IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Khadidja Issa; Q.M.H., a minor, individually, by and through his parent, Faisa Ahmed Abdalla; **Alembe Dunia; Anyemu Dunia**; **V.N.L.**, a minor, individually by and through her parent Mar Ki; **Sui Hnem Sung; and all others similarly situated,** Plaintiffs, v. **The School District of Lancaster,** Defendant.	Civil Action No. 16-cv-3881 HON. EDWARD G. SMITH CLASS ACTION ELECTRONICALLY FILED

PROPOSED ORDER

AND NOW, this ____ day of August, 2016, upon consideration of Plaintiffs' Motion for a Preliminary Injunction and any response thereto and hearing conducted by the Court, it is hereby ORDERED pursuant to Fed. R. Civ. P. 65(a) that Defendant School District of Lancaster ("District") shall by August 30, 2016:

(1) enroll and permit all school-age Plaintiffs and Class Members to attend the main high school, McCaskey, beginning on August 30, 2016, the first day of the upcoming school year;

(2) by that same date, ensure all Plaintiffs and Class Members are properly assessed for language proficiency and receive an appropriate and adequate program of language instruction, including assignment to the International School if appropriate, ESL instruction, modifications in the delivery of instruction and testing to facilitate their achievement of English proficiency and state academic standards, and interpretation and

translation services to enable Plaintiffs and their parents to meaningfully participate in education decisions;

(3) ensure Plaintiffs and Class Members have equal access to the full range of educational opportunities provided to their peers, including curricular and non-curricular programs and activities; and

(4) cease excluding Class Members from enrollment at McCaskey.

Plaintiff shall post a nominal bond of $1.00.

BY THE COURT:

Edward G. Smith, J.

IN THE UNITED STATES DISTRICT COURT
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Khadidja Issa; Q.M.H., a minor, individually, by and through his parent, Faisa Ahmed Abdalla; **Alembe Dunia; Anyemu Dunia**; **V.N.L.**, a minor, individually by and through her parent Mar Ki; **Sui Hnem Sung; and all others similarly situated,** Plaintiffs, v. **The School District of Lancaster,** Defendant.	Civil Action No. 16-cv-3881 HON. EDWARD G. SMITH CLASS ACTION ELECTRONICALLY FILED

MOTION FOR PRELIMINARY INJUNCTION

Khadidja Issa; Q.M.H., a minor, individually, by and through his parent, Faisa Ahmed Abdalla; Alembe Dunia; Anyemu Dunia; V.N.L., a minor, individually by and through her parent Mar Ki; Sui Hnem Sung and all others similarly situated, now move for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a) to require Defendant School District of Lancaster ("SDOL" or "District") to (1) enroll and permit all school-age Plaintiffs and Class Members to attend the main high school, McCaskey High School ("McCaskey"), beginning on August 30, 2016; and, by that same date, (2) ensure all Plaintiffs and Class Members are properly assessed for language proficiency and receive an appropriate and adequate program of language instruction, including assignment to the International School if appropriate, ESL instruction, modifications in the delivery of instruction and testing to facilitate their achievement of English proficiency and state academic standards, and interpretation and translation services to enable Plaintiffs and their parents to meaningfully participate in education decisions; (3) ensure Plaintiffs and Class Members have equal access to the full range of educational opportunities

provided to their peers, including curricular and non-curricular programs and activities; and (4) cease excluding future refugee applicants from enrollment at McCaskey. As grounds therefore, Plaintiffs aver as follows:

1. A party seeking a preliminary injunction must show: 1) a probability that movant will suffer irreparable harm in the absence of preliminary relief; 2) movant is likely to be successful on the merits ultimately; 3) granting preliminary relief will not result in even greater harm to the adverse party; and 4) a preliminary injunction is in the public interest. *Geneva College v. Secretary U.S. Dep't of Health and Human Services*, 778 F.3d 442, 435 n.9 (3d Cir. 2015).

2. In this case, Plaintiffs satisfy all four factors supporting issuance of a preliminary injunction for the reasons stated in Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction, which accompanies this motion and is being incorporated herein by reference.

3. Plaintiffs seek expedited, but limited, discovery on their claims in order to prepare for a preliminary injunction hearing and to uncover the full extent of the District's violations of Plaintiffs' rights.

4. Plaintiffs also seek an immediate status conference to discuss an expedited, but limited, discovery schedule, a preliminary injunction hearing date, and a schedule for filing of attendant motions, expert statements, briefs, and any other materials the Court should request.

WHEREFORE, in light of the foregoing and for reasons set forth in the accompanying Memorandum of Law, Plaintiffs respectfully request that the Court issue an order directing the following:

a) A status conference as soon as practicable to set a schedule for the orderly resolution of a preliminary injunction motion, including the taking of expedited, but limited, discovery, an evidentiary hearing, and the filing of attendant motions and briefs;

b) A preliminary injunction under Fed. R. Civ. P. 65(a) directing Defendant School District of Lancaster to

i. enroll and permit all school-age Plaintiffs and Class Members to attend the main high school, McCaskey, beginning on August 30, 2016, the first day of the upcoming school year;

ii. by that same date, ensure all Plaintiffs and Class Members are properly assessed for language proficiency and receive an appropriate and adequate program of language instruction, including assignment to the International School if appropriate, ESL instruction, modifications in the delivery of instruction and testing to facilitate their achievement of English proficiency and state academic standards, and interpretation and translation services to enable Plaintiffs and their parents to meaningfully participate in education decisions;

iii. ensure Plaintiffs and Class Members have equal access to the full range of educational opportunities provided to their peers, including curricular and non-curricular programs and activities;

iv. cease excluding Class Members from enrollment at McCaskey.

Dated: July 22, 2016

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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MEMORANDUM OF LAW IN SUPPORT OF
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

The Named Plaintiffs—Khadidja Issa, Q.M.H. (through his parent, Faisa Ahmed Abdalla), Alembe Dunia, Anyemu Dunia, V.N.L. (through her parent Mar Ki), and Sui Hnem Sung—are refugees who have fled their home countries due to war, violence, or persecution in countries like Somalia, Sudan, Democratic Republic of Congo, and Burma. They seek to represent a class of similarly situated older school-age immigrants with limited English proficiency ("LEP") who are facing irreparable harm from the denial of their right to a meaningful and equal education by Defendant, the School District of Lancaster (the "District" or "SDOL"). *See generally* Plaintiffs' Motion for Class Certification, ECF No. 2 (July 19, 2016). This suit challenges the District's custom, practice, and policy of denying Plaintiffs enrollment in their assigned high school, the McCaskey High School Campus, by either excluding them from SDOL altogether or admitting them only to Phoenix Academy, a school best characterized as an "educational dead-end." *See Lau v. Nichols*, 414 U.S. 563, 566 (1974), *abrogated on other*

grounds by Alexander v. Sandoval, 532 U.S. 275 (2001); *New York v. Utica City Sch. Dist.*, No. 15-cv-1364, -- F. Supp. 3d --, 2016 WL 1555399, at *11 (N.D.N.Y. Apr. 18, 2016) (holding that complaint sufficiently alleged that district deliberately diverted older immigrant students to "educational dead-ends" in violation of various state and federal laws).

Plaintiffs seek a preliminary injunction directing the District to: (1) admit all school-age eligible Named Plaintiffs and Class Members to McCaskey; (2) ensure Plaintiffs' and Class Members' equal access to the full range of educational opportunities at McCaskey, including curricular and extra-curricular programs and activities, and access to the International School; (3) provide Plaintiffs and Class Members with an appropriate and effective language program, as described in greater detail below, in time for the fall semester on August 30, 2016; and (4) cease excluding future LEP immigrant applicants from enrollment at McCaskey.

For the reasons discussed herein, the Court should grant Plaintiffs' motion for preliminary injunction.

II. STATEMENT OF FACTS

There are three public high schools in the District. Most students over the age of 14 attend the McCaskey High School Campus ("McCaskey"), which is run by SDOL and offers the full range of academic and extracurricular opportunities expected of an American public high school, with a fairly typical degree of student freedom in movement and expression.[1]

[1] *See generally* McCaskey High School Campus 2015/2016 Curriculum Guide, *available at* http://www.lancaster.k12.pa.us/wp-content/uploads/2015/01/2015-16-Curriculum-Guide-Rev-11-18-14-Final-PDF.pdf; Compl. ¶ 45.

There are two alternative public high schools in the District, Phoenix Academy and Buehrle Academy, both run by the private company Camelot Education.[2] Camelot runs two kinds of programs relevant to this lawsuit. "Transitional Programs" are described as "serv[ing] students in need of a temporary placement due to behavioral or disciplinary infractions." *See* Camelot Transitional Schools, *available at* http://cameloteducation.org/transitional-schools-2/ (last visited July 14, 2016). "Accelerated Programs" are described as "offer[ing] students a highly structured, engaging, direct instruction pathway to graduation," and an "opportunity for students from the ages 16-21 who are overage and under-credited to graduate in 2.5 years or less." *See* Camelot Accelerated Schools, *available at* http://cameloteducation.org/accelerated-schools (last visited July 14, 2016). Camelot lists Buehrle among its "Transitional Schools," and lists Phoenix as both an "Accelerated School" and a "Transitional School."[3] Buehrle Academy operates under Pennsylvania law as an "Alternative Education for Disruptive Youth" ("AEDY") program, which is "designed for seriously and persistently disruptive students."[4] Phoenix is not

[2] Camelot Education, *Camelot awarded contract to operate alternative education programs for Lancaster School District*, May 17, 2011, *available at* http://cameloteducation.org/camelot-awarded-contract-to-operate-alternative-education-programs-for-lancaster-school-district/; *see also* Compl. ¶ 46.

[3] Camelot Education, Phoenix Academy Accelerated/Transitional Program, http://cameloteducation.org/phoenix-academy/; Camelot Education, Buehrle Academy Transitional Program, http://cameloteducation.org/buehrle-academy/; *see also* Compl. ¶¶ 47-48.

[4] Approved Private Alternative Education Institutions, Pa. Dep't of Educ., http://www.education.pa.gov/K-12/Alternative%20Education%20for%20Disruptive%20Youth/Pages/List-of-Approved-Private-Alternative-Education-Institutions-Details.aspx?aedy=105#tab-1 (listing Camelot-run AEDY schools); *Alternative Education for Disruptive Youth,* Pennsylvania Department of Education Basic Education Circular 1, *available at* http://www.education.pa.gov/Documents/Codes%20and%20Regulations/Basic%20Education%20Circulars/Purdons%20Statutes/Alternative%20Education%20for%20Disruptive%20Youth.pdf (AEDY schools are "designed for seriously and persistently disruptive students"); *see also* Compl. ¶ 49.

an officially designated AEDY program like Buehrle,[5] but Camelot implements many of the same disciplinary and control tactics at both institutions.

A. Phoenix Is Substantially Inferior to McCaskey

McCaskey and Phoenix are worlds apart with regard to language instruction, academics, and school environment.

The students-to-teacher ratio at McCaskey is 14:1, whereas at Phoenix it is 42:1.[6] The percentage of classes taught by "highly qualified teachers," as defined by the Pennsylvania Department of Education, at McCaskey is 92% whereas 0% of the classes at Phoenix are taught by "highly qualified teachers."[7] The Pennsylvania Department of Education's School Performance Profile for the 2014-15 school year ranked McCaskey twice as high as Phoenix with scores of 60.4 and 30.3, respectively.[8] In terms of advanced academic courses, which the District characterizes as "highly recommended for every student planning to attend college,"[9]

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[5] Approved Private Alternative Education Institutions, Pa. Dep't of Educ., http://www.education.pa.gov/K-12/Alternative%20Education%20for%20Disruptive%20Youth/Pages/List-of-Approved-Private-Alternative-Education-Institutions-Details.aspx?aedy=105#tab-1 (listing Camelot-run AEDY schools).

[6] *Compare* McCaskey Campus, 2016 Rankings, http://www.usnews.com/education/best-high-schools/pennsylvania/districts/lancaster-sd/mccaskey-campus-17054 *with* Phoenix Academy, 2016 Rankings, http://www.usnews.com/education/best-high-schools/pennsylvania/districts/lancaster-sd/phoenix-academy-17055; *see also* Compl. ¶ 55(a).

[7] *Compare* Pa. Dep't of Educ., McCaskey Campus School Fast Facts, *available at* www.paschoolperformance.org (using query tool) *with* Pa. Dep't of Educ., Phoenix Academy School Fast Facts, *available at* www.paschoolperformance.org (using query tool); *see also* Compl. ¶ 55(b).

[8] *Compare* Pa. Dep't of Educ., McCaskey Campus School Fast Facts, *available at* www.paschoolperformance.org (using query tool) *with* Pa. Dep't of Educ., Phoenix Academy School Fast Facts, *available at* www.paschoolperformance.org (using query tool); *see also* Compl. ¶ 55(c). The Pennsylvania Department of Education's School Performance Profile provides the public with a comprehensive overview of student academic performance in every public school (including charter and alternative schools) and measures academic outcomes.

[9] McCaskey High School Campus 2015/2016 Curriculum Guide 4, *available at* http://www.lancaster.k12.pa.us/wp-content/uploads/2015/01/2015-16-Curriculum-Guide-Rev-11-18-14-Final-PDF.pdf (emphasis in original).

McCaskey offers 10 Advanced Placement ("AP") courses and an International Baccalaureate ("IB") program—one of only 15 Pennsylvania high schools to offer such a program—whereas Phoenix offers no AP courses and no IB program.[10] Thirty-two percent of students at McCaskey take AP tests, whereas 0% of Phoenix students take AP tests.[11] According to the Pennsylvania Department of Education, "college ready" students comprise 83% of the McCaskey student body whereas 0% of Phoenix students are deemed "college ready."[12] There are many extra-curricular activities, clubs, and opportunities, including interscholastic and other athletic teams, at McCaskey, whereas Phoenix offers no sports teams or extra-curricular activities on campus.[13]

Beyond the stark differences in academic opportunities and quality, Phoenix provides more limited and less tailored ESL instruction and few modifications to instruction and testing in regular education classes.

SDOL recognizes the unique challenges that newly-arriving LEP youth face, and McCaskey therefore offers a one-year (sometimes longer) transitional program (the

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[10] McCaskey High School Campus 2015/2016 Curriculum Guide 22, *available at* http://www.lancaster.k12.pa.us/wp-content/uploads/2015/01/2015-16-Curriculum-Guide-Rev-11-18-14-Final-PDF.pdf; *compare* Pa. Dep't of Educ., McCaskey Campus School Fast Facts, *available at* www.paschoolperformance.org (using query tool) *with* Pa. Dep't of Educ., Phoenix Academy School Fast Facts, *available at* www.paschoolperformance.org (using query tool); *see also* Compl. ¶ 55(d).

[11] *Compare* McCaskey Campus, 2016 Rankings, http://www.usnews.com/education/best-high-schools/pennsylvania/districts/lancaster-sd/mccaskey-campus-17054 *with* Phoenix Academy, 2016 Rankings, http://www.usnews.com/education/best-high-schools/pennsylvania/districts/lancaster-sd/phoenix-academy-17055; *see also* Compl. ¶ 55(e).

[12] Pa. Dep't of Educ., Phoenix Academy School Performance Profile – Comparison to McCaskey, *available at* www.paschoolperformance.org (using query tool); *see also* Compl. ¶ 55(f).

[13] *Compare* McCaskey Campus, Interscholastic Athletic Opportunities Disclosure Form 15.6, 2014-2015 School Year, *available at* http://www.lancaster.k12.pa.us/download/district_documents/athletics/2015_athletics_disclosures/McCaskey_Combined.pdf (showing that the District sponsors 45 athletic teams at the McCaskey Campus) *with* Phoenix Academy, Interscholastic Athletic Opportunities Disclosure Form 15.6, 2014-2015 School Year, *available at* http://www.lancaster.k12.pa.us/download/district_documents/athletics/2015_athletics_disclosures/Phoenix_Combined.pdf; *see also* Compl. ¶ 55(g).

"International School") designed to address the needs of such students through intensive ESL support and "sheltered instruction"[14] in science, math, and social studies.[15] English Language Learners ("ELLs")[16] at McCaskey who are not part of the "International School" program receive either one or two periods daily of English language skill development and support based on ELLs' assessed English proficiency.[17] McCaskey also has systems in place to offer ELLs additional language supports and accommodations in instruction and testing during their core classes and other times of the day beyond ESL classes.[18]

Plaintiffs intend to prove that there is no transitional program for ELLs at Phoenix equivalent to the International School at McCaskey. Phoenix provides more limited and less tailored ESL instruction than at McCaskey, and few modifications to instruction and testing in regular education classes. Phoenix's ELLs receive only one 80-minute ESL class with the same one-size-fits-all instruction regardless of the student's proficiency level. Most ELLs also do not

[14] "Sheltered instruction" is "adapted to the students' English proficiency levels and provides modified curriculum-based content. Teachers enhance context by providing visual props, hands-on learning experiences, drawings, pictures, graphic organizers, and small group learning opportunities." *See* Services for English Language Learners, Sch. Dist. of Lancaster (attached as Exhibit 1) (produced by Defendant as part of collection of documents labeled "5.pdf" on June 24, 2016, in response to request for public records filed by Plaintiffs' counsel on May 20, 2016). "Sheltered English instruction programs offer instruction to ELLs at lower English proficiency levels, who are often newcomers to the United States." *Id.*

[15] *See* Services for English Language Learners, Sch. Dist. of Lancaster (Exhibit 1); Compl. ¶¶ 58-60.

[16] The terms "LEP" students (denoting students with limited English proficiency) and "ELLs" (denoting English Language Learners) are used interchangeably in this brief.

[17] McCaskey High School Campus 2015/2016 Curriculum Guide 11, *available at* http://www.lancaster.k12.pa.us/wp-content/uploads/2015/01/2015-16-Curriculum-Guide-Rev-11-18-14-Final-PDF.pdf; *see also* Compl. ¶ 66(a).

[18] McCaskey High School Campus 2015/2016 Curriculum Guide 2, *available at* http://www.lancaster.k12.pa.us/wp-content/uploads/2015/01/2015-16-Curriculum-Guide-Rev-11-18-14-Final-PDF.pdf; Services for English Language Learners, Sch. Dist. of Lancaster (Exhibit 1); *see also* Compl. ¶ 66(b).

receive any in-class language supports during non-ESL classes or testing accommodations.[19] Phoenix also currently lacks sufficient certified staff to teach the 90 enrolled ELLs.[20]

Besides the major differences in academic quality and opportunities, curriculum, and essential language supports, Phoenix's environment and culture differ markedly from McCaskey and, indeed, from typical American high schools. Phoenix does not comply with SDOL policy regarding searches, which allows for pat-downs only if a student sets off a metal detector or there is other reason to suspect the individual student is concealing contraband, and prescribes certain privacy-guarding procedures that must be followed during pat-downs.[21] At Phoenix, students are subjected to pat-down searches and searches of their shoes every time they enter the building and remain subject to searches throughout the school day.[22]

SDOL policy protects students' right to freedom of expression and expressly permits students to use publications, handbills, buttons, armbands, and technology to express

[19] *See* Compl. ¶¶ 56, 66(a)-(c), 110-11, 122, 141-43; Verification of Khadidja Issa, Ex. A to Compl.; Verification of Q.M.H., Ex. A to Compl.; Verification of Anyemu Dunia, Ex. A to Compl.

[20] *See* Pa. Dep't of Educ., Phoenix Academy School Fast Facts, *available at* www.paschoolperformance.org (using query tool) (showing that at Phoenix Academy, 28.17% of students—90 students—are ELLs); Sch. Dist. of Lancaster Staff Directory, http://www.lancaster.k12.pa.us/staff-directory/ (last visited July 20, 2016); Teacher Information Mgmt. Sys., Pa. Dep't of Educ., http://www.teachercertification.pa.gov/Screens/wfSearchEducators.aspx; *see also* Compl. ¶ 65.

[21] *See* School District of Lancaster Standards and Expectations of Behavior for Students, 2013/2014 Revision 13, *available at* http://www.lancaster.k12.pa.us/download/district_documents/district_information/standards_of_conduct/standards_conduct_eng.pdf (Section entitled "Rights Regarding Searches").

[22] Phoenix Academy 2015-2016 Student Handbook at 3 (attached as Exhibit 2) ("All students will be searched every morning upon entrance to the school. . . . All students are subject to search in an appropriate manner by authorized personnel, at any time."); *see also* Compl. ¶ 71.

themselves at school.[23] But Phoenix students are prohibited from bringing belongings—including bags, books, papers, and other articles—to or from school.[24] SDOL policy states that ninth through twelfth graders may make their own choices regarding dress and grooming, so long as their choices do not affect the educational program of the school or the health and safety of others.[25] Phoenix students do not enjoy this right. Instead, Camelot assigns shirt colors based on student behavior.[26]

Phoenix students are subject to harsh and physical disciplinary interventions. Phoenix, like many Camelot-operated schools, uses a multi-tiered behavioral correction system called "Handle with Care" that employs both "verbal intervention" and "physical intervention."[27] Consistent with the "Handle with Care" model, Phoenix policy encourages "confrontations" between students: Phoenix requires students to "confront[] the negative behavior of their peers," and identifies confrontation of one's peers as the number one "step to success" at Phoenix.[28] To advance further in the behavioral rankings, a Phoenix student must fill out a "Pledge Log" so that school personnel can review "who they have been confronting, [and] the reason for the

[23] School District of Lancaster Standards and Expectations of Behavior for Students, 2013/2014 Revision 11, *available at* http://www.lancaster.k12.pa.us/download/district_documents/district_information/standards_of_conduct/standards_conduct_eng.pdf.

[24] Phoenix Academy 2015-2016 Student Handbook at 3 (Exhibit 2) (listing prohibited items); *see also* Compl. ¶ 78.

[25] School District of Lancaster Standards and Expectations of Behavior for Students, 2013/2014 Revision 17, *available at* http://www.lancaster.k12.pa.us/download/district_documents/district_information/standards_of_conduct/standards_conduct_eng.pdf.

[26] *See* Compl. ¶ 80.

[27] Compl. ¶ 73; *see also* Handle with Care Behavior Management System, http://handlewithcare.com/ (last visited July 12, 2016).

[28] Phoenix Academy 2015-2016 Student Handbook at 7, 11 (Exhibit 2); *see also* Compl. ¶ 77.

confrontation[.]"[29] Only students who are consistently documented "confronting and enforcing the normative culture at Phoenix" can earn the highest behavioral ranking.[30]

B. SDOL's Enrollment Decisions

Enrollment and placement decisions in the District are made by Jacques "Jack" Blackman, the Coordinator of Counseling and Dropout Prevention Programs at McCaskey East, one of the buildings on the McCaskey Campus. *See* Compl. ¶ 91. Older immigrant students (aged 17-21) are sometimes told after meeting with Mr. Blackman that they will not be permitted to enroll in any District school. Compl. ¶ 95. The District does not provide any documentation of enrollment denials, nor advise these students of any appeal rights. Compl. ¶ 98. Refugee resettlement case workers have met on several occasions over the past year with SDOL officials to discuss the troubling exclusion of refugee children from the District and their placement at Phoenix. Compl. ¶ 103. Advocates for immigrant students have also asked the District to formalize the enrollment process and provide documentation of the reason for the denials, but the District has not done so. Compl. ¶ 104.

Older immigrant students who are enrolled by SDOL—often only after advocacy by refugee resettlement case workers—are typically placed at Phoenix rather than their geographically assigned public high school, McCaskey.[31] Immigrant students placed at Phoenix are not given the option of attending McCaskey. Compl. ¶ 100. Indeed, Plaintiffs who have expressly requested enrollment in McCaskey have been refused. Compl. ¶ 101. Documents

[29] Phoenix Academy 2015-2016 Student Handbook at 13 (Exhibit 2); *see also* Compl. ¶ 77.

[30] Phoenix Academy 2015-2016 Student Handbook at 13, 15 (Exhibit 2); *see also* Compl. ¶ 77.

[31] Compl. ¶ 102. The District maintains an online tool that allows students new to the District to look up their assigned elementary, middle, and high schools based on their address. School Boundaries, Sch. Dist. of Lancaster, http://www.lancaster.k12.pa.us/school_boundaries/. McCaskey is the high school assigned to all students who live within the District's attendance area. No one is assigned to Phoenix based solely on their address.

produced by the District in response to Right to Know Requests filed by Plaintiffs' counsel strongly suggest that it is District policy to place at Phoenix all older immigrant students who have fewer credits than other students their age, regardless of their educational needs.[32]

[32] *See* 2015 Extended Day Program Abstract, Sch. Dist. of Lancaster at 15 (attached as Exhibit 3) ("Phoenix Academy [is] a credit recovery facility for students who, due to multiple risk factors including refugee status, pregnant and parenting youths, homelessness and other poverty-related issues, may not graduate on time").

III. LEGAL ARGUMENT

A. Legal Standard

This Court must weigh four factors to determine whether to issue a preliminary injunction:

> (1) the likelihood that the moving party will succeed on the merits;
>
> (2) the extent to which the moving party will suffer irreparable harm without injunction relief;
>
> (3) the extent to which the moving party will suffer irreparable harm if the injunction is issued; and
>
> (4) the public interest.

Liberty Lincoln-Mercury Inc. v. Ford Motor Co., 562 F.3d 553, 556 (3d Cir. 2009); *McNeil Nutritionals LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 356-57 (3d Cir. 2007). The balance of factors in this case regarding the education of vulnerable LEP immigrant youth clearly weighs in favor of granting the requested relief.

B. Plaintiffs Will Suffer Irreparable Harm Unless the Court Issues the Requested Injunction

Irreparable harm is shown where the movant suffers "potential harm which cannot be redressed by a legal or an equitable remedy following trial." *Acierno v. New Castle County,* 40 F.3d 645, 653 (3d Cir. 1994). Stated another way, irreparable harm occurs where monetary damages are difficult to ascertain or are inadequate. *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1146 (3d Cir. 1982).

Both refusing to enroll school-aged youth entirely and denying them legally-mandated educational services needed to access the curriculum plainly constitute irreparable harm. "Compensation in money can never atone for deprivation of a meaningful education in an

appropriate manner at the appropriate time." *John T. ex rel. Paul T. v. Commonwealth*, Civ. No. 98-5781, 2000 WL 558582, at *8 (E.D. Pa. May 8, 2000).

Denial of a free public education, either by refusing or delaying enrollment, is irreparable harm.[33] SDOL's custom, practice, and policy of denying enrollment outright, or refusing to enroll students until and unless their resettlement case workers convince the District they must enroll the student, excludes immigrant LEP youth from access to vitally important educational services necessary to help them survive and thrive in a new country and new culture. Alembe Dunia first tried to enroll in December 2014, and once again in October 2015, but to this day SDOL has refused to admit him and he has not had access to any public education. Compl. ¶¶ 136-39; Verification of Alembe Dunia, Ex. A to Compl.; Decl. of Alembe Dunia, July 14, 2016, ¶ 5 (attached as Exhibit 4). The District initially refused to enroll Khadidja Issa and Q.M.H., allowing months to pass during which time the students were deprived entirely of a free public education. Compl. ¶¶ 106-09, 116-21; Verification of Khadidja Issa, Ex. A to Compl.; Decl. of Khadidja Issa, July 14, 2016, ¶ 5 (attached as Exhibit 5); Verification of Q.M.H., Ex A to Compl.; Decl. of Q.M.H., July 14, 2016, ¶ 5 (attached as Exhibit 6). The District's denial of enrollment, or delay in enrolling school-age young people who are new to this country, speak little or no English, desperately need to resume what is typically an interrupted educational

[33] *See, e.g., N.J. v. New York*, 872 F. Supp. 2d 204, 214 (E.D.N.Y. 2011) ("interruption of a child's schooling causing a hiatus not only in the student's education but also in other social and psychological developmental processes that take place during the child's schooling, raises a strong possibility of irreparable injury"); *L.R. ex rel. G.R. v. Steelton-Highspire Sch. Dist.*, No. 1:10-CV-00468, 2010 WL 1433146, at *3-4 (M.D. Pa. Apr. 7, 2010) (holding that homeless student would be irreparably harmed "if he is not immediately re-enrolled in the District"); *Ross v. Disare,* 500 F. Supp. 928, 934 (S.D.N.Y. 1977); *Blackman v. Dist. of Columbia*, 185 F.R.D. 4, 7 (D.D.C. 1999); *Oravetz v. W. Allegheny Sch. Dist.,* 74 Pa. D. & C.2d 733, 737-38 (Pa. Ct. Common Pleas 1975) ("deprivation of educational rights can produce irreparable harm and establishes a need for prompt and immediate relief"); *Minnicks v. McKeesport Area Sch. Dist.,* 74 Pa. D. & C.2d 744, 749-50 (Pa. Ct. Common Pleas 1975) ("Absence from school cannot be repaired by money damages or even by a subsequent reinstatement at a future period").

history, and need to begin socializing with peers unquestionably causes irreparable harm. "By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." *Plyler v. Doe*, 457 U.S. 202, 223 (1982). Even if damages were available, they could not adequately compensate these young people for timely access to these important services.

SDOL's practice of placing older immigrant LEP students at Phoenix also constitutes irreparable harm. Phoenix operates on an educational model—accelerated credit recovery without special language support services—that does not and cannot enable immigrant LEP students to overcome their language barriers. Enrollment in an educational program that fails to provide legally mandated language services necessary to enable students to access instruction constitutes irreparable harm on par with the failure to provide sign language interpreters to deaf students,[34] or special education services to autistic students or students with Down's Syndrome.[35]

None of these students can learn without the necessary supports. The District's placement of Named Plaintiffs and Class Members at Phoenix—a school that fails to provide them with language and other support services necessary to overcome language barriers and allow them to participate equally in the core curriculum—constitutes clear irreparable harm that cannot be remedied by money damages.

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[34] *See Nieves-Marquez v. Puerto Rico,* 353 F.3d 108, 121-22 (1st Cir. 2003) (failure to provide sign language interpreter constitutes harm that cannot be adequately redressed post-trial because "at the rate at which a child develops and changes . . . a few months can make a world of difference in harm to a child's educational development") (internal quotations and citations omitted).

[35] *L.J. ex rel. V.J. v. Audubon Bd. of Educ.*, Civ. No. 06-5350, 2007 WL 3252240, at *8 (D.N.J. Nov. 5, 2007) (denial of special services for autism constitutes irreparable harm); *John T,* 2000 WL 558582, at *8 (denial of special services for Down's Syndrome student constitutes irreparable harm).

C. Plaintiffs Are Likely to Succeed on the Merits of Their Claims

To show a likelihood of success on the merits, it is "not necessary" that the moving party's entitlement to relief on the merits be "wholly without doubt." *Am. Freedom Def. Initiative v. SEPTA*, 92 F. Supp. 3d 314, 322 (E.D. Pa. 2015) (quoting *Oburn v. Shapp,* 521 F.2d 142, 148 (3d Cir. 1975)). Rather, the applicable standard is whether the moving party has made out a *prima facie* case showing a "reasonable probability" that the plaintiff will prevail on the merits. *Id.* The detailed allegations in the complaint, which Plaintiffs will prove at a preliminary injunction hearing, more than suffice to demonstrate a "reasonable probability" that Plaintiffs will succeed on the merits of their claims for violations of the Pennsylvania statute ensuring the right to enroll in public school, 24 Pa. Stat. § 13-1301 *et seq*.; the Equal Educational Opportunity Act ("EEOA"), 20 U.S.C. § 1703(f); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, U.S. Const., amend XIV, § 1.

1. Plaintiffs Who Were Denied Enrollment in the District Altogether Are Likely to Succeed on their State Law Claims.

The Named Plaintiffs and Class Members who have been denied enrollment in any District school are plainly likely to prevail on the merits of their state law claims related to their exclusion from school.

Plaintiffs will be able to prove at a preliminary injunction hearing that the District has a custom, practice, and policy of refusing to enroll in the District older LEP immigrants who are qualified for enrollment. The experiences of several of the Named Plaintiffs provide evidence of this pattern. When Plaintiff Khadidja Issa first attempted to enroll in school in November 2015, she was 17 years old, and the District refused her. Compl. ¶ 107; Verification of Khadidja Issa, Ex. A to Compl.; Decl. of Khadidja Issa, July 14, 2016, ¶ 5 (Exhibit 5). Only

after sustained advocacy by Khadidja's refugee resettlement case workers did the District relent and agree to place her in Phoenix Academy for the spring semester of the 2015-2016 school year. Compl. ¶ 108; Verification of Khadidja Issa, Ex. A to Compl.; Decl. of Khadidja Issa, July 14, 2016, ¶ 5 (Exhibit 5). When Plaintiff Q.M.H. first attempted to enroll in the school in September 2015, he was 17 years old, and the District refused him. Compl. ¶ 116; Verification of Q.M.H., Ex. A to Compl.; Decl. of Q.M.H., July 14, 2016, ¶ 5 (Exhibit 6). The District again refused to admit him in December 2015. Compl. ¶ 117; Verification of Q.M.H., Ex. A to Compl. Only after sustained advocacy by his refugee resettlement case workers did the District finally relent in late January 2016 and agree to place him in Phoenix Academy. Compl. ¶ 120; Verification of Q.M.H., Ex. A to Compl.; Decl. of Q.M.H., July 14, 2016, ¶ 5 (Exhibit 6). When Plaintiff Alembe Dunia first attempted to enroll in school in December 2014, he was 19 years old, and the District refused him. Compl. ¶¶ 136-37; Verification of Alembe Dunia, Ex. A to Compl.; Decl. of Alembe Dunia, July 14, 2016, ¶ 5 (Exhibit 4). He attempted to enroll again in November 2015, when he was still under age 21, and still the District refused to enroll him. Compl. ¶ 138; Verification of Alembe Dunia, Ex. A to Compl. He has still not been enrolled in school. Decl. of Alembe Dunia, July 14, 2016, ¶ 5 (Exhibit 4).

The right of older immigrant students to be educated in the district where they live is clear and unequivocal. In Pennsylvania, every child who has not graduated from high school has a right to attend the public schools in her district until the end of the school year in which she turns 21.[36] A child who turns 21 during the school term and who has not graduated from high

[36] 24 Pa. Stat. § 13-1301; 22 Pa. Code § 11.12; *Sch. Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n*, 667 A.2d 5, 9 (Pa. 1995) (interpreting Article III, Section 14 of the Pennsylvania Constitution to make public education a fundamental right in the Commonwealth).

school has the right to continue to attend the public schools in his district free of charge until the end of the school term. 24 Pa. Cons. Stat. Ann. § 13-1301; *see also* 22 Pa. Code § 12.1(a).

Pennsylvania regulations require that a "school district or charter school shall normally enroll a child the next business day, but no later than 5 business days of application." 22 Pa. Code § 11.11(b). They also explicitly state that a "child's right to be admitted to school may not be conditioned on the child's immigration status . . . [and, thus, a] school may not inquire regarding the immigration status of a student as part of the admission process." 22 Pa. Code § 11.11(d). Denying school-age immigrants admission to the District based on their national origin plainly violates state law.

2. Plaintiffs Who Were Placed at Phoenix Are Likely to Succeed On Their Claims That The District Violated the EEOA.

Plaintiffs placed at Phoenix and denied the opportunity to attend McCaskey are likely to succeed on the merits of their claims under the EEOA. After Plaintiffs have had the opportunity to present evidence and expert testimony at a preliminary injunction hearing, the evidence will show that the District has failed to take "appropriate action" to overcome the language barriers of ELLs at Phoenix. Plaintiffs are, thus, likely to succeed on their claims under the EEOA.

a. Equal Educational Opportunities Act

The EEOA provides that "[n]o State shall deny equal educational opportunity to an individual on account of his race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in instructional programs." 20 U.S.C. § 1703(f). To prevail under the EEOA, a plaintiff need not prove that the district intentionally denied educational opportunity on account of national origin. *C.G. v. Pa. Dep't of Educ.*, 888 F. Supp. 2d 534, 574-76 (M.D. Pa.

2012). To state a claim for national origin discrimination under Section 1703(f), plaintiffs need only allege facts showing: "(1) language barriers; (2) defendant's failure to take appropriate action to overcome these barriers; and (3) a resulting impediment to students' equal participation in instructional programs." *Id.* at 575.

The leading case articulating criteria for assessing programs serving LEP students for illegal discrimination is *Castaneda v. Pickard,* 648 F.2d 989 (5th Cir. 1981). *See also C.G.*, 888 F. Supp. 2d at 575 (applying *Castaneda* to determine whether language program constitutes "appropriate action" under the EEOA); *see also Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1017-18 (N.D. Cal. 1998) (same).

b. Castaneda Analysis

As the *Castaneda* Court explained, when evaluating the sufficiency of a particular program addressing language barriers, a reviewing court must determine: (1) whether a school system is pursuing a program "informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy"; (2) whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school; and (3) whether the program, once employed for a sufficient time period to give the plan a legitimate trial, produces "results indicating that the language barriers confronting students are actually being overcome." *Castaneda*, 648 F.2d at 1009-10. In this case, a *Castaneda* analysis of the evidence will show that, by placing older LEP immigrant students at Phoenix, the District has failed in its duty to take appropriate action to overcome language barriers, thus denying Plaintiffs an equal educational opportunity based on their national origin in violation of the EEOA.

i. The District's Placement of LEP Immigrants at Phoenix Is Not Based on Any Educational Theory Recognized as Sound by Experts.

Plaintiffs are likely to succeed in proving that placing LEP immigrants into the alternative accelerated program at Phoenix is not "informed by an educational theory recognized as sound" by language experts, nor is it even "a legitimate experimental strategy." *See Castaneda*, 648 F.2d at 1009. As Plaintiffs will prove through expert testimony, Phoenix's "accelerated credit recovery" model of instruction, deficient language program, and confrontational policies are fundamentally at odds with any accepted theory of education for newcomer ELLs.

The District's apparent rationale for placing older LEP immigrant students at Phoenix is that an accelerated program will allow these students to quickly receive enough credits to graduate, thereby divesting the District of the obligation to continue their schooling.[37]

However, this rationale deliberately ignores the reality that these students' significant language barriers prevent any meaningful access to instruction—let alone *accelerated* instruction. As the Supreme Court has observed, "[T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education . . . We know that those who do not understand English are certain to find their classroom experiences

[37] *See* Emily Previti, ACLU sues Lancaster school district over education of refugees, NewsWorks, July 19, 2016, *available at* http://www.newsworks.org/index.php/local/item/95571-aclu-sues-lancaster-school-district-over-education-of-refugees (Superintendent Rau stating that "What we're trying to do, what Phoenix does really well is that it gives him an opportunity to accelerate . . . So if a child comes to this country, a child who is 15-16 with no credits, it's practically impossible for them to graduate. And that's our goal."); *See* 2015 Extended Day Program Abstract, Sch. Dist. of Lancaster at 15 (Exhibit 3) ("Phoenix Academy [is] a credit recovery facility for students who, due to multiple risk factors including refugee status, pregnant and parenting youths, homelessness and other poverty-related issues, may not graduate on time").

wholly incomprehensible and in no way meaningful." *Lau,* 414 U.S. at 566. This is particularly true given the pronounced deficiencies in the ESL program at Phoenix. *See supra* Section II(A); *infra* Section III(C)(2)(c)(ii). Indeed, the District plans to graduate Plaintiff Anyemu Dunia from Phoenix in August—after only one year and eight months of schooling, despite the fact that Anyemu has not yet learned to speak, read, or write English, and has not attained a level of proficiency in the core curricular content to warrant graduation from any American school. Compl. ¶¶ 146-47; Verification of Anyemu Dunia, Ex. A to Compl.

Moreover, in addition to the deficiencies in the language program outlined herein, Plaintiffs will prove through expert testimony that the highly-restrictive and confrontational environment at Phoenix impedes meaningful education for immigrant students who have experienced significant trauma and are new to the country. Compl. ¶ 85. It is not uncommon for refugees and other immigrants to experience great difficulty in adjusting to the most basic expectations of a school setting in the U.S. For immigrants facing not only unfamiliar school routines but debasing and intimidating ones, their struggle is compounded. An educational environment that creates new stressors in their lives by treating them with suspicion or harshness severely undermines their ability to benefit from the educational opportunities afforded to them. Compl. ¶ 86.

The District understands that LEP immigrants who are newly arrived in the country require special supports, as evidenced by the existence of the "International School" newcomer program at McCaskey and the "Refugee Center" at Reynolds Middle School.[38] But

[38] *See*, *e.g.*, Services for English Language Learners, Sch. Dist. of Lancaster (attached as Exhibit 1) (describing "International School"); Dan Nephin, *Reynolds Middle School refugee center getting ready for opening*, LancasterOnline, Sept. 21, 2015, *available at* http://lancasteronline.com/news/local/reynolds-middle-school-refugee-center-getting-ready-for-opening/article_52126436-5ca9-11e5-84d0-ff227497033f.html.

District officials have been deliberately indifferent to the needs of older immigrant students, whom the District either denies schooling altogether or places at Phoenix in an atmosphere that actually undermines their ability to succeed. The District does not offer Phoenix students any transitional program for ELLs who have recently arrived in the country comparable to what the District has implemented at McCaskey and Reynolds, and Phoenix's language program is inferior to the program at McCaskey in terms of ESL instruction, staffing, language support in regular classes, and testing accommodations. *See supra* Section II(A); *infra* Section III(C)(2)(c)(ii).

Accordingly, Plaintiffs are likely to succeed in proving that the District's strategy of placing newcomer ELLs at Phoenix is not supported by sound educational theory.

ii. Phoenix's Practices Are Not Reasonably Calculated to Implement any Educational Theory.

Even if the District could establish that the language program at Phoenix, which is provided through an accelerated learning model, is based on a sound educational theory, the District's practices would nonetheless fail under *Castaneda* because "the programs and practices actually used by a school system [are not] reasonably calculated to implement effectively the educational theory adopted by the school." *Castaneda*, 648 F.2d at 1010.[39] The language program at Phoenix "fails to follow through with practices, resources and personnel necessary to transform the theory into reality." *Castaneda*, 648 F.2d at 1010.

[39] *See also* Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency, Memorandum from Michael L. Williams U.S. Dep't of Educ. Assistant Sec'y for Civil Rights to Senior Staff of the U.S. Dep't of Educ. Office for Civil Rights (Sept. 27, 1991), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/lau1991.html (hereinafter "1991 Policy Update, U.S. Dep't of Educ. Office for Civil Rights") (quoting *Castaneda*, 648 F.2d at 1010).

Experts at the United States Department of Education and the Pennsylvania Department of Education have recognized that, in order to effectively assist ELLs in overcoming language barriers and satisfy state and federal law, any language program must contain several basic essential elements. The need for each of these elements is heightened when ELLs are participating in an accelerated curriculum. And yet, at Phoenix, these elements are missing altogether or clearly deficient in each category.

Adequate ESL instruction time tailored to proficiency. Guidance issued by the Pennsylvania Department of Education states that language instruction must be commensurate with an ELL student's English proficiency level, meaning that ELL students who are less proficient in English require more hours of language instruction.[40] The Department recommends that Beginner Level I ELLs, like the Named Plaintiffs in this case, receive 2-3 hours per day of ESL instruction. *Id*. However, ELLs at Phoenix receive only one 80-minute ESL class per day, regardless of their level of proficiency.[41]

Certified ESL teachers. Pennsylvania law and agency guidance require all teachers in language instructional programs to hold a Program Specialist ESL Certificate. 24 Pa. Stat. § 15-1511 ("[T]he teaching of subjects in a language other than English may be permitted as part of a sequence in foreign language study or as part of a bilingual education program if the teaching personnel are properly certified in the subject fields."); *Educating Students with LEP*

[40] *Educating Students with Limited English Proficiency (LEP) and English Language Learners (ELL)*, Pennsylvania Department of Education Basic Education Circular (last modified Apr. 14, 2009) at 3, *available at* http://www.education.pa.gov/Documents/Codes%20and%20Regulations/Basic%20Education%20Circulars/PA%20Code/Educating%20Students%20with%20Limited%20English%20Proficiency%20(LEP)%20and%20English%20Language%20Learners%20(ELL).pdf (hereinafter "*Educating Students with LEP and ELLs*, Pa. Dep't of Educ.").

[41] *See* Compl. ¶ 66(a); Verification of Khadidja Issa, Ex. A to Compl.; Verification of Q.M.H., Ex. A to Compl.; Verification of Anyemu Dunia, Ex. A to Compl.

and ELLs, Pa. Dep't of Educ., at 7 ("All teachers in language instructional programs must hold the certification and endorsements required by [the Pennsylvania Department of Education]."). In addition to Pennsylvania's requirements, OCR has required that schools either hire formally qualified teachers for LEP students or require that teachers already on staff work toward attaining those formal qualifications. 1991 Policy Update, U.S. Dep't of Educ., Office for Civil Rights (citing *Castaneda*, 648 F.2d at 1013). Phoenix does not currently have any certified ESL teachers on staff, and appears to lack even sufficient *uncertified* ESL staff to teach the 90 ELL students at Phoenix.[42]

Language supports in content classes. Pennsylvania regulations require that every school district provide ELLs with an ESL program that includes "adaptations/modifications in the delivery of content instruction by all teachers" based on the student's English proficiency and Pennsylvania academic standards. *Educating Students with LEP and ELLs*, Pa. Dep't of Educ., at 1 (interpreting 22 Pa. Code § 4.26). The lower the ELL student's English proficiency level, the greater the amount of adaptations required to instruction and assessment in content classes. *Id.* at 3. Phoenix, however, does not provide anything resembling the intensive "sheltered instruction" model at McCaskey's International School.[43] Moreover, after limited discovery, Plaintiffs expect to prove at a preliminary injunction hearing

[42] *See* Pa. Dep't of Educ., Phoenix Academy School Fast Facts, *available at* www.paschoolperformance.org (using query tool) (showing that at Phoenix Academy, 28.17% of students—90 students—are ELLs). Upon information and belief, the only state-certified ESL staff person listed on the District's online staff directory for Phoenix (one of only two ESL staff listed at Phoenix) no longer works there. *See* Compl. ¶ 65; Teacher Information Mgmt. Sys., Pa. Dep't of Educ., http://www.teachercertification.pa.gov/Screens/wfSearchEducators.aspx (using query tool); School District of Lancaster Staff Directory, http://www.lancaster.k12.pa.us/staff-directory/ (last visited July 20, 2016).

[43] Services for English Language Learners, Sch. Dist. of Lancaster (attached as Exhibit 1).

that Phoenix fails to offer ELLs any meaningful modifications to classroom curriculum or testing—even those students at the most basic level of English proficiency.[44]

In order to equip teachers to appropriately modify instruction and testing in non-ESL classes, all school districts in Pennsylvania with ELLs must, as part of the Professional Development Act 48 Plan, offer staff development related to ESL for *all* personnel. *Educating Students with LEP and ELLs*, Pa. Dep't of Educ., at 7. This professional development training is necessary to give teachers the tools to be able to modify the curriculum and testing in content classes to effectively teach ELLs. Plaintiffs expect to prove at a preliminary injunction hearing that teachers at Phoenix do not receive the professional development training necessary to learn this strategy, and consequently do not modify instruction or testing to meet the needs of ELLs.

Periodic assessment of English proficiency to gauge progress. Federal and state law require annual assessment of ELLs' proficiency in English language reading, writing, speaking, and listening or understanding. *Educating Students with LEP and ELLs*, Pa. Dep't of Educ., at 4 (citing 20 U.S.C. §§ 6311(b(7), (6826(b)(3)(C),(d)(2)). Only with periodic assessments of English proficiency based on objective standards that test reading, writing, speaking, and listening can a school district gauge whether ELLs are able to participate meaningfully in the regular educational program. *See* 1991 Policy Update, U.S. Dep't of Educ. Office for Civil Rights. Phoenix, however, does not regularly perform any valid and comprehensive evaluation of its ELLs' English proficiency.[45]

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[44] *See* Compl. ¶¶ 56, 66(b)-(c), 110-11, 122, 142-43; Verification of Khadidja Issa, Ex. A to Compl.; Verification of Q.M.H., Ex. A to Compl.; Verification of Anyemu Dunia, Ex. A to Compl.

[45] *See* Compl. ¶ 168; Compl. ¶ 111 (Plaintiff Khadidja Issa has not been assessed for language proficiency since beginning at Phoenix); Verification of Khadidja Issa, Ex. A to Compl.; Compl. ¶ 147 (Plaintiff Anyemu Dunia will be graduated next month from Phoenix despite his inability to read, write, speak, and understand English); Verification of Anyemu Dunia, Ex. A to Compl.

Confrontational environment. The overtly confrontational and restrictive environment at Phoenix provides yet another reason that placement of LEP immigrants at Phoenix is not reasonably calculated to implement effectively a valid educational theory. As Plaintiffs expect to prove through expert testimony at a preliminary injunction hearing, it is not uncommon for refugees to experience great difficulty in adjusting to the most basic expectations of a school setting in the U.S. *See* Compl. ¶¶ 85-86. That struggle is only compounded by the debasing and intimidating environment and daily routines at Phoenix—characterized by daily pat-down searches, harsh restrictions on personal freedom and expression, and disciplinary and uniform policies that pit students against each other by rewarding regular confrontation with peers "exhibiting negative behavior" and documentation of others' disciplinary infractions.[46] The educational environment at Phoenix creates new stressors in the lives of already-struggling LEP immigrant youth and severely undermines their ability to benefit from any educational opportunities. *See* Compl. ¶ 86. Thrusting Plaintiffs into an environment that actually *undermines* their ability to overcome the obstacles to their success is plainly not reasonably calculated to implement any sound educational theory.

For all of these reasons, Phoenix's ESL program does not meet the second prong of *Castaneda*. Indeed, Phoenix's program suffers from many of the same deficiencies as other ESL programs that federal administrative agencies and courts have found to violate the EEOC and Title VI.[47] Significantly, in *Utica,* 2016 WL 1555399, plaintiffs alleged that the school

[46] *See supra* Section II(A); Compl. ¶¶ 67- 86.

[47] *See* Letter from Wendella P. Fox, U.S. Dep't of Educ. Office for Civil Rights, to Dr. Francis X. Antonelli, Hazleton Area Sch. Dist. (Apr. 10, 2014), *available at* http://www2.ed.gov/documents/press-releases/hazleton-area-school-district-letter.doc (finding Title VI violations where students were inappropriately assigned to regular classes without an assessment of their English language proficiency, the district failed to provide sufficient ESL instructional time, failed to identify LEP parents or make interpreters available as needed, and lacked any system to internally evaluate the effectiveness of the ELL

district had systemically diverted limited English proficient immigrant students aged 17-20 into alternative schools and programs that provided unequal educational opportunities compared to the mainstream high school. *Id.* at *1-3. The court held that these allegations stated a valid claim under both the EEOA and Title VI. *Id.* at *9-10. For these reasons, Plaintiffs are likely to succeed in proving that placement of LEP immigrants at Phoenix is not reasonably calculated to implement a sound, expert-backed theory of ESL education.

iii. There Is No Evidence that Phoenix's ESL Program Is Effective.

Although *Castaneda* allows school districts flexibility in choosing and implementing a program to address language barriers, districts must modify their programs if they prove to be unsuccessful after a legitimate trial. *Castaneda*, 648 F.2d at 1010; 1991 Policy Update, U.S. Dep't of Educ. Office for Civil Rights. Thus, the third *Castaneda* prong considers whether the ESL program produces "results indicating that the language barriers confronting students are actually being overcome[.]" *Castenada*, 648 F.2d at 1010.

"As a practical matter, [schools] cannot comply with this requirement without periodically evaluating their programs." 1991 Policy Update, U.S. Dep't of Educ. Office for Civil Rights (citing *Keyes v. Sch. Dist. No. 1*, 576 F. Supp. 1503, 1518 (D. Colo. 1983) ("The defendant's program is also flawed by the failure to adopt adequate tests to measure the results of what the district is doing.")). State law requires that every school "periodically evaluate its

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programs and rectify deficiencies); Press Release, Dep't of Educ. Office for Civil Rights, U.S. Department of Education Announces Resolution of Hazleton, Pa., Area School District Civil Rights Investigation (Apr. 11, 2014), *available at* http://www.ed.gov/news/press-releases/us-department-education-announces-resolution-hazleton-pa-area-school-district-ci (announcing Hazleton findings and settlement agreement); Letter from Arthur Zeidman, U.S. Dep't of Educ. Office for Civil Rights, to Dr. John Deasy, L.A. Unified Sch. Dist. (Oct. 11, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/investigations/09105001-a.html (explaining that Title VI is implicated by school's failure to adopt consistent standards for evaluating the proficiency level of students and failure to provide intervention services for students who were not progressing in English).

language instructional program to ensure all components are aligned and working effectively to facilitate the acquisition of the English language and academic achievement defined by the PA academic standards." *Educating Students with LEP and ELLs*, Pa. Dep't of Educ., at 7 (citing 22 Pa. Code § 4.52; Castaneda, 648 F.2d at 989; 20 U.S.C. § 6841). Generally, whether a program can be considered "successful" depends on whether its participants are overcoming their language barriers "sufficiently well and sufficiently promptly" to participate meaningfully in educational programming. 1991 Policy Update, U.S. Dep't of Educ. Office for Civil Rights.

In this case, after a preliminary injunction hearing, Plaintiffs expect that the evidence will show that SDOL's language program at Phoenix fails the third prong of *Castaneda* because the District fails to conduct any ongoing and meaningful assessment of the program's effectiveness, and because there is no evidence that the program is effective. In response to extensive Right to Know Requests filed by Plaintiffs' counsel, the District has not produced any documents reflecting evaluation or analysis of the ESL program at Phoenix. Moreover, Plaintiffs expect to prove that Phoenix's language program fails to help many ELLs, including the Named Plaintiffs, advance in their English language acquisition or meaningfully participate in school.[48] Indeed, Plaintiffs expect to prove that ELLs routinely drop out of Phoenix because the environment and ineffective language access program make it impossible for ELLs to participate meaningfully in educational programming.[49]

For the reasons discussed above, Phoenix's language program fails to constitute "appropriate action" to assist ELLs to overcome language barriers in the specific ways recognized as essential by experts. While Plaintiffs need to show that the Phoenix program fails

[48] Compl. ¶¶ 110, 124, 132, 141, 143, 147; Verification of Khadidja Issa, Ex. A to Compl.; Verification of Q.M.H., Ex. A to Compl.; Verification of Anyemu Dunia, Ex. A to Compl.

[49] *See*, *e.g.*, Compl. ¶ 132; Verification of Q.M.H., Ex. A to Compl..

only one of the *Castaneda* prongs, Plaintiffs are likely to prove that it violates all three *Castaneda* prongs and, thus, prevail on the EEOA claim.

3. Plaintiffs Who Were Placed at Phoenix Are Likely to Succeed On Their Claims That The District Violated Title VI.

Title VI states that "[n]o 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; *see also* 34 C.F.R. § 100.3(b)(1)(i)-(vi) (describing specific discriminatory actions prohibited under Title VI).[50] Title VI prohibits intentional discrimination, which the Third Circuit has held may be demonstrated through proof of "deliberate indifference." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 272-73 (3d Cir. 2014). A plaintiff can establish deliberate indifference by proving that a school district: (1) had actual knowledge of the alleged misconduct; (2) had the power to correct it; and (3) failed to do so. *Id.* at 273 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645-49 (1999) (articulating a deliberate indifference standard in the Title IX context)). Thus, school systems can be found liable under Title VI for discrimination against ELLs not only by their actions but by inaction.

ELLs denied access to school on the basis of their national origin state a clear claim for violation of their rights under Title VI.[51] The United States Department of Justice issued a "Dear Colleague" letter in May 2014 to make it clear that recipients of federal funds

[50] There is no question that the District is a recipient of federal funding and subject to Title VI's anti-discrimination mandate.

[51] Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Colleague (May 8, 2014) *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf (open "Dear Colleague" letter drafted in response to lawsuit alleging that older immigrants were being denied enrollment, and explaining that barring students from enrolling in school district based on country of birth violates Title VI).

violate federal law when they deny immigrant students equal access to schools. Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Colleague (May 8, 2014) *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf. For the same reasons that Plaintiffs are likely to prevail on the merits of their state law claims, they are also likely to prevail on their Title VI claims regarding the denial of enrollment. *See supra* Section III(C)(1).

The Plaintiffs who were placed at Phoenix are also likely to prevail on the merits of their Title VI claims. Plaintiffs expect to prove at a preliminary injunction hearing that the District acted with deliberate indifference toward Plaintiffs in a number of ways, including by placing older LEP immigrant students in Phoenix's inferior educational setting, without adequate language support to enable their participation, and quickly advancing them through school and prematurely graduating them.

Placement at Phoenix in an inferior educational setting. As detailed in Section II(A) Statement of Facts, *supra*, Phoenix is substantially inferior to McCaskey in every measurable dimension. McCaskey far surpasses Phoenix in terms of teacher ratios, the percentage of teachers who are "highly qualified," and school rankings. Phoenix lacks any of the opportunities available at McCaskey to participate in the advanced academic courses that the District acknowledges are "highly recommended" for anyone who plans to attend college, and 0% of Phoenix students qualify as "college ready." McCaskey offers a range of extracurricular activities and athletics not available to Phoenix students. And students at Phoenix have far less personal freedom than students at McCaskey, in terms of their rights with respect to searches, access to their own personal belongings, dress and grooming choices, and freedom of expression. Students at Phoenix are subject to daily harsh disciplinary "interventions" and a degrading

behavior-based uniform policy that are not part of the culture at McCaskey. McCaskey students, unlike Phoenix students, are not required to perform interpersonal "confrontations" to correct the "negative behavior" of their peers, and are not evaluated on the frequency and quality of their peer behavioral corrections. District officials are charged with knowing how their schools operate.

Placement at Phoenix without adequate language support to enable participation. The District had notice that the ESL program and environment at Phoenix undermined Plaintiffs' ability to participate in their education, and failed to take any action to address Plaintiffs' significant unmet needs. Notably, the United States Department of Education's Office of Civil Rights ("OCR"), one of the federal agencies charged with enforcing Title VI, uses the analytical framework laid out in *Castaneda* to analyze whether a language program complies with Title VI. 1991 Policy Update, U.S. Dep't of Educ. Office for Civil Rights. OCR's policy standards represent an "attempt to combine the most definitive court guidance with OCR's practical legal and policy experience in the field" as to what is required under Title VI. *Id.* As one of the administrative agencies responsible for enforcing the statute, OCR's interpretation of Title VI is entitled to deference. *See*, *e.g.*, *Favia v. Indiana Univ. of Pennsylvania*, 812 F. Supp. 578, 584 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993) (according *Chevron* deference to OCR's interpretation of Title VI); *Asllani v. Board of Educ.,* 845 F.Supp. 1209, 1223 (N.D.Ill. 1993) (same). The deficiencies in Phoenix's language program outlined above under the *Castaneda* rubric, *see supra* Section III(C)(2)(b), constitute further evidence that the District has acted with deliberate indifference toward Plaintiffs.

Quickly advancing Plaintiffs through Phoenix to premature graduation. The District's deliberate indifference to Plaintiffs' rights is further evidenced by the District's

prioritization of their graduation rates over the Plaintiffs' educational needs. Plaintiffs expect to prove at a preliminary injunction hearing that the District quickly advances older LEP immigrants through Phoenix, whether or not they are sufficiently learning the curriculum, and prematurely graduates them, thus divesting the District of its obligation to educate them. For example, Anyemu Dunia will graduate from Phoenix next month after spending only 1 year and 8 months in high school—and without having acquired English, mastering basic reading and math skills, or meeting state academic proficiency standards. Compl. ¶¶ 149-50. Upon information and belief, many other older immigrant students educated at Phoenix are routinely "prematurely graduated" within one or two years of entry into the District, despite their failure to acquire English, access instruction, or make progress towards meeting state academic standards, including mastery of core academic skills or content knowledge. These students are thereby foreclosed from a free public education in the future.

In this case, all of the District's conduct in question occurred under circumstances giving rise to an inference of discrimination. *See Blunt,* 767 F.3d at 275 (plaintiff in Title VI case may establish a prima facie case of discrimination through circumstantial evidence that would support an inference of discrimination). The District not only had notice of the placement and treatment of older LEP immigrant students at Phoenix, but also had ample opportunity to correct the situation and failed to do so. After a preliminary injunction hearing, Plaintiffs expect that the evidence will show that the District has acted with deliberate indifference to the educational needs of LEP immigrant youth placed at Phoenix.

4. Plaintiffs Are Likely to Prevail on Their Procedural Due Process Claims.

Plaintiffs are also likely to prevail on their procedural due process claim. The Fourteenth Amendment provides that "no person shall be deprived of life, liberty, or property

without due process of law." U. S. Const. amend. XIV. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (citations omitted). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

The Supreme Court uses a two-step test for examining procedural due process claims: the first asks whether there exists a liberty or property interest that has been interfered with by the government; the second examines whether the procedures that attend the deprivation are constitutionally sufficient. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted); *accord Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000). Property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (citations omitted).

The Third Circuit has held that Pennsylvania law creates a protected property interest in attending public school. *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 149 (3d Cir. 2005); *Bell v. Pennsbury Sch. Dist.*, Civ. No. 09-5967, 2011 WL 292241 at *6 (E.D. Pa. Jan. 31, 2011); *see also Goss v. Lopez*, 419 U.S. 565, 573 (1975) (protected property interest in education created by Ohio law). The right to a free public education is established clearly in Pennsylvania law.[52] Accordingly, a student's legitimate entitlement to a public education cannot be taken away without procedural due process.

[52] *See supra* Section III(C)(1) (authority demonstrating that Plaintiffs are likely to prevail on the merits of their state law claims arising out of the denial of enrollment). Pennsylvania regulations also

Once a protected liberty or property interest has been identified, the focus shifts to assessing the quality and timing of the process due. *Goss*, 419 U.S. at 577; *Shuman*, 422 F.3d at 149. The test, first enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), requires this Court to balance three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id*. at 334-35; *accord E.B. v. Verniero,* 119 F.3d 1077, 1106 (3d Cir. 1997).

The *Goss* Court established the minimum process required for brief (*i.e.,* ten days or less) exclusions from school:

> [I]n connection with a suspension of 10 days or less . . . the student [must] be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. . . The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

Shuman, 422 F.3d at 149-50 (*quoting Goss*, 419 U.S. at 581). *Goss* noted that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Id*. at 584. *Goss*, thus, establishes "the *minimum* requirements" for exclusions from school. *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 927 (6th Cir. 1988) (emphasis in original).

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posit, in the context of school expulsions for disciplinary reasons, that "education is a statutory right, and students must be afforded all appropriate elements of due process if they are to be excluded from school." 22 Pa. Code § 12.8(a) (2005).

Although the process due to students who are denied enrollment may not be the same as that due to students who are expelled from a school they are already attending, *see Orozco by Arroyo v. Sobol*, 703 F. Supp. 1113, 1120 (S.D.N.Y. 1989) (at least some "notice advising that the system provides for a hearing at which the prospective student's contrary concerns may be aired" is required when school refuses to enroll students for not meeting residency requirements), in this case the Court need not rule now on the exact contours of what process is due to students denied enrollment because SDOL provides no process whatsoever. Plaintiffs are accordingly likely to prevail on the merits of their due process claims.

In this case, Plaintiff Alembe Dunia has been excluded from school for over a year, and Plaintiffs Issa and Q.M.H. were excluded for many months before their respective case workers convinced SDOL to reverse the decision to deny enrollment. The District did not provide them with written notice of why they were excluded and failed to provide them notice of their appeal rights to the Pennsylvania Department of Education. The District did not even provide an interpreter for the enrollment meeting, leaving the students and their parents truly without notice or knowledge. In a case similar to this one, a U.S. District Court judge recently denied a motion to dismiss a procedural due process claim over the Utica School District's failure to provide any process before refusing to enroll refugee children in the regular high school, sending them instead to an alternative high school, like Phoenix. See *Utica,* 2016 WL 1555399, at *9(students "deprived of that property interest by virtue of the deliberate diversionary policies enacted and enforced by senior District officials").

SDOL's failure to provide students denied enrollment in McCaskey with any notice of reason for denial, with documents translated into their native language, or an interpreter

to assist them violates Plaintiffs' right to procedural due process. Without any due process, the risk that the District's decisions will be arbitrary or discriminatory is high.

5. Plaintiffs Are Likely to Prevail on Their Equal Protection Claims.

Plaintiffs are likely to prevail on the merits of their Equal Protection claims because of two improper types of discrimination: 1) SDOL applies a different standard, based on alienage and national origin, to enrollment decisions concerning older refugee students than it does to American and non-immigrant students; and 2) SDOL irrationally treats older similarly-situated immigrant LEP students differently from younger ones. Younger refugee students are not systematically denied enrollment or diverted to Phoenix, and are often sent to McCaskey, with its specialized transition program in the International School. But older students are forced to attend the confrontational accelerated program with no specialized transition services at Phoenix, which cannot provide a meaningful education. This treatment serves no legitimate interest.

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *Plyler,* 457 U.S. at 216 (1982) (citation omitted). Under well-established constitutional law, the level of scrutiny applied to review differences in treatment depends on whether the governmental action involves a "suspect" classification based on race, alienage, or national origin. *Doe v. Pennsylvania Bd. of Probation & Parole*, 513 F.3d 95, 107 (3d Cir. 2008) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (U.S. 1985)) ("the general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy")). If the

classification involves a suspect class, the strict scrutiny standard applies; if not, the distinction need only be rationally related to a legitimate interest. *Doe,* 513 F.3d at 107.

a. SDOL Applies a Different Standard to Enroll Older Immigrant LEP Students at Phoenix than it does to Enroll American Students.

The District assigned the Named Plaintiffs to Phoenix Academy because they are over-aged and under-credited refugee students. *See generally* Compl. ¶¶ 87-104. SDOL did not give them the option of attending McCaskey and outright refused counsel's request to transfer Q.M.H. from Phoenix—where he was struggling to learn and enduring persistent and serious bullying by other students—to McCaskey. *Id*. ¶¶ 124-32; Verification of Q.M.H., Ex. A to Compl. This is no fluke. Assigning older refugee students to Phoenix is SDOL policy. An SDOL-submitted request for grant funding states that "if [refugee students] are of a certain age, [they] enroll at Phoenix Academy, our high school for overage students").[53] Elsewhere in the same document, SDOL writes that "[o]lder refugee students (19+) will be enrolled in Phoenix Academy, a small learning environment for students with specific needs related to credit recovery." *Id.* at 13-14 (parenthetical in original). While this passage suggests that only refugee students older than 19 are sent to Phoenix, SDOL's treatment of Named Plaintiffs and other evidence to be presented at an evidentiary hearing demonstrate that, in practice, the age of involuntary enrollment is actually 17 and older.

In sharp contrast with SDOL's practice and policy of involuntarily forcing older immigrant students into Phoenix, the District treats Phoenix as a "school of choice" for all other students. In a June 2, 2014, letter from Pennsylvania Department of Education's Acting

[53] Refugee Student Initiative, Sch. Dist. of Lancaster, at 2 (attached as Exhibit 8) (produced as "Produc. 11" on July 1, 2016, in response to request for public records filed by Plaintiffs' counsel on May 25, 2016).

Secretary, Carolyn C. Dumaresq, to then-SDOL Superintendent Pedro Rivera, she writes that Phoenix may continue to operate as a "magnet" school, which is described as a "public school of choice."[54] Attendance at Phoenix is, thus, voluntary for non-refugee students, unless they are placed there for disciplinary reasons, which occurs only after due process. The disparate treatment of refugees is clear.

It has long been the rule that classifications based on alienage and national origin are "inherently suspect and subject to close judicial scrutiny." *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (citations omitted); *Hernandez v. Texas*, 347 U.S. 475, 479 (1954); *Oyama v. California*, 332 U.S. 633, 646 (1948). The fact that SDOL may not, as a matter of practice, force all refugees to attend Phoenix does not insulate the District from liability. Even if SDOL admits some younger refugees to McCaskey, so long as the policy is "directed" at a sub-class of people based on alienage and national origin and "only [foreign-born people] are harmed by it," the classification is subject to strict scrutiny. *Nyquist*, 432 U.S. at 9 (citations omitted); *see also, Exodus Refugee Immigration, Inc. v. Pence*, 2016 WL 772897, at *11 (S.D. Ind. Feb. 29, 2016) (excluding only subset of refugees from Syria still triggers strict scrutiny). Under strict scrutiny a policy of discrimination may be sustained only if the disparate treatment is necessary to promote a compelling state interest and it is narrowly tailored to meet that end. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). SDOL cannot meet this exacting standard.

There is no rational reason, much less a compelling one, for SDOL to force immigrant students into Phoenix while giving non-immigrant students and their families a choice to attend, particularly where the placement is not likely to further, but rather to *preclude*,

[54] Letter from Carolyn C. Dumaresq, Acting Secretary of Education, Pennsylvania Department of Education, to Pedro Rivera, Superintendent, Lancaster City School District (June 2, 2014) (attached as Exhibit 7) (produced as "Produc. 13" on July 1, 2016, in response to request for public records filed by Plaintiffs' counsel on May 25, 2016).

meaningful education. If non-immigrant students and their families have a choice, immigrant students deserve at least the same level of respect, autonomy, and freedom to make the decision. Since SDOL is unlikely to be able to justify the differential treatment of immigrant students forced into Phoenix, Plaintiffs are likely to prevail on the Equal Protection Claim.

b. Excluding Older, but not Younger, Refugee Students from McCaskey and the International School is Irrational.

A classification that "neither burdens a fundamental right nor targets a suspect class" must still bear a "rational relationship to some legitimate end." *Doe*, 515 F.3d at 107 (citation omitted). "Although this is a low threshold, the Supreme Court has nonetheless instructed that 'even in the ordinary equal protection case calling for the most deferential standards, we insist on knowing the relation between the classification adopted and the object to be obtained.'" *Id*. at 107-08 (citation omitted); *see also Romer v. Evans*, 517 U.S. 620, 632 (1996) (invalidating statute because it "lacks a rational relationship to legitimate state interests"); *Ledezma-Cosino v. Lynch*, 819 F.3d 1070, 1075 (9th Cir. 2016) ("The absence of a rational relationship between a medical disease and bad moral character therefore renders any classification based on that relationship a violation of the Equal Protection Clause."); *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1065-67 (9th Cir. 2014) (holding that plaintiffs were likely to prevail on their claim that Arizona's denial of drivers licenses to DACA recipients was irrational discrimination).

In this case, SDOL discriminates against older LEP refugee students by refusing to enroll them in McCaskey, forcing them instead to attend Phoenix Academy. Many similarly-situated younger immigrant LEP students are sent initially to the International School. SDOL recognizes the importance of providing newly arrived immigrant LEP students with a transition program to help them adjust to life in the United States and learning in an American school:

> Our Refugee Students arrive with unique and varied needs, including: little or no English speaking ability; little or no understanding of the American educational system in general, and the School District of Lancaster in particular; limited formal schooling and/or significant gaps in school attendance; lack of knowledge of the expectations of students and their families regarding school attendance, completion of assignments, appropriate behavior, and more; unawareness of the availability of services and support and how to access them; and limited assimilation and acculturation. Many of these high school students are older, and need specific attention to help them progress toward graduation.

Refugee Student Initiative, Sch. Dist. of Lancaster, at 2 (attached as Exhibit 8) (produced as "Produc. 11" on July 1, 2016, in response to request for public records filed by Plaintiffs' counsel on May 25, 2016). This statement accurately describes Plaintiffs. It applies equally to *older* refugee students as it does to *younger* ones. They have the same obstacles to overcome and the same need for specialized, transition services.

Indeed, SDOL recognizes the importance of sending *all* newly arrived immigrant LEP students, regardless of age, to the International School. The same document, which describes how SDOL allegedly operates, states as follows:

> When our high school refugee students first arrive they are enrolled in our International School at McCaskey East, where they receive academic supports to attain English fluency and maintain their grades. The goal is to have these students exit the International School and enter another Small Learning Community on the McCaskey Campus, or, if they are of a certain age, enroll at Phoenix Academy, our high school for overage students.

Id. However, as evidenced by Named Plaintiffs' experiences, SDOL's practice does not match its rhetoric. LEP immigrants over age 17 are routinely denied access to McCaskey, including the International School, and instead forced into Phoenix, where they receive none of the specialized benefits of the International School.

SDOL can point to no rational reason for denying older refugee LEP students enrollment in McCaskey and thereby treating them differently from their younger peers. Older refugee students' needs, in terms of educational services, are identical to younger students' needs. The only difference between the two groups is age, and the services SDOL identifies as important for refugee students are needed equally by older students, too. It is completely irrational to expect that students who do not speak English, or know and understand how American schools operate, can access the curriculum without the specialized services of a transition program, like the International School. It is even more irrational to force such unprepared students into an accelerated program like Phoenix. If they have trouble learning the material at a regular pace, accelerating the instruction will make the instruction even more incomprehensible.

Consequently, as in the Third Circuit's *Doe* decision, which applied rational basis review to declare unconstitutional the differential treatment of out-of-state versus in-state Megan's Law offenders, SDOL's refusal to send older immigrant LEP students to McCaskey, and specifically the International School, "is not rationally related to [the] goal" of helping the older students learn the material so they are able to graduate. 513 F.3d at 112.

D. The Balance of Equities Weighs in Favor of Granting the Injunction

A preliminary injunction is appropriate here because placing Plaintiffs in their assigned high school, McCaskey, simply could not result in "greater harm" to the District that outweighs the indisputable, serious, and ongoing harm to Plaintiffs of being excluded from equal educational opportunities. *See Allegheny Energy, Inc. v. DQE, Inc.,* 171 F.3d 153, 167 (3d Cir. 1999) (explaining that the relevant question is not whether the defendant "would suffer some harm" but which of the two potential harms is greater). In balancing those potential harms, the

court should be "unwilling to gamble with a child's education." *New Jersey v. New York*, 872 F. Supp. 2d 204, 215 (E.D.N.Y. 2011).

Education is not merely a "'benefit' indistinguishable from other forms of social welfare legislation." *Plyer*, 457 U.S. at 221. Rather, "[b]oth the importance of education in maintaining our basic institutions, and its lasting impact of its deprivation on the life of the child, mark the distinction." *Id*. Accordingly, courts routinely find that the balance of harms favors students in education cases, rather than schools. *See*, *e.g.*, *Abington Heights Sch. Dist. v. A.C.*, No. 3:14-CV-00368, 2014 WL 1767193, at *11 (M.D. Pa. May 2, 2014) (finding balance of harms favored student seeking special education, noting that "any harm to the school district presents only solvable issues of a financial, staffing, and administrative nature"); *John T.*, 2000 WL 558582, at *8 (finding the balance of harms favors plaintiff student when he suffers more harm the longer defendant fails to provide services for which there is a legal entitlement).

In this case, Plaintiffs have a clear legal entitlement to enrollment in school, education services free from discrimination, and meaningful and appropriate English language instruction. The longer the District fails to ensure these services, the greater harm Plaintiffs suffer.

In contrast, the District has *no* interest in continuing practices that violate the Constitution and federal and state law. *See Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. Sch. Dist.*, 233 F. Supp. 2d 647, 667-68 (D.N.J. 2002), *aff'd on appeal by Child Evangelism Fellowship of New Jersey, Inc. v Stafford Tp. School Dist.*, 386 F.3d 514 (3d Cir. 2004) (citing *American Civil Liberties Union v. Reno*, 217 F.3d 162, 180-81 (3d Cir. 2000)). "Providing statutorily [and constitutionally] granted services to a child does not harm the school district; doing so is its function under state and federal law." *See John T.,* 2000 WL 558582, at

*8. The District's only potential claim of harm is administrative inconvenience and expense. However, if the District had complied with federal and state law from the Plaintiffs' first contact with the District, it would have incurred the same educational expenses then that it will incur now, and would have avoided the administrative inconvenience of having to change course. These theoretical harms to Defendant should be "discounted" by virtue of the fact that the Defendant "brought that injury upon itself." *Karakozova v. University of Pittsburgh*, 2009 WL 1652469, *3 (W.D.Pa. Jun. 11, 2009) (internal quotations omitted).

E. Granting the Requested Preliminary Injunction Is in the Public Interest

The Third Circuit has stated that, "[a]s a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *American Tel. and Tel. Co. v. Winback and Conserve, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994); *L.R.,* 2010 WL 1433146, at *5(granting preliminary injunction to homeless student denied enrollment in school in violation of the McKinney-Vento Act, observing, "[t]he court can think of no more clear expression of the public interest than statutory language, and no better way to effectuate that interest than by directing the District to immediately re-enroll L.R."). Moreover, the public interest generally favors constitutional protection even in the face of otherwise important interests. *Child Evangelism Fellowship*, 233 F. Supp. 2d at 667-68.

It is "undeniably in the public interest for providers of public education to comply with the requirements [of federal education law]." *L.J.,* 2007 WL 3252240, at *9; *see also Reach Acad. for Boys & Girls, Inc. v. Del. Dep't of Educ.*, 46 F. Supp. 3d 455, 475-76 (D. Del. 2014) (granting preliminary injunction to student plaintiffs because protecting educational opportunities of students and demanding that Defendants comply with state and federal law is in

the public interest); *John T.,* 2000 WL 558582, at *8 (observing in case involving student seeking special education services that "[i]t is in the public interest to provide benefits to those entitled to them under the law."); *Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418, 424-25 (E.D. Pa. 1982) (granting preliminary injunction to plaintiff student in discrimination case because "the public interest is served when plaintiffs such as these vindicate important federal rights"). The same principle applies here with equal force. The public interest clearly weighs in favor of granting a preliminary injunction to ensure Plaintiffs' immediate enrollment in McCaskey and access to the meaningful education to which they are legally entitled.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be granted. A proposed Order is attached to the Motion.

Dated: July 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, a true and correct copy of the foregoing Plaintiffs' Motion for Preliminary Injunction and supporting Memorandum of Law was electronically filed using the Court's ECF system and served via email upon the following:

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