Specific Measures for Selecting Candidates for Admission to a Governor's School

Plaintiffs' likelihood of success requires a clear showing that as a Governor's School, – a school for gifted students – TJ must abide by specific law or regulation to admit students. There is no Virginia Code statute governing admission to a Governor's School. In fact, statutory references are sparse. Adding to the provision cited above regarding accreditation, a Governor's School is included under definitions of joint and regional schools. *See* Va. Code § 22.1-26. The statutes are otherwise silent as to admission criteria. Evidence shows that the VDOE did not impose an admission standard or any particular process of selection for admission to the Governor's School Programs, leaving each Governor's School to create its own policies and admission procedures.[6]

Once the Court compared the local plans for the education of gifted students and the Board of Education's oversight of plans, it became less apparent than had been assumed at the demurrer stage that the regulations are applicable to the admission process. The "measures" to identify gifted students apply between kindergarten and eighth grade. Plaintiffs reasonably rely on measures used to identify and place gifted students to argue that the same measures should be adopted to place a student into a gifted program. The measures include:

a. Assessment of appropriate student products, performance or portfolio;

b. Record of observation of in-classroom behavior;

c. Appropriate rating scales, checklists, or questionnaires;

d. Individual interview;

[6] According to TJ's Director of Admission, TJ administered its own test until 2016, when the vendor who had administered TJ's customized test no longer offered its services. TJ was forced to search for and obtain comparable standardized tests on the market for the 2017-2018 school year. The tests that are the subject of this proceeding were first used in Fall 2016. *See* Defendants' Exhibit #1.

e. *Individually administered or group-administered, nationally norm-reference aptitude or achievement tests*;

f. Record of previous accomplishments (such as awards, honors, grades, etc.); or

g. Additional valid and reliable measures or procedures.

8 VAC 20-40-40(D)(3) (emphasis added). Plaintiffs extended those measures to the admissions process of TJ because TJ has used many of the measures previously. The voluntary adoption of measures to guide the selection process does not bind the school to its continued use. In contrast to Plaintiffs' position, and as the Coordinator of K-12 Advanced Academic Programs credibly explained, the Fairfax County Local Plan for the Education of Gifted Students, approved by the VDOE after a review in 2016, identified programs for gifted students that did not require an admissions process or reliance on a measure for acceptance into programs, including TJ. The procedure to admit students to TJ must, as a practical matter, be separate from the educational options provided for gifted students. In Fairfax County alone, 3,206 eighth grade students have been identified as eligible for Level IV services.[7] Level IV provides gifted students with a full-time curriculum shared with other eligible students. If TJ is a Level IV program, all eligible eighth graders would be entitled to attend TJ if the Court applies the regulations as Plaintiffs propose.

TJ is "a highly competitive Governor's School that conducts a separate screening and selection process using a standardized reasoning test and multiple criteria." Defendants' Exhibit 2A at Page 10. The use of a "standardized reasoning test" does not preclude testing that is not a nationally norm-reference test. For years TJ had its own test. Unless the VDOE regulations

[7] Defendants' Exhibit 2 – Declaration of Kirsten Maloney at ¶ 24.

mandate a particular process, the program can develop its own admission policies and procedures. The VDOE has not promulgated specific regulations governing the admissions process of Governor's Schools and, consequently, the School Board is within its authority to develop or change the admissions procedures it deems consistent with the operation of a Governor's School.

If TJ decides to admit a student who is not gifted by any measure, that selection is an educational decision not prohibited under existing regulation. It is a different matter if the School Board decides to remove all standards of admission and converts TJ into a high school for any student to apply and attend via random selection. This decision does not address that issue.

The question of whether an "individually administered or group-administered, nationally norm-reference aptitude or achievement test" is necessary to sustain the educational qualities that a Governor's School demands is not subject to judicial review. Educational experts reasonably disagree as to the need for such tests, and some select universities have turned away from using standardized testing altogether. From the Court's perspective, there is a value in standardized testing to the extent it provides an impartial and objective platform by which to select competitive candidates. The test scores are the equivalent of a blind audition.

The argument that some students gain an unfair advantage because they have the means to take advantage of preparatory materials, teachers, and classes goes too far when it leads to the conclusion that to combat inequity, testing must be eliminated. Instead of eliminating standardized testing, educators could redouble their efforts and direct needed resources to increase awareness, exposure, and access to preparatory materials and teachers in underserved school communities. The students in those communities would be better served in learning how to prepare for admission to TJ, and in the process learn the steps for admission to universities who continue to rely, in part,

on standardized tests. Utlimately, the debate over standardized testing belongs to educational professionals on the national, statewide, and local levels, and should not be decided by the courts.

Absent a clear mandate from either the General Assembly or the Board of Education directing the use of standardized testing for admission into a Governor's School or other programs for the gifted, the School Board's decision to eliminate standardized testing does not appear to be subject to reversal under judicial review. For that reason, under the standards applied at a hearing for a preliminary injunction, the plaintiffs cannot show that they will likely succeed on the merits.

The Public Interest Favors the School Board

Consistent with the Court's reluctance to consider whether a standardized test is necessary, reluctance is heightened when the Court is also asked to approve a replacement test. Not only is the Court ill-equipped to judge the appropriateness of replacement tests, but neither party offered examples of discarded tests, such as the Quant-Q test, with which a fair comparison could be made. Instead, the Court had to consider the difference between summative assessments and formative assessments, and whether one form is preferred. Whereas the Court can easily examine whether a promulgated regulation requires standardized testing for a particular process, it has no business deciding which test out of many TJ should us if it is required to resume testing.

The conclusion that certain decisions are beyond judicial review does not support Defendants' argument that the School Board's decision to eliminate standardized testing had been reached after much debate and consideration of multiple proposals. The debate may have been extensive but this lawsuit calls into question the deliberateness and transparency of the decision.

To suddenly cancel a November test in October suggests a rush to judgement and not a deliberate process. The testimony describing the devastation of students upon learning of the

cancellation was both credible and impactful during the hearing. Even accepting the rationale that standardized tests unfairly eliminated qualified candidates who had a "bad testing day," why eliminate the tests altogether? Why not just give test results less weight than what had been previously granted absolute finality? Why not allow students to take the test without making test scores either a precondition for the application process or a deciding factor for admission? The standardized test scores became a barrier to admission because the admissions committee made them a barrier. In approaching a holistic consideration of qualitative and quantitative components in the selection process, why not keep the data offered by standardized testing as a relevant factor?

After all, the school system regularly relies on test scores to identify and place a gifted student either at the second-grade level or when assessing a transfer student who arrives from another jurisdiction without the gifted label. Why are standardized test scores reliable measures of a second grader's giftedness or of the giftedness of a transfer student who is a stranger to the school system, but then are decidedly unreliable when deciding whether to admit a student to the school?

The recent proposal of offering a spot at TJ to the top 1.5% of students at every middle school suffers the same arbitrary and capricious flaw as any other quota system. That system creates more questions than answers. For example, what happens to the students who attend schools that attract a large population of gifted students? How will the quota define who falls within the top 1.5% of a school designed solely for gifted students? What if a middle school has an overabundance of students in the top 1.5% of their class who are uninterested in STEM? Why use a quota system when educational policies that foster diversity are permitted and encouraged, allowing academic institutions to consider the role of locality and personal experience as relevant factors in admissions decisions? Many reasons exist why quotas are controversial and disfavored.

Nonetheless, the issue most relevant at the preliminary injunction stage is the potential harm to the thousands of other families if an injunction is granted requiring the resumption of testing. In the past, offers of admission were made by the end of April. That gave unsuccessful applicants the opportunity to meet the deadlines for course selection at their home high schools and to meet admissions timetables for private and parochial schools. This year, the offers will not be made until June. Requiring the resumption of testing may prevent the selection of the class of the 2021-2022 school year until September – well after the start of school.

The delay is not the fault of the plaintiffs. Plaintiffs have diligently pursued their claims. They promptly filed their Complaint and have assembled the evidence needed to present their claims in as favorable a light as the circumstances will allow. The Court further agrees with the plaintiffs' position that the request for a preliminary injunction is appropriately directed to preserve the status quo – defined as the "last uncontested status between the parties which preceded the controversy." *League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 236 (4th Cir. 2014); *see also Aggarao v. MOL Ship Mgmt. Co. Ltd.*, 675 F.3d 355, 3798 (4th Cir. 2012). The last uncontested status had standardized testing in place. The effects of a mandatory preliminary injunction, where the Court directs a party to do something to return to the status quo, nonetheless burdens the public interest more than a prohibitory injunction, where the Court directs a party to refrain from acting until a final hearing on the merits may be heard.

The delay and burden on the school division are significant. Defendants' reference to the impact of COVID-19 is not a desperate attempt to improve its position under the public interest factor. The impact of COVID-19 cannot be ignored. The Commonwealth is under a Declaration of Judicial Emergency and has been in this state since March 2020. COVID-19 has forced the

suspension of in-person education in favor of remote teaching – an inferior form of education. The Court accepted and found credible the statement of TJ's Director of Admission that it would be difficult if not impossible to restore the testing that had been abruptly cancelled in November. When considering the deference accorded to the School Board's operation of the school systems, along with difficulties expressed, the public interest favors the defendants.

FOR REASONS STATED above, the plaintiffs have not clearly shown that they are likely to succeed on the merits nor have they shown that it is in the public interest to restore standardized testing as a prerequisite for admission to the class of 2021 – 2022. The objections and arguments presented that are inconsistent with this decision as set forth in the pleadings or reflected in the transcript of the hearing and are duly noted. It is therefore,

ORDERED, ADJUDGED and DECREED that the motion for preliminary injunction is DENIED.

AND THIS MATTER IS CONTINUED.

ENTERED this 2 day of February 2021.

John M. Tran

JUDGE, Fairfax Circuit Court

Endorsement of this Order is dispensed under Virginia Supreme Court Rule 1:13.