No. 16-3528

In the United States Court of Appeals for the Third Circuit

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-Appellees,

v.

THE SCHOOL DISTRICT OF LANCASTER,

Defendant-Appellant.

On Appeal From the Order Entered August 26, 2016, by the United States District Court For The Eastern District Of Pennsylvania

BRIEF OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

STATUTES

COUNTER-STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343 and 28 U.S.C. § 1367. This Court has jurisdiction over the interlocutory appeal of the District Court's order granting Plaintiffs' motion for preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

COUNTER-STATEMENT OF THE ISSUES

Whether the District Court properly exercised its discretion in determining after expedited discovery and a five-day trial that the School District of Lancaster's practice of diverting older immigrant LEP students away from its International School, specifically designed for newcomer English language learners, and placing them in an alternative school employing an accelerated credit-recovery model without regard to and without addressing their significant language needs likely violates the Equal Education Opportunity Act?

Suggested Answer: Yes.

Whether the District Court properly exercised its discretion in determining after expedited discovery and a five-day trial that the School District of Lancaster violated Pennsylvania law by denying or delaying enrollment of eligible resident

students based on the School District's categorical determination that they are not likely to graduate before age 21?

Suggested Answer: Yes.

Whether the District Court properly exercised its discretion in determining after expedited discovery and a five-day trial that depriving Plaintiffs of a meaningful education through denial or delays in enrollment and placement at an alternative accelerated school that fails to overcome their language barriers causes Plaintiffs irreparable harm?

Suggested Answer: Yes.

COUNTER-STATEMENT OF THE STANDARD OF REVIEW

On appeal of a district court's grant of a preliminary injunction, legal conclusions are reviewed *de novo*, findings of fact are reviewed only for clear error, and the ultimate decision to grant or deny the preliminary injunction is reviewed for an abuse of discretion. *See Maldonado v. Houstoun,* 157 F.3d 179, 183 (3d Cir. 1998). An abuse of discretion exists when a judicial action is "arbitrary, fanciful or clearly unreasonable." *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 412 (3d Cir. 2002).

COUNTER-STATEMENT OF THE CASE

On July 19, 2016, six recently-arrived immigrant students, aged 17 through 20—Plaintiffs-Appellees Khadidja Issa, Qasin Hassan (Q.M.H.), Alembe Dunia, Anyemu Dunia, Van Ni Iang (V.N.L.), and Sui Hnem Sung ("Plaintiff Students")—filed suit, claiming that the School District of Lancaster ("SDOL") has a custom, practice, and policy of refusing to admit older immigrant LEP students into SDOL's regular high school, McCaskey, either by refusing to enroll them altogether or assigning them to an alternative "accelerated" school, Phoenix Academy, in violation of the Equal Education Opportunity Act ("EEOA"), 20 U.S.C. § 1703(f); Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq. ("Title VI"); the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, U.S. Const., amend XIV, § 1; the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, U.S. Const., amend XIV, § 1; and various provisions of the Pennsylvania Public School Code of 1949, 24 Pa. Stat. § 13-1301, *et seq.* JA55 (Complaint). Plaintiffs also filed a motion to certify a class of similarly-situated students. JA48 (ECF 2).

On July 22, 2016, Plaintiff Students filed a motion for preliminary injunction, seeking an order directing SDOL to allow them and similarly-situated students to attend McCaskey's International School. After a period of expedited discovery in which the parties exchanged documents and conducted fifteen

depositions, the District Court held a five-day trial on Plaintiffs' Motion, which included the testimony of eighteen witnesses and the presentation of dozens of exhibits. The parties submitted post-trial proposed findings of fact and conclusions of law.

On August 26, 2016, the District Court entered an Order and accompanying Memorandum Opinion, granting in part Plaintiffs' Motion for Preliminary Injunction and finding that SDOL violated the EEOA and Pennsylvania law.[1] The Order required the SDOL to enroll in McCaskey the Plaintiff Students who wished to do so; directed the SDOL to ensure that Plaintiff Students are properly assessed for language proficiency and receive appropriate language instruction and support; and required that Plaintiff Students receive equal access to the full range of educational opportunities provided to their peers. The District Court deferred ruling on Plaintiffs' class-certification motion, but in its Order included a footnote that "encouraged" SDOL to "fairly apply [the Court's] reasoning" to "school-age refugees similarly situated to the plaintiffs with regard to language proficiency . . . ." JA7. On August 30, SDOL appealed. On September 13, SDOL filed a motion

[1]The District Court did not address Plaintiffs' Title VI and constitutional claims because it found "the relief granted on [the EEOA and Pennsylvania law] sufficient to resolve" the preliminary injunction motion. JA17.

with this Court seeking an emergency stay, which the Court denied on September 21.

In the interim, on September 16, Plaintiff Students filed in the District Court an Emergency Motion for Provisional Class Certification and Entry of Preliminary Injunction Protecting Similarly-Situated Students. JA52 (ECF 42). The Motion raised the cases of four new immigrant students whose enrollment was delayed or denied and who were denied admission to McCaskey and required to attend Phoenix. On September 28, the District Court held a hearing on Plaintiffs' Motion. The District Court subsequently on October 11 issued an order denying, without prejudice, Plaintiffs' Motion for Class Certification. On October 14, 2016, the District Court denied Plaintiffs' Emergency Motion for Provisional Class Certification without prejudice to refiling after the Third Circuit concludes its review.

COUNTER-STATEMENT OF FACTS

Plaintiff Students

Plaintiff Students are school-age immigrants aged 17 or older who were re-settled, within the past two years, by international refugee agencies in Lancaster, Pennsylvania. JA55 (Complaint); JA110 (Answer). They have fled war, violence, and persecution from their native countries of Somalia, Sudan, Democratic Republic of Congo, and Burma. JA55 (Complaint); 110 (Answer). None of the

Plaintiff Students are native English speakers; there is no dispute that they all have language barriers. JA110 (Answer).

Khadidja Issa was born in January 1998, in Sudan. JA980 (student records). Her family fled the country when she was five-years old because of insecurity under President Bashir. JA568 (Khadidja testifying). She lived in refugee camps in Chad until she was 17. JA568 (Khadidja testifying). She was resettled in Lancaster in October 2015. JA569 (Khadidja testifying). Her only prior schooling was in refugee camps. JA568-569 (Khadidja testifying). Her first language is Fur. JA568 (Khadidja testifying). She could not read, write, understand or speak English when she arrived in the U.S. JA569 (Khadidja testifying); 986-987; 990-993 (student records). Her dream in coming to the United States was to get a better education because, "in America if you don't get an education you'll have a very hard life and it's very important to get an education." JA569; 572 (Khadidja testifying).

Qasin Hassan (Q.M.H.) was born in September 1998 in Somalia. JA1303 (student records). His family fled Somalia after his father was killed by Al-Shabaab terrorists, eventually finding refuge in Egypt. JA575 (Qasin testifying). Qasin was unable to attend school in Egypt, but took some private lessons at home, where he learned Arabic to complement his native Somali. JA575 (Qasin testifying). He spoke only a few words of English upon arrival in the U.S. in

September 2015. JA575 (Qasin testifying). Qasin testified that he was the "happiest person" in the world when he found out he was coming to America, because America is "number one" in his mind. JA583 (Qasin testifying). Qasin hoped to pursue his education and help his family. He wants to become a policeman. JA580 (Qasin testifying).

Brothers Alembe and Anyemu Dunia were born in November 1995, and September 1997, respectively. JA1326; 1396 (student records). They are the children of a Congolese father and a Tanzanian mother who fled Congo because of war. JA615-616 (Aleme testifying). They lived for most of their lives in a refugee camp in Mozambique where life was "very difficult." JA616 (Alembe testifying). Their only schooling occurred in the camp. JA 616 (Alembe testifying). Their native language is Swahili. JA1337 (student records). They arrived in Lancaster in November 2014 speaking only a few words of English. JA616; 618 (Alembe testifying); JA1334 (student records).

Sisters Van Ni Iang and Sui Hnem Sung were born in Burma in October 1998, and October 1996, respectively. JA556 (Van Ni testifying); 561 (Sui Hnem testifying). After their father was forced into labor in Burma, they fled the country as refugees. JA557 (Van Ni testifying). Neither spoke or understood English when they arrived in the United States in October 2015. JA556-557 (Van Ni testifying); 561 (Sui Hnem testifying); 1257-1258. At the time they arrived, Van

Ni had completed eighth grade and Sui Hnem had completed ninth grade. JA556 (Van Ni testifying); 561 (Sui Hnem testifying). Van Ni wants to become a doctor and Sui Hnem wants to be a teacher. JA559 (Van Ni testifying); 563 (Sui Hnem testifying).

All Plaintiff Students are limited-English-proficient ("LEP") students, JA55 (Complaint); 110 (Answer), also known as English Language Learners ("ELLs").[2] All are also "students with limited or interrupted formal education," referred to as "SLIFE." SLIFE are a sub-group of ELLs who share the following common characteristics: (1) two years or more behind assigned grade level; (2) limited or no literacy; (3) limited or interrupted education; and (4) stressful experiences and acculturation issues. SLIFE may be refugees or other types of immigrants. JA650-651 (Marshall testifying). In addition to refugees, Lancaster schools educate non-

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[2]LEP is used interchangeably with ELL, which is defined as:

> An individual who, due to any of the reasons listed below, has sufficient difficulty speaking, reading, writing, or understanding the English language to be denied the opportunity to learn successfully in classrooms where the language of instruction is English or to participate fully in the larger U.S. society. Such an individual (1) was not born in the United States or has a native language other than English; (2) comes from environments where a language other than English is dominant; or (3) is an American Indian or Alaska Native and comes from environments where a language other than English has had a significant impact on the individual's level of English language proficiency.

See, e.g., Glossary, National Center for Education Statistics, https://nces.ed.gov/programs/coe/glossary.asp#ell (last visited October 12, 2016).

refugee immigrants from places like Cuba, Haiti, and Ethiopia, many of whom are also SLIFE. JA533; 535 (Mastropietro testifying); 837 (Ortiz testifying).

McCaskey High School and Phoenix Academy

SDOL has three high schools: the McCaskey High School Campus,[3] Phoenix Academy, and Buehrle Academy. JA66 (Complaint); 116 (Answer). McCaskey is the main high school for students living in SDOL and enrolls the vast majority of SDOL's high school students. JA66 (Complaint); 116 (Answer). McCaskey is a traditional public high school, similar to hundreds of public high schools around the country. JA 66 (Complaint); 116 (Answer). Buehrle is an "Alternative Education for Disruptive Youth" (AEDY) school where "disruptive students" are referred for disciplinary reasons. JA6 (Complaint); 117 (Answer).

Like Buehrle, Phoenix is operated by SDOL under a contract with a private company, Camelot Education, to run an "alternative education program." JA904. Phoenix serves "At-Risk Students," and others who are overage for their appropriate grade and in danger of not graduating. JA910 (Camelot Contract). Phoenix is organized around the central goal of changing students' negative behaviors. JA1039; 1044-1051; 1056 (Phoenix Academy student handbook). Academic proficiency is not one of Phoenix's stated goals. JA1039 (Phoenix

[3]The McCaskey Campus comprises two separate buildings, J.P. McCaskey and McCaskey East. JA66 (Complaint); 116 (Answer).

Academy student handbook); *see also* JA497 (Misnik Dep); 788-789 (Heisey testifying).

The security practices at Phoenix more closely resemble those of an AEDY school than a typical high school. Indeed, SDOL's AEDY school, Buerhle, also operated by Camelot, employs the same rules and regulations. *See* JA633-34 (Rivera testifying). At Phoenix, students are subjected to daily pat-downs by building security. *See, e.g.*, JA562 (Sui Hnem testifying); 579 (Qasin testifying); 635 (Rivera testifying). Students are not permitted to carry into or out of school any personal belongings, including bags, books, food, or even homework. *See, e.g.*, JA570 (Khadidja testifying); 601 (Chesson testifying); 635 (Rivera testifying); 1041 (Phoenix Student Handbook). All staff are trained on how to control student behavior through an escalating series of interventions culminating in a full physical restraint. *See, e.g.*, JA501 (Misnik Dep.); 600 (Chesson testifying); 719 (Hilt testifying). And students are encouraged to regularly confront the negative behavior of their peers as a way to earn status and privileges. *See, e.g.*, JA812 (Misnik testifying); 1045; 1049 (Phoenix Academy Student Handbook). Phoenix also has a dress code designed to reinforce the student hierarchy based on behavior where students are rewarded with different colored uniform shirts. *See*, *e.g.*, JA634 (Rivera testifying); 824 (Misnik testifying). None of these policies and practices are in effect at McCaskey.

Phoenix generally ranks far below McCaskey in every measure of performance tracked by the Pennsylvania Department of Education, such as number of highly qualified teachers, drop-out rates, college preparedness, and student academic performance. JA803-806 (Heisey testifying); *see generally* JA1657-1671 (School Performance Profiles for Phoenix and McCaskey). Phoenix has fewer course options than McCaskey; indeed, most of the courses in McCaskey's 104-page Curriculum Guide are not available at Phoenix. JA789-792 (Heisey testifying). Phoenix offers no extra-curricular activities or sports. JA792-793 (Heisey testifying); 1589-1594 (Phoenix Academy, Interscholastic Athletic Opportunities Disclosure Form 15.6, 2014-15 School Year listing zero Phoenix student participants in interscholastic athletic).

Phoenix operates on an "accelerated curriculum" model, whereby students accrue credits faster than they could in a regular school environment, allowing students to complete high school in less than four years—and sometimes, as evidenced by Plaintiff Anyemu Dunia, in less than 2 years. JA67 (Complaint); 117 (Answer); 495 (Misnik Dep.); 825 (Misnik testifying that "accelerated means faster"); 1601 (Camelot website description of accelerated programs). Whereas students at McCaskey can earn only 7 credits in an entire year, Phoenix students can obtain 5.5 credits per semester, or 11 per year, excluding optional summer courses. JA503 (Misnik Dep.); 1039 (Phoenix Student Handbook). Phoenix

purports to cover the same academic content in one semester that McCaskey covers in a year by using a block scheduling system, with five 80-minute class periods per day instead of McCaskey's seven 48-minute class periods per day. JA486-487 (Heisey Dep.); 632 (Rivera testifying); 782-783 (Heisey testifying). But, because McCaskey students take each course for an entire year and classes at Phoenix are not twice as long as they are at McCaskey, the result of Phoenix's "acceleration" is that McCaskey students receive 24 more hours of instruction per credit than Phoenix students (the equivalent of thirty more 48-minute class periods). JA785 (Heisey testifying). The material is, therefore, covered much more quickly at Phoenix than at McCaskey. JA632 (Jandy Rivera, former Phoenix teacher, told "you need to teach this double time"); 841 (Ortiz testifying).

Programs for Immigrant ELLs at McCaskey and Phoenix

The academic programs for ELLs—especially newly-arrived immigrants, including SLIFE—offered at McCaskey and Phoenix differ greatly. Whereas Phoenix has no special program for such students, McCaskey operates a program known as the International School, which SDOL describes as follows:

> The International School located at McCaskey East for grades nine to 12 provides intensive ESL support and content-based ESL instruction in a one-year program, primarily for "Entering" students. This unique small learning community introduces new cultural values and beliefs while respecting the cultural diversity brought by the students. Students participate in ESL, Sheltered Instruction (SI) Science, SI math, SI social studies, and enrichment subjects. Students develop a beginning level of English proficiency and prepare to enter another small learning community of their choice based on

> personal interests. Key features of the International School include close communication with families, access to appropriate translation services and assistance in connecting to community resources. Eligibility for this program is determined through screening conducted at the Enrollment Center in collaboration with the facilitator of the International School.

JA901 (SDOL Services for ELLs).

During that first year at the International School, "Entering" level ELLs (who are just starting to learn English) have two 48-minute periods of English as a Second Language ("ESL") per day. JA1071 (McCaskey Curriculum Guide). Importantly, the students receive "sheltered content instruction" in their other academic classes, like mathematics, science, and social studies, which means they learn alongside other English learners at a similar proficiency level (and separate from students who are English proficient) in a setting where the ESL-trained teacher provides differentiation and accommodations to ensure students learn English alongside the subject matter. JA 661; 663-664 (Marshall testifying); 1070 (McCaskey Curriculum Guide). According to District documents, McCaskey even "shelters" SLIFE together in sections separate from other ELLs. JA667 (Marshall testifying); 1555 (ESL Instruction Service Matrix). The International School also teaches students about "cultural values and norms while fostering an environment of tolerance and diversity." JA1071 (McCaskey Curriculum Guide).

The evidence at trial proved that Phoenix offers ELLs, including SLIFE, only one 80-minute ESL class per day, and has no special program or teaching

methodology designed for newly arrived students or ELLs. JA838 (Ortiz testifying). ELLs at Phoenix are purportedly taught under a "structured immersion" model. JA800 (Heisey testifying); 903 (SDOL Services for ELLs). Under this model, all ELLs take mainstream content classes that mix together ELLs with native English speaking students, rather than being "sheltered" alongside students of similar English proficiency. JA664 (Marshall testifying); 732 (Hilt testifying that Phoenix classes combine "Entering" and "Emerging" ELLs and native English speakers); 838 (Ortiz testifying).

Phoenix offers few supports and resources to help ELLs keep up in their fast-paced content classes. JA666 (Marshall testifying); 839; 842 (Ortiz testifying). SDOL does not evaluate the efficacy of the ESL program at Phoenix and cannot quantify whether the program is successful. JA14 (Memorandum Opinion); 682 (Marshall testifying); JA734 (Hilt testifying). It has never attempted to evaluate the impact of Phoenix's "accelerated" program model on ELLs. JA20-21 (Memorandum Opinion).

Effect of Phoenix Environment on Plaintiff Students

The Plaintiff Students who attended Phoenix testified that the accelerated pace and inadequate language supports there impeded their ability to learn. They testified that their classes moved too quickly, that they had trouble understanding what their teachers and classmates said and what was being taught.

Notwithstanding these issues, they quickly accrued credits and advanced to higher grades.

Anyemu Dunia attended Phoenix for less than 16 months, yet was awarded four years of credits. He began as a ninth grader on February 9, 2015, and was graduated from twelfth grade on June 2, 2016. JA1329 (Entry/Withdrawal List); 1357 (Student Transcript showing "Graduation Date: 6/2/2016"). He testified that the material was taught too fast. JA628. He did not get enough education to prepare him to do what he wants to do, which is to be a biologist. JA625-626. Anyemu could not explain what he was taught at Phoenix, notwithstanding that he was ranked sixth in his class. JA620; 622 (Anyemu testifying); 1357 (Student Transcript showing class rank).

Qasin testified that learning at Phoenix was "impossible." JA580. He understood only his ESL teacher, and did not understand any other teachers or classes. JA557. He testified that he sat in class all day without understanding anything. JA583. Qasin stopped attending Phoenix after only six weeks because he did not understand the material and the school failed to deal with his complaints of bullying. JA1201-1203 (ACLU letter demanding that Qasin be transferred to McCaskey); 1321-1322 (student attendance records). Nonetheless, Phoenix awarded him credits for completing an entire grade. JA1320 (Student Transcript); JA1324 (Entry Withdrawal List).

Khadidja testified that at "Phoenix Academy the classes go very fast and I do not understand anything and I'm not benefiting so I want a school that is slower in pace so I can understand." JA573. She testified that she did not understand Phoenix teachers and staff, or her classmates speaking English. JA571. She did not even know what subjects were taught in two of her classes because "they speak and write in English and I don't understand." JA571. When Khadidja did not understand an activity or a test, the teachers "helped" by giving her the answers. JA572. Khadidja was promoted to the next grade after attending Phoenix for less than one semester (February 17 through May 24, 2016); she was ranked first in her class even though she did not understand her classes. JA572 (Khadidja testifying); 965 (Entry/Withdrawal List). Khadidja wanted to attend McCaskey, where her younger sister was enrolled and was learning much more English. JA570-572.

Van Ni testified that she had trouble understanding what was being taught in core classes because she did not understand what is being said by her teachers and the English-speaking students. JA558. Her sister Sui Hnem testified that her core classes are very difficult because everything was in English. JA562. Both girls also testified that their younger brother, who just finished tenth grade at McCaskey, receives more ESL instruction, brings home books and homework, and has been able to learn much more English than them. JA557-558; 560; 562-563.

All Older Immigrant ELLs are Subject to "Mandatory Enrollment" in Phoenix

Enrollment in Phoenix, an "alternative" school, is generally a choice offered to students and families, but not for newly-arrived older, under-credited ELLs, like Plaintiff Students, whose only option for schooling in SDOL is Phoenix. JA761 (Blackman testifying). With respect to Plaintiff Students and similarly-situated students, SDOL substitutes its judgment for that of the immigrant students' families and diverts them to the accelerated-credit recovery program at Phoenix. JA506-507 (Rau Dep); 761 (Blackman testifying). Even seventeen-year-olds, who still have five years of eligibility for public schooling, are sent to Phoenix. JA771; 1763[4] (Blackman testifying).

SDOL acknowledges that this assignment is not based on the student's language needs, newcomer status, educational background, or individual educational goals. *See, e.g.*, JA749 (Rau testifying). Rather, this decision is based strictly on the student's age and whether they are under-credited, without regard to whether Phoenix can meet the student's needs as a newcomer ELL. JA471-472 (Abrom Dep.); 506-507 (Rau Dep.); 721; 728 77:12-78:10 (Hilt testifying). These students are never given the option to attend McCaskey's International School and

[4]Counsel for SDOL failed to include all of Plaintiff Students' requested counter-designations in the Joint Appendix. JA1672. Accordingly, Plaintiff Students include a Supplemental Appendix with their brief containing any such requested counter-designations cited herein and containing JA1672-1763.

SDOL refuses to grant any student's request to transfer from Phoenix to McCaskey to take advantage of that program. JA502 (Misnik Dep.); 822 (Misnik testifying). For instance, SDOL refused an April 2016 request from then-17-year-old Plaintiff Qasin Hassan's lawyers to transfer him to McCaskey because he was not learning anything at Phoenix and was suffering persistent and unaddressed bullying by other students. JA744 (Rau testifying); 834 (Abrom testifying that after receiving ACLU letter, District turned it over to their counsel and did nothing else in response); 1201-1203 (ACLU letter demanding that Qasin be transferred to McCaskey).

Older Immigrant Students' Enrollment is Delayed or Denied

SDOL's official policy is to comply with state law requiring prompt enrollment of new students (within no more than five days) once their paperwork is complete. Yet the reality is that, for entering 17-21-year-old ELLs, to the extent they can gain admittance to SDOL at all, they are routinely subject to enrollment and placement delays of weeks or even months. SDOL delays enrollment of immigrant 17-to-21-year-old ELLs new to SDOL by requiring them to meet with its Coordinator of Counseling and Dropout Prevention, Mr. Jacques Blackman, before they are assigned to a school. JA515; 518-519; 523-524 (Riddick Dep.); 763 (Blackman testifying). These appointments can be delayed for weeks

depending on Blackman's availability. JA1415 (Qasin's Family Case File showing no meeting time available for one month).

Consequently, many older immigrant students experience significant delays between when they complete their applications for enrollment in SDOL and when they are ultimately placed in school (or denied enrollment) by Mr. Blackman. The evidence at trial showed that Van Ni enrolled in SDOL on November 18, 2015, but she did not actually start at Phoenix until December 22, 2015. JA1676; 1696 (Van Ni student records). Sui Hnem went with her sister, Van Ni, to SDOL Enrollment Center in November 2015, but was not allowed to start school until February of 2016. JA1230; 1248 (Sui Hnem student records). Khadidja completed her enrollment paperwork in November 2015, but was not permitted to start school until February 2016. JA965; 981 (student records listing "District Enrollment Date" as 11/18/15 and her "new entry" as a student at Phoenix on 2/17/16). It took Qasin's refugee resettlement worker nearly three months of trying to enroll him in school before SDOL finally agreed to place him at Phoenix in late January 2016. JA1304; 1324 (student records). A resettlement caseworker testified that similar enrollment delays for older immigrant ELLs at SDOL have been a problem since 2010. JA535-536 (Mastropietro testifying).[5]

[5]SDOL witnesses admitted that these enrollment dates trigger the flow of funds to SDOL from the state and federal government. Consequently, SDOL is

(continued...)

SDOL also often outright denies enrollment to older immigrant students. It initially denied enrollment to four Plaintiff Students, all of whom were under age 21 and legally entitled to attend school. SDOL officials stated that then-19-year-old Alembe Dunia was denied admission because, in light of his limited prior schooling and age, the SDOL officials did not believe he could graduate high school by age 21. JA60; 81-82 (Complaint); 114; 126 (Answer); 617-618 (Alembe testifying). SDOL officials initially denied enrollment to Qasin based on SDOL administrators' subjective impression that he was not sufficiently motivated and their speculation that he would rather get a job. *See* JA727 (Hilt testifying that, "He was not sitting at the table with us and interacting" and seemed "disinterested"); *see also* JA595 (Chesson testifying); 764-765 (Blackman testifying). Instead of enrolling Qasin in school, as was his request, Mr. Blackman steered him to private ESL classes at the Literacy Council, a local non-profit agency, GED programs, and Job Corps. *See*, *e.g.*, JA456 (Brown testifying that Blackman recommended Job Corps or Literacy Council); 576 (Qasin testifying that he was referred to the Literacy Council by Mr. Blackman). SDOL eventually

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(continued...)

reporting students as enrolled and generating benefits from that representation before these students ever set foot in an SDOL classroom. JA 741 (Rau testifying); JA 728 (Hilt testifying).

agreed to enroll Qasin in school only because of pressure by his refugee resettlement workers. JA450-463 (Brown Dep.); 594-596 (Chesson testifying).

SDOL also refused to enroll Sui Hnem based on her age. JA538 (Mastropietro testifying). She was eventually admitted after her case worker advocated on her behalf, but her enrollment took two months longer than that of her younger sister. JA562 (Sui Hnem testifying). SDOL officials also refused to enroll Khadidja, explaining that she was too old to go to school. JA570 (Khadidja testifying). Only after persistent advocacy by her case workers did SDOL enroll Khadidja, two months after her younger sister started at McCaskey. JA570 (Khadidja testifying); 730 (Hilt admitting that Khadidja was enrolled in Phoenix only as a result of advocacy by her case worker).

Expert Testimony

Plaintiffs' expert witness, Dr. Helaine Marshall, is an Associate Professor of Education, and the Director of Language Education Programs, at Long Island University. JA640-641 (Marshall testifying); 1559 (Marshall CV). Dr. Marshall has more than thirty years of professional experience in Teaching English to Speakers of Other Languages, or TESOL and her sub-specialty is teaching ESL to SLIFE. JA641; 650-651 (Marshall testifying). She has published scholarly books and peer-reviewed articles on the subject. JA1560-1562 (Marshall CV). She has also consulted with the states of New York and Massachusetts, and various

individual schools and districts, on how to teach ESL for SLIFE. JA643-644 (Marshall testifying); 1560; 1567-1568 (Marshall CV). After extensive review of her experience and with no objection from SDOL, the Court accepted Dr. Marshall as an expert under Federal Rule of Evidence 702 in the fields of TESOL, ESL programming, and meeting the needs of SLIFE. JA650.

Dr. Marshall based her opinions on a wide range of SDOL's own recently-created documents, as well as multiple interviews with Plaintiff Students, parents, refugee caseworkers, and a former Phoenix teacher, Ms. Rivera. *See* JA654-657; 672-673 (Marshall testifying); 1572 (Information Considered in Marshall Report).

Dr. Marshall opined that the Phoenix program was not based on sound educational theory and, even if it was, it was not implemented in a way likely to succeed in assisting newly-arrived ELLs and SLIFE in overcoming language barriers. JA656; 671-672. She also testified that there was no evidence that SDOL had evaluated the efficacy of the Phoenix program, and that, in fact, all evidence suggested Phoenix was not helping SLIFE ELLs overcome their language barriers. JA676-77; 681-682; 684-685.

Dr. Marshall's testimony was unrebutted by any other expert.

Why the District Refuses to Admit Older Immigrant ELLs to McCaskey

SDOL's resistance to placing Plaintiff Students at McCaskey appears to be rooted in its desire to keep graduation rates at McCaskey high enough to avoid

state monitoring. JA736; 744-746 (Rau testifying); 836 (Abrom testifying). Dr. Rau testified she did not want SDOL to be known as a "dropout factory." JA745. She explained that if a student ages out of school without graduating, that will count as a "drop out" and affect SDOL's graduation rates. JA508 (Rau Dep); 743 (Rau testifying). However, if a student is never enrolled (such as Alembe), that will not affect the District's graduation rates. JA744 (Rau testifying).

SUMMARY OF THE ARGUMENT

The District Court's August 26, 2016, Order and Memorandum Opinion, granting in part Plaintiffs' Motion for Preliminary Injunction, were based on evidence adduced during a five-day evidentiary hearing on Plaintiff Students' Motion for Preliminary Injunction, which included the introduction of dozens of documents and testimony from eighteen witnesses. The only issue in this appeal is whether the District Court abused its discretion in issuing the injunction. The record below, which includes the unrebutted testimony of Plaintiffs' expert, Dr. Helaine Marshall, and the admissions of SDOL's own witnesses, amply support the injunction.

SDOL acknowledges that the District Court applied the right legal standards for both the EEOA and state law claims. SDOL's arguments on the Court's adjudication of the merits and weighing of the relative harm to the parties and public interest essentially involve disagreement with the deference and weight the

District Court accorded to particular witnesses and documents in making its findings of fact. SDOL's arguments are peppered with claims that the District Court "erroneously disregarded" testimony, "overlooked" circumstances, "clearly erroneously viewed facts of record," credited testimony "not entitled to the weight placed on it", "closed its eyes to the testimony," and "credit[ed] contradictory testimony." Its appeal is focused on re-litigating the facts and challenging credibility determinations, ignoring that the District Court's fact-finding is entitled to substantial deference under the "clear error" standard.

Under any standard of review, the District Court's decision is sound. The Court's conclusion that SDOL failed to take appropriate action to overcome language barriers by placing students at Phoenix, in violation of the EEOA, is based on sound evidence. In reaching this conclusion, the District Court relied on: (1) unrebutted expert testimony that Phoenix's accelerated credit-recovery model and one-size-fits all English language program is not informed by an educational theory recognized as sound by any experts or by a legitimate experimental strategy, and, in fact, is contraindicated for ELL students such as Plaintiff Students; (2) the testimony of former teachers, including Phoenix's lead ESL teacher who testified that acceleration does not work for these students; (3) the testimony of the Plaintiff Students themselves (through interpreters) who explained that they could not understand the lessons in core subject classes and were not learning; and (4)

SDOL's own documents and witness testimony. The District Court's conclusion that SDOL violated the EEOA for the additional reason that Phoenix's program does not produce results indicating that language barriers are actually being overcome is likewise well-grounded in the unrebutted testimony of Dr. Marshall and admissions by SDOL officials.

The District Court's conclusion that SDOL violated state law when it failed to timely enroll Plaintiff Students is also supported by record evidence. The District Court did not commit "clear error" when it relied on evidence showing that none of Plaintiff Students were enrolled within the time frame mandated by Pennsylvania law.

SDOL's only argument purporting to identify a legal error is its contention that the District Court's decision usurps the "discretionary exercise of the school board's power." Appellant Br. at 55. SDOL asserts some variation of this argument with respect to every element of the injunction standard. The argument is fatally flawed, however, because no government agency has the authority or discretion to violate federal and state laws. In the District Court's words, "the law is clear: eligible students must be timely enrolled, and efforts to overcome language barriers must be sound and effective." JA23. Enforcing clear law is not only within the District Court's discretion, it is obligatory and its core judicial function.

ARGUMENT

I. STANDARD OF REVIEW

As stated, the District Court's legal conclusions are reviewed *de novo*, findings of fact are reviewed only for clear error, and the ultimate decision to grant or deny the preliminary injunction is reviewed for an abuse of discretion. *See Maldonado,* 157 F.3d at 183. In determining whether to issue a preliminary injunction, the court must consider: (1) the likelihood that the moving party will succeed on the merits; (2) the extent to which the moving party will suffer irreparable harm absent injunctive relief; (3) the extent to which the non-moving party will suffer irreparable harm if the injunction is issued; and (4) the public interest. *See, e.g.*, *Liberty Lincoln-Mercury Inc. v. Ford Motor Co.*, 562 F.3d 553, 556 (3d Cir. 2009).

II. THE DISTRICT COURT PROPERLY CONCLUDED PLAINTIFF STUDENTS WERE ENTITLED TO A PRELIMINARY INJUNCTION ON THE BASIS OF THEIR EEOA CLAIM.

SDOL concedes that the District Court applied the appropriate legal standard to plaintiffs' EEOA claim. Appellant Br. at 38. 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). Rather, plaintiffs need only show: "(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 SDOL agrees that *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), sets forth the test for assessing whether programs that serve LEP students illegally discriminate in violation of the EEOA. Appellant Br. at 39. *See also C.G.*, 888 F. Supp. 2d at 575 (applying *Castaneda* to determine whether language program constitutes "appropriate action" under the EEOA); *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1017-18 (N.D. Cal. 1998) (same). Under *Castaneda*, 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." 648 F.2d at 1009-10. The test is

conjunctive; a school district must satisfy all three requirements in order to comply with the EEOA.[6] The District Court acknowledged it should not attempt to weigh "the relative merits of sound but competing bodies of expert educational opinion." JA20 (quoting *Castaneda*, 648 F.2d at 1009). Rather, a court's responsibility is to ascertain whether SDOL is pursuing a language program informed by some sound educational theory. *See id.*

The District Court correctly applied *Castaneda* in assessing the program provided to immigrant ELLs at Phoenix, and correctly concluded that the program provided through Phoenix's accelerated educational model did not satisfy the first and third prongs of the *Castenada* test. JA19-21. While SDOL claims that the District Court somehow "misapplied" the test for "appropriate action," Appellant Br. at 39, SDOL's argument is actually one long quibble with the Court's fact-finding. That the District Court rejected some of the cherry-picked representations of SDOL witnesses in light of those witnesses' own contradictory testimony on cross-examination and, instead, chose to credit the consistent testimony of Plaintiff

[6] *See*, *e.g.*, *Castaneda*, 648 F.2d at 1010 ("If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails . . . to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.").

Students, Phoenix's ESL teacher, and the unrebutted testimony of Dr. Marshall, is not clear error warranting reversal.

A. The Program at Phoenix Is Not Informed By a Sound Educational Theory.

In concluding that "the ESL program at Phoenix does not sufficiently overcome the plaintiffs' language barriers," JA20, the District Court properly focused its attention on the educational theory employed at Phoenix, which is *Castaneda*'s first prong. The Court observed that:

> When a student with no ability to speak or understand English, such as the plaintiffs, is placed in accelerated classes, the student will cover material twice as fast as a normal school, but that material is also taught in a language that student does not understand. On its face, this practice appears to be counterintuitive; expert testimony confirmed that the practice was unsound.

JA13. The District Court found that Plaintiff Students' unrebutted expert, Dr. Marshall, "testified convincingly that the 'accelerated recovery program is totally inappropriate for [the plaintiffs]' and that there is 'absolutely no [contrary research'" on this point. JA20. Additionally, the District Court looked to the Plaintiff Students' testimony: "a common complaint is that they did not understand a vast majority of content taught in the non-ESL classes." JA15. The District Court determined from all of the evidence presented that the "Phoenix model of accelerated learning presents different language barriers than a traditional educational program, and is particularly imposing for students who cannot yet understand the language in which the courses are taught." *Id*.

The Court's reasoning and conclusion on *Castaneda's* first prong are amply supported by the record.

Dr. Marshall's unrebutted expert opinion was that the Phoenix program is not informed by a sound educational theory and, in fact, the accelerated program is contraindicated for SLIFE. JA671. Dr. Marshall explained that students cannot learn in an accelerated model because LEP students that are behind academically need a "runway" in order to reach a threshold of English proficiency and to enable them to access core subject content. JA656. Rather, she testified, SLIFE will succeed when educators "go more slowly and build, build the language, build the literacy and reach [a] certain threshold, and then also fill in the gaps." JA656.

As Dr. Marshall explained, no expert in the field recommends acceleration for the SLIFE population of ELLs. JA658. Rather, the field "uniformly" supports the opposite of Phoenix's accelerated program: permitting students more time to learn the material, not going "double time." JA656. Multiple studies "uniformly" found that the key for SLIFE is to allow sufficient time and to present material in different ways in order to accommodate weak language skills and gaps in education. JA656; 658. Dr. Marshall testified that there is no research to the contrary. JA658. And she observed that the accelerated model has the effect of "holding . . . back" ELLs who are unable to understand what is happening in their content classes and are thus not actually learning the material. JA669.

Dr. Marshall's opinion and the Court's conclusion are buttressed by the Plaintiff Students' testimony that they did not understand much, if anything, in their content classes and were nonetheless promoted quickly to higher grades. *See supra* Counter-Statement of Facts, "Effect of Phoenix Environment on Plaintiff Students." Further, the only two Phoenix teachers to testify at trial effectively endorsed Dr. Marshall's opinion by testifying that they observed that the material was taught too fast for ELL students to master and that the program was otherwise not conducive to beginner-level ELLs. JA632-633; 637; 639-640 (Rivera testifying); 837-839; 840 (Ortiz testifying). Ms. Ortiz, who spent six years as Phoenix's lead ESL teacher, testified that the students would have benefitted more from an "extended," "slowed down" program that would allow for "more assistance" and "more time to learn things" instead of an accelerated curriculum. JA841. She further testified that Phoenix ELLs' language acquisition was constrained by the fact that ELLs had only one ESL teacher and no classroom aides. JA841.

Dr. Marshall explained that "Entering" level ELL students like Plaintiff Students need to receive "sheltered instruction" in order to overcome language barriers. JA661-664. Dr. Marshall testified that in contrast to Phoenix, McCaskey's International School "conforms exactly" to what is known as a newcomer program and ensures that "Entering" level ELLs receive "intensive

English and content material from day one, but with language [instruction] incorporated into the content." JA662. She explained that a newcomer school is "intended for English learners, immigrants, refugees of whatever age at the secondary level." JA662. Dr. Marshall opined that placement at the International School would have benefited Plaintiff Students, who precisely fit the type of student for whom such newcomer programs are designed. JA667; JA669. Dr. Marshall testified that the International School program would even have been beneficial for a 20-year-old student like Alembe Dunia. Although Alembe was too old to accrue enough credits to earn a high school diploma before age 21 because of his limited formal education, Dr. Marshall testified that he could benefit from the International School's specially-designed one-year program that provides a "window" into math, science, and social studies, as well as intensive English language instruction. JA668.

In contrast, Dr. Marshall testified that the purported "structured immersion" model used at Phoenix is an unsound method of educating SLIFE ELLs. JA666.[7]

[7]SDOL appears to attempt to confuse the record by referring to the non-existent and oxymoronic term "sheltered immersion." *See* Appellant Br. at 22. Ms. Hilt admitted that there was no such thing as sheltered English immersion. JA 722. Unsurprisingly, SDOL offered no evidence that this non-existent theory has ever been adopted by any expert in the field nor does it offer any explanation as to how students can be "sheltered" if they are "immersed" with native speakers. As described above, SDOL's own witnesses and documents admit that Phoenix does not offer sheltered instruction. Further, contrary to its assertion that Dr. Marshall

(continued...)

Dr. Marshall stressed that it is "definitely not appropriate" to have newcomer SLIFE ELLs in a structured immersion program taking classes with English proficient students because of their unique needs. JA666. In addition, Dr. Marshall explained that English learners in this model should be supported by a teacher that is certified in ESL instruction, and with ESL trained staff offering formalized and consistent "push in" or "pull out" modifications and accommodations.[8] JA665. Dr. Marshall's assessment of the Phoenix program, however, revealed that there were very few accommodations made and ESL teachers did not "push in" to support ELLs in their other classes. JA666. This was confirmed by Phoenix's ESL teacher. JA839; 843 (Ortiz testifying). Dr. Marshall

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(continued...)

contradicted her testimony, Appellant Br. at 44, Dr. Marshall never recommended that "sheltered immersion" be used for entering ELL students; rather, she testified that immersion is completely inappropriate for these students and they need sheltered instruction. J.A. 661; 663; 666.

[8]"Push in" instruction refers to the ESL teacher attending a mainstream content class to assist ELLs while the lesson is being presented by the content teacher to the entire class. This requires a formalized structure with the ESL teacher pushing into the class on a regular basis and ideally staying for the entire period, to assist with the full lesson. JA665 (Marshall testifying). "Pull-out" instruction at the high school level means removing ELL students out of the mainstream content classes to work in a structured setting with an ESL certified teacher to complete the material that the mainstream content teacher is covering in that particular lesson and then returning that ELL student to the mainstream content classroom. This requires communication and coordination with a content teacher to modify the content lesson for an ELL student by "slowing it down to their pace." JA665 (Marshall testifying).

also testified that the ratio of ESL certified teachers to ELLs at Phoenix was insufficient to support ELLs in an immersion model. JA673.

Dr. Marshall also observed that other aspects of Phoenix's environment undermined ELLs' ability to access the curriculum. She opined that Phoenix's policy and practice of not assigning homework is "slowing [ESL students] down" and "retarding their progress," and is thus contraindicated for students who need "maximum exposure" to their new language so that they can "revisit what they've learned" at home. JA675.In addition, she observed that the restrictive security environment and culture of peer confrontation at Phoenix "encouraged [SLIFE students] to feel marginalized," which negatively affects their ability to learn. JA674.

SDOL introduced neither expert testimony nor any contrary research to dispute Dr. Marshall's opinions. Moreover, the testimony of the District's own witnesses supports Dr. Marshall's conclusions. Although, on appeal, SDOL devotes much energy to attacking Dr. Marshall's opinion, its ESL Coordinator, Amber Hilt, in fact testified that she reads and relies upon ESL experts such as Dr. Marshall, particularly in connection with issues pertaining to SLIFE ELLs such as Plaintiff Students. JA721. In addition, notwithstanding SDOL's representations on appeal that the language program at Phoenix is similar to the International School, SDOL's own witnesses admitted that Phoenix does not offer sheltered

instruction but instead mixes different levels of English speakers and native English speakers. JA723 (Hilt testifying); 800 (Heisey testifying).

Ms. Hilt agreed with many of the observations supporting Dr. Marshall's conclusion that Phoenix's accelerated model impedes ELLs' ability to learn. She acknowledged that it is difficult for "Entering" ELLs to access core content if teaching is presented at a pace appropriate for more advanced English speakers or native speakers, as is done at Phoenix. JA722. She also testified that she never recommended that "Entering" ELLs be taught at an accelerated pace as is done at Phoenix. JA729.

Ms. Hilt likewise agreed with many of Dr. Marshall's observations regarding the efficacy of the International School program at McCaskey. Ms. Hilt acknowledged that the International School at McCaskey was developed to meet the needs of new ELLs such as Plaintiff Students. JA723.[9] Ms. Hilt testified that the International School is good at progressing SLIFE and uses nationally recognized best practices for ELLs, including providing sheltered instruction in core subject classes for ELLs at lower proficiency levels. JA722-724. Like Dr.

[9]Indeed, the District touted its International School program in a grant application to the Pennsylvania Department of Education and represented that "[w]hen 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." JA1179.

Marshall, Ms. Hilt recognized that sheltered classes are better for entering ELLs because it is difficult for them to access core content if the teaching pace is calibrated to more advanced or native English speakers. JA722.

On appeal, SDOL ignores the substantial, clear evidence supporting the District Court's ruling. Instead, SDOL points to the fact that its witnesses—none of whom was offered or accepted as an expert witness under Federal Rule of Evidence 702 and all of whom are employed by SDOL—testified that Phoenix's program for ELLs was an appropriate educational model, notwithstanding its admitted limitations. Appellant Br. at 40-43. Their opinions, which the District Court considered and rejected, do not render the District Court's contrary conclusion "clear error."

In sum, the District Court's determination that Phoenix's model of accelerated learning "presents different language barriers than a traditional education program, and is particularly imposing for students who cannot yet understand the language in which the courses are taught" was fully supported by the record. JA20.

B. The Record Does Not Show that Language Barriers are Actually Being Overcome at Phoenix.

The trial record also amply supports the District Court's conclusion that SDOL failed to satisfy the third prong of the *Castenada* test because it failed to even evaluate whether the accelerated curriculum and English language program at

Phoenix are working to overcome ELLs' language barriers. The District Court relied on SDOL's admission that it has never evaluated the program, citing Ms. Hilt's testimony that "there is no data at this level that would allow us to determine whether the educational program, the ESL delivered to these students in the Phoenix accelerated model is working or not." JA20-21. SDOL's Superintendent admitted that they have not evaluated, and have no system in place to evaluate, whether ELLs are learning at Phoenix. JA 734; 746-749.

In fact, SDOL could have disaggregated its Phoenix ACCESS test score data from that of District scores as a whole, which might have allowed it to evaluate the effectiveness of Phoenix's program—but SDOL elected not to do this. JA682 (Marshall testifying); 734 (Hilt testifying). Significantly, while Superintendent Rau testified that she had a goal of evaluating the International School, she had no similar plans to evaluate Phoenix's ESL program. JA746-747.

All of the record evidence indicates that language barriers confronting ELLs at Phoenix were, in fact, *not* being overcome. After personally interviewing each Plaintiff Student and reviewing their education records, Dr. Marshall testified that students were promoted and graduated without mastering the English language or curriculum, and that the high grades reported on their transcripts were not a reflection of such mastery. JA676. Dr. Marshall noted that Plaintiff Khadidja Issa, for example, was ranked first in her class, but could not read or understand the text

that she copied onto her worksheets. JA676-677; *see also* JA995; 1015-1023 (student records). As Dr. Marshall testified, the Plaintiff Students' failure to advance to higher levels of English proficiency and inability to understand what was happening in their classes indicate that "Phoenix is not overcoming the language barriers for this population." JA681-682.

Based on her own extensive efforts to disaggregate SDOL's ACCESS score data, Dr. Marshall also offered unrebutted testimony that if SDOL had disaggregated its data, it would have learned that Phoenix's performance on literacy measures—the core indicator of whether language barriers were being overcome—was far worse than McCaskey's. JA684-85.

In support of the purported "success" of the Phoenix program for ELL students, SDOL touts the "graduation" of Anyemu Dunia. Appellant Br. at 45. As the District Court correctly observed during Anyemu's testimony, Anyemu required a translator to testify in court and had "readily apparent difficulties conversing in English." JA15. Anyemu's records show that he completed all of high school in under 16 months at Phoenix (spending approximately a week in twelfth grade), despite arriving as an "Entering" Level 1 ELL with little-to-no ability to speak or understand English. JA1329; 1334 (student records). The District Court correctly determined that rushing students such as Anyemu through an accelerated program they do not understand in order to provide them with a

diploma and disregarding their need for significant language and educational supports does not constitute appropriate action under the EEOA. JA17.

In sum, the District Court acted well within its discretion in determining that SDOL's actions violated the first and third prongs of the *Castaneda* test, and that Plaintiff Students were likely to prevail on their EEOA claim.

III. THE DISTRICT COURT PROPERLY CONCLUDED PLAINTIFF STUDENTS WERE ENTITLED TO A PRELIMINARY INJUNCTION ON THE BASIS OF THEIR STATE LAW CLAIMS.

The District Court did not commit "clear error" in concluding that SDOL violated Pennsylvania law by failing to enroll Alembe Dunia, and failing to promptly enroll any of the other five Plaintiff Students within five days.

The right of older immigrant students to be educated in the district where they live is clear and unequivocal. Under Pennsylvania law, every child who has not graduated from high school has a right to attend the public schools in his or her district until the end of the school year in which he or she turns 21. 24 Pa. Stat. § 13-1301; 22 Pa. Code § 11.12 (describing school age); *see also* 22 Pa. Code § 12.1(a) ("All persons residing in this Commonwealth between the ages of 6 and 21 years are entitled to a free and full education in the Commonwealth's public schools."). Additionally, Pennsylvania regulations provide that a school district shall "normally enroll a child the next business day, but no later than 5 days after application." 22 Pa. Code § 11.11(b). Pennsylvania regulations 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); *see generally Plyler v. Doe*, 457 U.S. 202 (1982). SDOL's own policies reflect these requirements. *See, e.g.*, JA886 (definition of school age); JA887 (timeline for enrollment).

The record is clear that SDOL failed to meet its obligations to enroll Plaintiff Students in accordance with Pennsylvania law.

When the Dunia brothers attempted to enroll in the District in late 2014, Alembe had just turned 19 years old. JA1396 (student records). The District admitted that, because of Alembe's age and limited prior schooling in refugee camps, it denied Alembe admission because it did not believe he could graduate by age 21. JA60; 81-82 (Complaint); JA114; JA126 (Answer). This fact was confirmed by Alembe's own testimony. JA617-618 ("I was told I was too old, I could not study.").

SDOL contends that Alembe "was not enrolled because he did not follow [up] with" Mr. Blackman for placement. Appellant Br. at 37. However, the District Court properly refused to credit this explanation, observing that Anyemu, Alembe's younger brother, also purportedly missed the same meeting with Mr. Blackman, but was still placed at Phoenix. JA18; *see also* JA1329 (Anyemu

student records); JA1398 (Alembe student records).[10] Moreover, the testimony regarding Alembe's experience of being turned away by the SDOL was consistent with the experiences of Qasin, Khadidja, and Sui Hnem, who were initially refused enrollment. JA455 (Brown Dep.); JA1416 (Qasin's Family Case File); JA570 (Khadidja testifying); JA538 (Mastropietro testifying); JA562 (Sui Hnem testifying).

At any rate, it is undisputed that Alembe submitted the proper enrollment documents. JA616-617. He thus should have been enrolled in SDOL, like his brother, but wasn't, which the District Court correctly concluded was a violation of state law.

The District Court also properly determined that SDOL failed to meet its obligations under Pennsylvania law by not timely enrolling the other Plaintiff Students. JA18. SDOL argues that two of Plaintiff Students' enrollments were properly delayed because they did not have proper immunizations. But none of

[10]SDOL also argues that the reason it permitted Anyemu to enroll, but not Alembe, was because Alembe had a knee injury that prevented him from attending school. Appellant Br. at 37. Notably, this argument relies on a mischaracterization of Alembe's testimony. Alembe testified that, *at the time of trial*, he was not working or participating in educational programming "since his knee was bothering" him. JA618. He never testified that he did not want to attend high school for this reason. Nor is there any record evidence that SDOL was aware of this injury or that the injury caused SDOL's differential treatment of Alembe and Anyemu. At any rate, the District has identified no authority for the notion that a student's knee injury is a valid reason to deny that student enrollment.

SDOL's record citations support this assertion. To the contrary, the record evidence shows that Khadidja and Qasin presented the requisite immunization documentation to SDOL well before they were placed at Phoenix. Indeed, SDOL's records show that it formally enrolled Khadidja for purposes of reporting to the State on November 18, 2015, having received her immunizations in mid-November 2015. JA972-973 (Immunization records); JA981 (Student Enrollment Form). Yet, as of January 21, 2016, Khadidja remained out of school. The record indicates that her resettlement caseworker, Bilal Al Tememi, had to email Ms. Hilt to convince SDOL to permit Khadidja to attend, and that only after persistent advocacy on the part of her caseworkers was Khadidja permitted to attend classes on February 17, 2016. JA1024-1025 (January 2016 email exchange); JA965 (Entry/Withdrawal List).

Similarly, SDOL's own records show that Qasin was reported as enrolled in SDOL as of November 2, 2015, and the District received confirmation that Qasin had the requisite immunizations no later than November 13, 2015. JA1304-1305 (student records); 1415 (Qasin's Family Case File indicating clinic confirmed Qasin received vaccinations and records were provided to SDOL). Despite satisfying all of the prerequisites for enrollment under Pennsylvania law, SDOL did not permit Qasin to attend classes. His caseworker, Megan Brown, advocated for him to attend classes, but was informed that Qasin had to meet with Mr.

Blackman first, and the District did not schedule that meeting until December 10, 2015. JA1415 (Qasin's Family Case File). The undisputed evidence reflects that SDOL did not permit Qasin to begin school until January 20, 2016. JA1324 (Entry/Withdrawal List).

Notably, SDOL's brief is silent as to the enrollment delays experienced by the other three Plaintiff Students. According to Van Ni's student records, SDOL formally enrolled her on November 18, 2015, but did not permit her to start at Phoenix until five weeks later on December 22, 2015. JA1679; 1696. SDOL delayed Van Ni's older sister Sui Hnem Sung's placement even longer. SDOL first enrolled her on November 18, 2015, but did not place her at Phoenix until February 26, 2016. JA1230; 1248 (student records). Finally, Anyemu Dunia enrolled in SDOL in December 2014, but he was not permitted to attend classes at Phoenix until February 9, 2015. JA82 (Complaint); 126 (Answer); JA1329 (student records).

As this record evidence clearly shows, SDOL failed to enroll these children within five days of receipt of enrollment documents as required by Pennsylvania law. Accordingly, the District Court correctly concluded that Plaintiff Students would likely succeed on their state law claims.

IV. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE BALANCE OF EQUITIES WEIGHED IN FAVOR OF GRANTING THE INJUNCTION.

A. SDOL's Practice of Depriving Plaintiff Students of a Meaningful Education Through Denial or Delays in Enrollment and Placement at Phoenix Causes Them Irreparable Harm.

The District Court correctly held that SDOL denied Plaintiff Students "a meaningful education through denial or delays in enrollment, and by placement at a school that fails to overcome their language barriers in violation of the EEOA" and had caused Plaintiff Students irreparable harm. JA37. The District Court applied the proper standard in noting that irreparable harm must not be redressible by a legal or equitable remedy after trial, and that "deprivation of a meaningful education in an appropriate manner at the appropriate time" met that test. JA21; *see also Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 122 (1st Cir. 2003) (irreparable injury found where student "was destined to spend a silent, fruitless year in school with only the most remote hopes of being educated"); *Hispanic Interest Coalition v. Governor of Ala*., 691 F.3d 1236, 1239 (11th Cir. 2012) (interference with the educational rights of undocumented children is not a harm that can be compensated by monetary damages); *Plyler*, 457 U.S. at 221 (describing education as essential to maintaining "the fabric of our society" and noting "the lasting impact of its deprivation on the life of the child."). Indeed, other district courts in this Circuit have found that a school district's denial of an

education or educational benefit constitutes irreparable harm. *See, e.g., L.J. v. Audubon Bd. of Educ.*, No. 06-5350, 2007 U.S. Dist. LEXIS 81527, at *25-26 (D.N.J. Nov. 5, 2007) (denial of special education services cannot be redressed post-trial due to the rate at which a child develops and changes, causing harm to a child's educational development); *L.R. v. Steelton-Highspire Sch. Dist.*, No. 10-cv-00468, 2010 U.S. Dist. LEXIS 34254, at *10-11 (M.D. Pa. Apr. 7, 2010) (finding risk of irreparable harm if student were not immediately re-enrolled in the District where student had already missed over five months of school).[11]

The harm suffered by Plaintiff Students was all the more irreparable here because they are "overage," and thus have only a limited period of eligibility remaining to access a free public education.[12] Moreover, Plaintiff Students are

[11]In accordance with the District Court's Order, several of the Plaintiffs are now enrolled in McCaskey, where they are flourishing. To interrupt their education by overturning the preliminary injunction now, as SDOL urges in its brief and in its Motion for a Stay (which this Court denied), and returning them to Phoenix for the duration of the District Court litigation, only to be potentially transferred yet again, would certainly qualify as irreparable harm. *See, e.g., Brewer v. West Irondequoit Cent. Sch. Dist*., 212 F.3d 738, 745 (2d Cir. 2000) (finding irreparable harm where student was "told that she can attend a certain school and then that offer is later withdrawn").

[12]SDOL alleges in its brief, without any support, that "overage students are more likely to graduate and obtain a high school diploma at Phoenix than McCaskey." Appellant Br. at 53. Given SDOL's practice of awarding credits for "seat time" (simply being present in class) and speeding students through Phoenix without regard to whether they are actually learning anything, this assertion is not surprising. JA 544 (Mastropietro testifying); JA 639-640 (Rivera testifying)). At

(continued...)

refugees who need and desire to learn English and cultural skills in order to acclimate to their new home. The District Court did not abuse its discretion in concluding that Plaintiff Students were likely to suffer irreparable harm absent an injunction.

B. SDOL Is Not Irreparably Harmed by Providing Plaintiff Students with the Educational Opportunities Federal and State Law Require.

Balancing the equities involved, the District Court correctly concluded that any purported harm suffered by SDOL in offering Plaintiff Students enrollment in the preexisting International School, a program which by SDOL's admission was designed for them, was outweighed by the indisputable, serious, and ongoing harm to Plaintiff Students caused by their exclusion from equal educational opportunities to which they are entitled under federal and state law. *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). Plaintiff Students' placement at McCaskey could not possibly result in "greater harm" to the SDOL than the serious, significant,

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(continued...)

any rate, the mere fact that SDOL graduates students does not necessarily mean that SDOL is offering an appropriate education as the EEOA requires. Indeed, as the District Court recognized, Plaintiff Students were being promoted through Phoenix even though "they did not understand the vast majority of content taught in the non-ESL classes." JA 15.

ongoing harm experienced by Plaintiff Students denied any education, or a meaningful education and equal educational opportunities.

SDOL's arguments that the balance of harm weighs in their favor because it will suffer irreparable harm are baseless. SDOL's concern that International School teachers will be overloaded and overtaxed by the purported influx of new students fails both legally and factually. *See* Appellant Br. at 55. Claims of administrative inconvenience and expense do not constitute irreparable harm. *See, e.g., Abington Heights Sch. Dist. v. A.C.*, No. 3:14-CV-00368, 2014 U.S. Dist. LEXIS 61487, at *40 (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"); *Borough of Palmyra v. Hurley*, 2 F. Supp. 2d 637, 644 (D.N.J. 1998) ("In this case, the Board's only asserted loss is financial . . . . To the extent the Board's own delay has compounded the harm the Board will suffer, the harm is self-inflicted and cannot be considered irreparable."). Further, this assertion is not supported by SDOL's representations to this Court that there are only eight students currently at McCaskey that are benefiting from the District Court's Order. Appellant's Resp. to Order of Sept. 16, 2016. Moreover, as the District Court recognized, SDOL had "designed a plan so that older students, like the plaintiffs, receive the benefit of the International School before entering the general school population," yet that

program was not offered to Plaintiff Students. JA38. Pursuant to the preliminary injunction properly issued by the District Court "all that is required is that [the District] do what it said it would do" and offer these services to the Plaintiffs, not in months' time, but in time for the 2016-2017 school year. *Id*.

SDOL also argues, without any evidence or support, that there is a "risk of harm to both upcoming middle school 13 and 14-year-old students who must share an ESL cohort with overage students." Appellant Br. at 55. Such an argument is "farfetched and more importantly bears no relationship to the facts of the case." *L.R.*, 2010 U.S. Dist. LEXIS 34254, at *12 (rejecting argument that enforcing injunction would encourage homeless students to "abandon the District and yet insist on being educated"). It also ignores the fact that younger middle school children attend Phoenix, *see* JA1048 (Phoenix Student Handbook), and that Pennsylvania law provides children with the right to attend school until the end of the school year when they turn twenty-one if they have not earned a high school diploma before that time.[13]

Moreover, an order to comply with federal and state law quite simply cannot constitute irreparable harm. *See*, *e.g., John T. ex rel. Paul T.*, 2000 U.S. Dist.

[13]SDOL additionally argues that it will suffer irreparable harm by the District Court's "usurpation" of its decision-making authority. This argument is addressed separately. *See infra* Section V.

LEXIS 6169 at *26 ("Providing statutorily granted special services to a child does not harm DCIU; doing so is its function under state and federal law."). Any "injury" suffered by SDOL due to the correction of its failure to comply with the law is of its own doing. *See Novartis Consumer Health, Inc., v. Johnson & Johnson*, 290 F.3d 578, 596 (3d Cir. 2002) (holding that "the injury a defendant might suffer if an injunction were imposed may be discounted by the fact that the defendant brought the injury upon itself.").

The District Court did not abuse its discretion in determining that the balance of harms tips in favor of Plaintiff Students. Indeed, in weighing the equities, the court should be "unwilling to gamble with a child's education." *New Jersey*, 872 F. Supp. 2d at 215.

C. The Public Interest Weighs in Favor of the Preliminary Injunction.

In issuing the preliminary injunction, the District Court properly found that the public interest weighed in favor of "ensur[ing] the plaintiffs immediate enrollment in McCaskey," as "[i]t is undeniably in the public interest for providers of public education to comply with the requirements [of federal education law]." JA38 (internal citations omitted). This conclusion was not error. As this Court has held, "[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. & Tel. Co. v. Winback and Conserve, Inc*., 42 F.3d 1421, 1427 n.8 (3d Cir. 1994).

While SDOL now argues that the injunction undermines its authority and therefore is contrary to the public interest, this argument ignores both the significant nature of violation of federal and state protections at issue and the narrow scope of the injunction ruling. *See B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 324 (3d Cir. 2013) (rejecting district's argument that lifting a ban on bracelets would harm the public interest by undermining school's "authority to manage its student population" where ban was an unconstitutional speech restriction and thus "vindicates no public interest").

V. THE DISTRICT COURT DID NOT IMPROPERLY "USURP" SDOL'S DECISION-MAKING AUTHORITY

Many of SDOL's arguments on appeal center on the contention that the District Court's order impermissibly infringed upon its decision-making authority or interfered with its lawful exercise of discretion. While SDOL suggests that the District Court misapplied *Castaneda's* "appropriate action" prong, Appellant Br. at 39, what SDOL in fact argues is that the District Court "subsitut[ed] its policy judgment for the District's," and that it was in effect acting as a "super school board" when it should instead have deferred to the school board's authority to "classify and assign" students "as it may deem best[.]" Appellant Br. at 40 (citing *Zebra v. School Dist. of City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972)); *id.* at 41

(citing 24 Pa. Stat. § 13-1310). SDOL makes similar arguments with respect to the District Court's findings that it would not suffer irreparable harm by the issuance of an injunction and that the public interest favors Plaintiff Students. *See* Appellant Br. at 54 (arguing that SDOL is irreparably harmed because the preliminary injunction "permit[s] the usurpation of decision-making authority of the SDOL Board"); *id.* at 55 (arguing that the public interest was harmed because the court interfered with the "discretionary exercise of a school board's power") .

Indeed, at trial, SDOL witnesses expressed broad concerns about preserving the scope of SDOL's own authority. In response to the District Court's pointed questioning about why SDOL was opposed to giving students similarly situated to Plaintiffs the option of transferring from Phoenix to McCaskey, Superintendent Rau responded, "I think that our biggest—one of our biggest concerns is that the School Code gives the authority to the Board of Directors to place students in a school. And there's a real concern of taking away the authority of a School Board in making those decisions." JA755.

SDOL's arguments overlook the fact that governmental entities and officials, including school boards, may have broad discretion to manage operations, but they have neither the authority nor the discretion to violate federal and state laws.

The District Court's order merely requires SDOL to comply with the law. A school district has no cognizable interest in continuing practices that violate 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*, 386 F.3d 514 (3d Cir. 2004) (citing *American Civil Liberties Union v. Reno*, 217 F.3d 162, 180-81 (3d Cir. 2000)). And district courts unquestionably have the power to enjoin violations of both state and federal law. SDOL has identified no authority for the notion that a federal court's equitable power to remedy a violation of law is constrained by a general grant of discretion to a school board.

With respect to Plaintiff Students' EEOA claim, the Supremacy Clause entirely forecloses SDOL's arguments that the federal requirement that educational agencies take "appropriate action" to overcome language barriers should take a backseat to a school district's exercise of its state law power to "classify and assign" students. The Supremacy Clause means that state and local laws and policies cannot be used to "frustrate application of federal law." *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 224 (3d Cir. 2003). Rather, once the court has found a violation of federal law, "a state law cannot prevent a necessary remedy. Under the Supremacy Clause, the federal remedy prevails: 'To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the

Constitution imposes on them.'" *Perkins v. City of Chicago Heights,* 47 F.3d 212, 216 (7th Cir. 1995) (quoting *Missouri v. Jenkins,* 495 U.S. 33, 57–58 (1990)); *see also United States v. Metropolitan District Commission,* 930 F.2d 132, 136 (1st Cir. 1991) ("Considerations of comity and federalism" do not give a state or municipality "the legal power to violate the law [or] to continue violations that have taken place over a fifteen-year period . . . .").

The question is, thus, not whether the District Court's decision usurped the SDOL's authority, but whether the District Court properly followed and applied the underlying statutes and regulations. SDOL has failed to identify any legal error made by the District Court.

CONCLUSION

As detailed above, the evidence of record clearly shows the District Court did not abuse its discretion in deciding to partially grant Plaintiff Students' motion for preliminary injunction based on its conclusions that Plaintiff Students are likely to prevail on their EEOA and Pennsylvania law claims, that failure to order immediate relief would cause Plaintiff Students to suffer irreparable harm, and that the equities favored Plaintiff Students. None of the District Court's rulings rested on "clearly erroneous" factual findings or errors of law. Accordingly, the District Court's decision should be affirmed.

REQUEST FOR ORAL ARGUMENT

Plaintiff Students request oral argument only to the extent the Court believes it will be helpful to its disposition of this appeal.

Dated: October 19, 2016

Respectfully submitted,

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LOCAL RULE 28.3(D) CERTIFICATION

The undersigned certifies that at least one of the attorneys whose names appear on the foregoing brief, including the undersigned, is a member of the bar of this Court or has filed an application for admission pursuant to 3d Cir. L.A.R. 46.1.

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CERTIFICATE OF COMPLIANCE

I, Kathleen A. Mullen, hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. Appellant P. 32(a)(7)(B) because it contains 12,165 words, excluding the parts of the brief exempted by Fed. R. Appellant P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. Appellant P. 32(a)(5) and the type style requirements of Fed. R. Appellant P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using MS Word in font size 14, Times New Roman.

3. The text of the electronic brief is identical to the text of the paper copies, and Kaspersky 15.0.2.361(f) has been run on the file and no virus has been detected.

Dated: October 19, 2016

s/ Kathleen A. Mullen
KATHLEEN A. MULLEN

CERTIFICATE OF SERVICE

I, Kathleen A. Mullen, declare as follows:

On the 19th day of October, 2016, I filed with the Court an electronic PDF copy of the foregoing Brief of Appellee. Seven (7) copies of the Brief of Appellee were delivered to the Third Circuit Office of the Clerk via Federal Express, Next Day service. The foregoing document was also served via the Court's ECF system and e-mail upon the following counsel of record:

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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Dated: October 19, 2016

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