

the Motion for Class Certification are not incorporated to the extent that they have been amended by the testimony of record beginning August 16 and ending August 22, 2016, and are reflected below.

STANDARD OF REVIEW

Fed. R. Civ. P. 65 provides that the court may issue a preliminary injunction after notice to the adverse party, *F.R.C.P. 65(a)*; *only if* the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained, *F.R.C.P. 65(c)*. Moreover, every order granting an injunction must (a) state the reasons why it issued; (b) state its terms specifically; and (c) describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required. *F.R.C.P. 65(d)*.

To evaluate whether or not a preliminary injunction should issue, the court determines whether or not the movant has demonstrated that: (1) she is likely to suffer irreparable harm in the absence of preliminary relief; (2) the balance of equities tips in her favor; (3) she is likely to succeed on the merits; and (4) an injunction is in the public interest. Miller v. Monroe School District, 131 F.Supp.3d 1107, 1112 (W.D. Wash. 2015), citing, Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20, (2008); accord, Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011), quoting, Winter, supra. "A preliminary injunction is an 'extraordinary and drastic remedy'; it is never awarded as of right." Munaf v. Geren, 553 U.S. 675, 689-690 (1998), quoting, 11A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2948, at 129 (2d ed. 1995). "Though each factor is important, ... the 'sine qua non' of the four-part test is likelihood of success on the merits; if the movant cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle

curiosity. " Sindicato Puertorriqueno de Trabajadores, SEIU Local 1996 v. Fortuno, 699 F.3d 1, 10 (1st Cir. 2012) quoting, New Comm Wireless Servs., Inc. v. SpringCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002).

Here, Plaintiffs and the putative class are young adults, ages 17-21. They reside within the geographical parameters of the District. They are refugees of other countries, who do not speak English, need credits to graduate and have shown that they are eligible and qualified for public school enrollment. Most have been placed at the Phoenix Academy. One of the Plaintiffs, Alembe Dunia, was 20 years old when he presented for enrollment at the District and did not enroll.

Plaintiffs and the putative class members have the burden of demonstrating that they have a substantial likelihood of proving that the Board of School Directors of the School District of Lancaster have unlawfully placed them in the Phoenix Academy, either on account of, or by reason of, their race or national origin. 24 P.S. §13-1310; Title VI, 20 U.S.C. §1703(f).

They further claim that they have been denied equal access to education with their siblings who have been placed at the International School at McCaskey because the educational methodology at Phoenix is allegedly substantially inferior to that at McCaskey and, consequently, it is alleged, Plaintiffs have been deprived of an opportunity to overcome language barriers sufficient to participate meaningfully in the schools' educational programs, both curricular and extra-curricular. (Complaint, pp. 8-9).

While Title VI prohibits discrimination on the basis of national origin, our courts have held that language and national origin are not interchangeable. K.A.B., et al. v. Downingtown Area School District, 2013 U.S Dist. LEXIS 99321, at *30-31 (E.D. Pa. 2013). A policy that treats students with limited English proficiency differently than other students in the district does

not facially discriminate on the basis of national origin. *Id.*, citing, Mumin v. Abraham Lincoln High Sch., 618 F.3d 789 (8th Cir. 2010); accord, Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir. 1983) (stating in the equal protection context, that "[a] classification [that] is implicit made...on the basis of language, i.e., English-speaking versus non-English-speaking individuals, [is] not on the basis of race, religion, or national origin", citing, Frontera v. Sindell, 522 F.2d 1215, 1219-1220 (6th Cir. 1975) and Carmona v. Sheffield, 475 F.2d 738, 739 (9th Cir. 1973). Consequently, Plaintiffs' complaint that "language barriers are tantamount to their exclusion from McCaskey" and that such exclusion is based upon their national origin is not only factually inaccurate, but also legally incorrect. As such, their claims for violations of the equal protection clause of the Fourteenth Amendment, the EEOA, Title VI, 42 U.S.C. 2000d and 24 P.S. §13-1310, must fail.

Likewise, because Plaintiffs' have alleged a violation of the Fourteenth Amendment procedural due process clause, based upon the absence of an appeal process from the school board's exercise of its discretionary right to place students where the board deems the student is best placed for education within the District, that claim, too, must fail. The Board's authority and discretion is founded within the black letter law of the Pa. School Code, *supra*. If Plaintiffs take issue with the lack of an appeal process, their complaints are better levied against the Legislature who promulgated that law, and not to this Court, which is powerless to re-write it.

Should this Court wish to consider other factors which may give rise to the imposition of an injunction, the Defendant points out the following.

(1) Plaintiffs will not suffer irreparable harm if the Board of Education is not enjoined from assigning them to the Phoenix Academy to accelerate their education to graduation.

"Irreparable harm" has been defined by our courts as the type of harm that cannot be compensated by standard civil remedies such as money damages. An injury is irreparable if "it cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy." NW. Bypass Grp. V. U.S. Army Corps of Engineers, 470 F. Supp. 2d 30, 64 (D.N.H. 2007). A finding of irreparable harm must be grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store." Charlesbank Equity Fund II v. Blinds to Go, Inc., 370 F.3d 151, 162 (1st Cir. 2004).

While it is true that money damages will not compensate some of the Plaintiffs for the time they have spent at the Phoenix Academy, or, at least in the case of Plaintiff Qasin Hassan, for any time that they have refused to spend at Phoenix Academy, Plaintiffs, and each of them, have always had the right to come to school and obtain an education until they graduate. No Plaintiff has yet shown that they were refused admission to the School District of Lancaster. Therefore, because the "right" at issue is the "right to equal access to education", and each of the Plaintiffs, ages 17-21, has been fully afforded the right to attend school at Phoenix which has a comparable educational program with ESL instruction and support, they cannot show that they will suffer irreparable harm if they are not enrolled at McCaskey High School. The Plaintiff, Alembe Dunia, who was not enrolled in school, cannot show that he will suffer irreparable harm by not enrolling in high school because he will soon turn 21 years of age. Even if he did express a desire to enroll, he would not have graduated before the end of his 21st year.

(2) The balance of equities for transferring Plaintiffs and the class members to the McCaskey High School does not tip in Plaintiffs' favor and is not in the public interest

The balancing of equities inquiry requires the court to weigh "the hardship that will befall the nonmovant if the injunction issues contrasted with the hardship that will befall the movant if the injunction does not issue." Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112 (1st Cir. 2006). As well, courts should "pay particular attention to the public consequences in employing the extraordinary remedy of injunction." Winter, supra, citing, Weinberger v. Romero-Barcelo, 456 U.S. 305, 102 S. Ct. 1798, 72 O. Ed. 2d 91 (1982). In their Complaint, Plaintiffs identify themselves by their national origins, the amount of time spent in refugee camps, whether they have been accompanied by (a) parent(s) to Lancaster, and their ages. They have not pleaded whether or not they have accumulated educational credits before coming to Lancaster or whether or not they have already graduated from their home schools. Such being the case, they cannot prove that the District's reason for placing them at Phoenix Academy, i.e., for the acceleration or recovery of educational credits towards graduation, is a pretext for unlawful discrimination on account of, or based upon their national origins.

Since none of the six Plaintiffs herein have been refused enrollment within the District, Plaintiffs will suffer no hardship whatsoever if their motion for this extraordinary relief is denied because they have a right to a full, free public education, complete with ESL instruction and supports, at the Phoenix Academy to obtain the balance of their educational credits towards graduation, and to graduate.

Plaintiffs' Alleged Hardships

When the Plaintiffs testified about their hardships, their complaints focused primarily on not having equal access to English language instruction that is "better" at McCaskey, and, secondarily, to the many elective courses available to students at McCaskey. However, the overwhelming testimony was that the program called the International School at McCaskey

is intended for entering level ELS who are educated in a cohort of other English Learners for one year. In a few months to a year, they would be moved out of the International School based on their beginning language proficiency status and into the regular curriculum with their same-aged peers. These over-aged, under-credited Plaintiffs, and their expert, Dr. Marshall, believe that the International School is a better program for entering English Learners regardless of their ages. There is no agreement on the part of the School District of Lancaster to that unfounded belief. No educator at Phoenix Academy or the School District of Lancaster Administration would agree that the sound educational theories at the Phoenix pale in comparison to those at McCaskey. All of the District representatives, and, most importantly, the Coordinator of ESL K-12/World Languages, Ms. Amber Hilt, who assisted the Phoenix Academy Principal/Academic Lead, Ms. Aura Heisey, testified that the programs are similar. Ms. Hilt helped Ms. Heisey to develop a program at Phoenix Academy for the incoming non-English speaking students, who are over-aged and under credited, that models the International School at McCaskey. However, all of the District representatives testified that the soundness, implementation and successes of educational theories and programs in either school do not stop "life from getting in the way."

The District representatives testified that the Phoenix Academy accelerated program helps to alleviate the obstacles to graduation that are created by the ultimate hardships that befall over-aged students. They testified that the true hardship is when students drop out altogether because of the stresses on time for school and other matters that become larger priorities. Therefore, should this Court decide to substitute its judgment for the judgment of the professional educators and Board of Education whose overarching goals are to assist and encourage students to achieve the best result possible, i.e., a diploma, the Court will be

transferring them against the better judgment of the School District of Lancaster and setting up the Plaintiffs, and potentially many others, for failure.

Hardships on the Defendant, School District of Lancaster

Plaintiffs have attacked the Phoenix Academy's program management by Camelot. They have attacked Camelot's philosophy for New Student Orientation, security, and academic program construction through an accelerated model. However, Pennsylvania law allows for variations in student attendance, *22 Pa. Code §11.5(a)* (students of school age may qualify for graduation by attending the public school part-time when lawfully employed). This section gives older students with family obligations a chance to participate meaningfully in a public school education towards graduation while holding a full-time job. Pennsylvania law allows searches at school, *22 Pa. Code §12.14* (the governing board of every school entity shall adopt reasonable policies and procedures regarding student searches... and shall notify students and parents or guardians of the policies and procedures regarding student searches.) This section gives the District the power to protect its students at the Phoenix Academy and allows Camelot to conduct its orientation to advise students and parents of the methods to be used in performing security measures. Pennsylvania law further provides a School District with the power to prepare its own written strategy and plan for the provision of student services, *22 Pa. Code §12.41(a)*, including, but not limited to the power to use "diagnostic services to identify barriers that limit a student's success in school, and actively engage staff in activities planned to reduce or eliminate specific barriers to student success." *22 Pa. Code §12.41(b)(2)(i)*. This section gives the School District the power to develop and use its own curriculum and instructional methods, including an accelerated model of learning for under-credited persons who want to accumulate credits sufficient to graduate, and especially, the educational theory espoused in English-for-Second-

Language as an instructional device to assist English Learners to overcome language barriers to achieve success.

Any Court intervention that transfers enrolled adult public school students ages 17-21 from their present location to a different location, removes the power, authority and choice of this Pennsylvania public school district's Board of Education to do any one of the foregoing and will have the unintended consequence of ignoring the public policies underlying Pennsylvania law by tying the hands of the school board from placing adult students who are 17-21 of age where they believe they young adults are most appropriately and best educated. This would improperly usurp the role of The School District of Lancaster's School Board. See, Zebra v. Sch. Dist. of City of Pittsburgh, 296 A.2d 748, 750 (Pa. 1972) (courts are restrained when reviewing matters of school policy and "should not function as super school boards.").

(3) Plaintiffs are not likely to succeed on the Merits of their Claims

In order to establish that Plaintiffs cannot succeed on the merits of proving their claims, we take each seriatim.

(A). The claims of Plaintiffs Alembe Dunia and others similarly situated under the Equal Education Opportunity Act, 20 U.S.C. §1703(f).

The Equal Education Opportunity Act¹, as cited by Plaintiffs in their Complaint, provides:

¹ This Act effectively codified the U.S. Supreme Court decision in Lau v. Nichols, 414 U.S. 563, 94 S. Ct. 786, 39 L. Ed. 2d 1 (1974); See, 4-10D EDUCATION LAW §10D.01; but, see, University of California Regents v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 750 (1978), wherein Justice Brennan observed, "...We recognize that Lau, especially when read in light of our subsequent decision in Washington v. Davis, 426 U.S. 229 (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribed conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds,

"No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin, by... the failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (*Compl. P. 164*).

First and foremost, the foregoing provision applies to children 21 years of age, or younger, who are enrolled in a public school. Collins v. City of New York, et al., 2016 U.S. Dist. LEXIS 3062 (S.D.N.Y. 2016). Because Alembe Dunia, and others similarly situated, is not a student enrolled in the District, he cannot be denied an equal educational opportunity to participate in its instructional programs because of his alleged language barrier. Consequently, Count I of Plaintiffs' Complaint must be dismissed as to Alembe Dunia and others similarly situated.

Secondly, Plaintiffs cannot show that the School District of Lancaster has "failed to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." Although the Pennsylvania School Code cited above requires the District to teach the curriculum in English, it also imposes upon the District a duty to take appropriate action to identify barriers and develop a plan to overcome those barriers in order for students to access the curriculum. Federal law also provides a rubric from which a court may observe whether or not the action taken by the School District is reasonably calculated to overcome language barriers for the Phoenix-Plaintiffs to access the curriculum. Horne v. Flores, 557 U.S. 433 (2009). In C.G., et al. v. Commonwealth of Pennsylvania, Department of Education, et al., 888 F.Supp.2d 534 (M.D.Pa. 2012), the district court observed that, "this Court has previously adopted the standard articulated by the United States District Court for the Northern District of Illinois and held that to establish an EEOA violation, Plaintiffs must

is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision."

establish: (1) language barriers; (2) defendant's failure to take appropriate action to overcome these barriers; and (3) a resulting impediment to student's equal participation in instructional programs. Id., 888 F.Supp.2d at 575, citing, Leslie v. Bd. of Educ., 379 F. Supp. 2d 952, 960 (N.D. Ill. 2005). Further, in that decision, Judge Kane observed that, as here, the Plaintiffs had established that they were non-English speaking students and that the School District of Lancaster had indeed identified them as LEP students and EL learners, with all the "challenges faced by certain members of the class." Judge Kane found, however, that the Plaintiffs had failed to meet their burden of establishing the second and third elements, *i.e.*, the failure to take appropriate action and resulting impediments to the students' equal participation in instructional programs. In so finding, Judge Kane looked to the purpose of the EEOA by noting that "Congress granted the *states broad discretion* in determining which programs and techniques should be implemented to satisfy the EEOA's requirement to take 'appropriate action to overcome language barriers,'" Id., citing, Horne, supra, 557 U.S. at 440-441, quoting, Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981)(emphasis added). Moreover, Judge Kane observed that under Castaneda, a reviewing court must evaluate whether or not a [school district] has taken 'appropriate action' under 20 U.S.C. §1703(f) by determining whether: (a) a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field², or at least, deemed a legitimate experimental strategy; (b) the programs and

² The Castaneda Court further opined that its examination is not be done with any eye toward discerning the relative merits of sound but competing bodies of expert educational opinion, for choosing between sound but competing theories is properly left to the educators and public officials charged with responsibility for directing the educational policy of a school system. ... The court's responsibility, insofar as educational theory is concerned, is only to ascertain that 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." Moreover, in that case, the trial court noted that there was 'almost total disagreement between the experts, witnesses, and lay persons as to the benefits of the [challenged] program... however, ... we do not think that the school system has failed to fulfill its obligation under 1703(f), even if the result of such a program is an interim sacrifice of learning in other areas during this period.... We believe that statute clearly contemplates that provision of a program placing primary emphasis on the development of English language skills would constitute "appropriate action." 648 F.2d at 1009-1011.

practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school; and (3) the program, after being employed for a period of time sufficient to give the plan a legitimate trial... produce(s) results indicating that the language barriers confronting students are actually being overcome. " Id., citing, Castaneda, supra, 648 F.2d at 1009-1010; Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1017-1018 (N.D. Cal. 1998).

In C.G., Judge Kane found that the Plaintiffs had failed to challenge the appropriateness of the program and therefore, entered judgment for the Defendants on all of Plaintiffs' claims. The Defendant in this case, The School District of Lancaster, asked this Court to enter judgment in its favor on the basis that the weight of the evidence does not support Plaintiff's allegations that the "District has failed to pursue a program informed by an educational theory recognized as sound by some experts in the field"; or, that the District has failed to take "appropriate action" to overcome the language barriers of its EL students; or that the programs in place at the Phoenix Academy have failed.

More specifically, all of the District representatives and Plaintiffs' expert, Dr. Marshall, testified that English-as-a-Second Language is a sound educational theory, given its wide acceptance through the Commonwealth of Pennsylvania. Where the parties disagree is in the delivery of ESL instruction. Defendant's witnesses, Amber Hilt and Aura Heisey, both testified that the ESL instruction at Phoenix Academy is modeled directly after the programming and instruction provided at the International School. The difference between the McCaskey International School (MIS) ESL program and the Phoenix Academy ESL program is in the delivery – MIS instructors deliver two 48 minutes of direct ESL instruction daily, one of which counts as an ESL credit and one which counts as a Communication Arts credit towards

graduation. The Phoenix Academy provides two 80 minute classes per day of direct ESL supports, which of which counts as an ESL credit and one which counts as CA credit towards graduation. In addition to instruction, the District provides supports in the nature of word-to-word translation dictionaries, Google Translator, computer translation, I-Pad translation, and Language Line, in addition to a buddy-system where students at differing levels can assist each other to translate to English. One witness, Marianne Ortiz, the former ESL teacher at Phoenix, testified that although she recently left for another opportunity, during her six-year tenure, she provided additional language support services to non-English speakers during Sixth Period Resource Class to help them understand the lesson and what was being asked of them.

Although Dr. Marshall testified that she was provided with documents subpoenaed by Plaintiffs' counsel, Maura McInerney, from the District, and looked on-line at the various websites of Phoenix and McCaskey, she was completely unaware that she could have personally observed the classrooms and high school environments of both buildings and hence had no "hands-on" information upon which to base her opinion that the International School was a better placement for the students because they received "more" English instruction. Dr. Marshall's usage of a visual analogy to an airplane taking off on a runway was based upon her review of documents, alone, together with her academic and professional experience as an expert in "TESOL," an acronym for "Teaching English to Students of Other Languages." She admitted that although she was a "teacher of teachers," she had never actually taught ESL instruction to young adults, or children, of public schools, ever, in her lifetime. She did not observe any classes that occurred in the summer program nor did she inquire with any district administration or teachers.

Finally, the record evidence amply demonstrates that the ESL instruction, supports and delivery is, and continues to be successful. One Plaintiff, Anyemu Dunia, testified that he graduated from the Phoenix Academy on August 16, 2016, after 16 months of accelerated programming (80-minute classes limited to core curriculum for graduation) and by attending summer school for two consecutive summers in order to accumulate additional credits over the course of two summers. Mr. Dunia spoke no English prior to coming to Phoenix and read aloud to the Court an essay that he wrote while at Phoenix. Aura Heisey, the former Principal/Academic Lead at Phoenix, and the current Executive Director, Megan Misnik, both testified that they have graduated many 17-21 students, a good portion of them former non-English speaking refugees. Both Ms. Heisey and Ms. Misnik testified that many of their graduates have gone on to college at Millersville University and the Harrisburg Area Community College.

In short, Plaintiffs have failed to establish that the delivery of ESL instruction and supports at the Phoenix Academy is not implemented, or not successful. Such being the case, Plaintiffs have failed to show that they have a substantial likelihood of success on the merits on their EEOA claim.

(B). Plaintiffs claim under Title VI of the Civil Rights Act, 42 U.S.C. 2000d, must be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6)

It is well-settled that the legislative intent of Title VI reflects a strong prohibition against unlawful discrimination on the basis of [race/national origin] in the provision of benefits through federally funded programs. University of California Regents v. Bakke, 438 U.S. 265 (1978). Courts before and after Bakke have carefully scrutinized education claims where individual and class plaintiffs have complained of being victimized by a public school district that intentionally deprives students of color, or non-American national origin, from receiving the same or similar

educational opportunities as their white peers, and vice versa. Id. Indeed, the Bakke court observed, without deciding, that a private right of action may not even exist to state a claim for a denial of rights to participate equally in the benefits of federal funding, citing Representative Gill's argument in debate:

"Nowhere in this section do you find a comparable right of action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." Id., at fn 18, *citing*, 110 Cong. Rec. 2467 (1964); *accord, id.*, at 765 (remarks of Sen. Keating); 6562 (remarks of Sen. Kuchel).

That said, our sister courts have observed the Supreme Court's desire to construe Title VI as co-extensive with the Equal Protection Clause of the Fourteenth Amendment insofar as the racial classifications for protection are concerned. Bakke, supra, 438 U.S. at 352-353; Fullilove v. Klutznick, 448 U.S. 448 (1980).³ Moreover, in Mumid, et al. v. Abraham Lincoln High School, et al., 618 F.3d 789 (8th Cir. 2010), the court correctly observed that Title VI prohibits only intentional discrimination of those protected racial classifications. Proof of disparate impact is insufficient. Id., citing, Alexander v. Sandoval, 532 U.S. 275 (2001).

Under Title VI, a plaintiff who claims to be a member of a racial classification subject to protection from unlawful discrimination, must plead the existence of:

- (a) Language barriers;
- (b) A school's failure to take appropriate action to overcome these barriers; and
- (c) A resulting impediment to students' equal participation in instructional programs.

42 U.S.C. 2000d; 35 Fed. Reg. 11, 595 (1970).

In this case, Plaintiffs' Complaint, at paragraph 165 alleges:

"165. National origin discrimination has been defined to include the denial of equal opportunities due to an individual's, or his or her ancestor's, place of origin, or because an

³ For the sake of argument, Defendant assumes this court will treat similarly the protected class of national origin.

individual has the physical cultural or linguistic characteristics of a national origin group, including limited English proficiency. (No citation.)"

And, at paragraph 166:

"All Named Plaintiffs... are LEP immigrants who have documented language barriers."

And finally, at paragraph 167:

"Through its actions and inactions, the District denied enrollment to Plaintiffs or required them to attend Phoenix Academy.... Providing limited and inadequate language assistance services in an accelerated instructional model that is not reasonably designed to appropriately address their educational and language needs."

Courts have held that "while Title VI prohibits discrimination on the basis of national origin, language and national origin are not interchangeable." Mumid, et al., supra, 618 F.3d at 795, citing, Hannoon v. Fawn Eng'g Corp., 324 F.3d 1041, 1048 (8th Cir. 2013); Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir. 1983); Garcia v. Gloor, 618 F.2d 264, 268 (5th Cir. 1980).

Here, like the Mumid Plaintiffs, Plaintiffs claim that they are assigned to an alleged substandard curriculum and programming at Phoenix Academy, compounded by fewer educational and extra-curricular opportunities available to students in the other high school, on account of their documented language barriers. Plaintiffs claim that the Phoenix Academy does not provide adequate English language instruction or support to them. However, English language instruction or support cannot be a legal basis to claim national origin discrimination. "A policy that treats students with limited English proficiency differently than other students in the district does not facially discriminate based on national origin." Mumid, 618 F.3d at 795. Therefore, even if it were true that the District's policy is to assign all of its enrolled LEP students between the ages of 17-21 to the Phoenix Academy, that policy is not facially unlawful or unconstitutional. Moreover, for the reasons stated above, the record evidence does not substantiate that the ESL instruction and supports delivered to Phoenix Academy students in 80-

minute daily increments coupled with push-in support as necessary throughout the day is "not reasonably designed to appropriately address their educational and language needs." To the contrary, students of the Phoenix Academy, ages 17-21, who enter without any credits toward graduation and who do not speak English are, indeed, successful – and they graduate.

Such being the case, Plaintiffs have failed to show a substantial likelihood of success on the merits of their Title VI claim.

(C). Plaintiffs claim under 42 U.S.C. §1983 for an alleged violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution must be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6)

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that:

"no state shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

Our Supreme Court has construed that provision to mean that, "this is not a command that all persons be treated alike, but, rather, a direction that all persons similarly-situated be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). The Court has further explained that this Amendment is designed to prevent official conduct that discriminates on the basis of race, Washington v. Davis, 426 U.S. 229 (1976), or any other suspect classification, Bakke, supra, 438 U.S. at 289-290 (the "guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color" and "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination").

Plaintiffs' Complaint fails to state that Plaintiffs' national origins were considered by the District in making its assignments to the Phoenix Academy. Rather, their claims insinuate that

their placement at Phoenix Academy is based upon their language barriers and that the accelerated or transitional implementation of the curriculum, supported by ESL classes⁴, is unlawfully discriminatory. Plaintiffs acknowledge in their Complaint that they receive ESL education at Phoenix Academy. *Complaint*, at ¶ 56. Their claim is that the ESL education at McCaskey is better because McCaskey has an International School that "provides intensive support and content-based ESL instruction in a one-year program... primarily for entering students." *Complaint*, at ¶ 59. This allegation is particularly telling because it identifies other students who are foreign nationals with language barriers, newly enrolled with the District who have been assigned to McCaskey, as "entering students." Clearly, because Plaintiffs have pleaded that the District enrolls all qualified non-English-speaking foreign national students, and then assigns them to either McCaskey or Phoenix Academy, Plaintiffs have not stated a claim for discrimination on the basis of national origin. Moreover, Plaintiffs have not stated a claim that, in either school, they have been deprived of ESL education. Rather, their only complaint is that because of their ages (17-21) and lack of academic credits, they are assigned to the Phoenix Academy for enrollment. However, neither age, education nor refugee status are valid, protected classes under the applicable analytical framework necessary to show a constitutional violation.

Because Plaintiffs fail to state that their national origins are part of the decision-making process in assigning them to Phoenix, and further, have failed to state that their assignments to Phoenix consequently deprive them of any ESL education as opposed to the *other ESL students* at McCaskey, their claims alleging violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution show no likelihood of success on the merits.

⁴ English-as-a-Second-Language, or ESL program, is an acceptable alternative to a true bilingual education, in which a special English class is added to the standard school curriculum which a student attends in addition to regular classes. *See*, American Inst. For Research in Behavioral Sciences, *Evaluation of the Impact of ESEA Title VII*, Spanish/English Bilingual Programs, Vols. I & II (1977), Vols. III & IV (1978).

(D). Plaintiffs claim under 42 U.S.C. §1983 for an alleged violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution must be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6)

Fourteenth Amendment Substantive Due Process Alleged Violations

Bullying

Respecting the claims of Q.M.H. and Anyemu Dunia who have alleged that they were bullied at Phoenix, the District cites, in response, the jurisprudence of S.K. v. North Allegheny School District, 2016 U.S. LEXIS 25975 (W.D. Pa. 2016) and Monn v. Gettysburg Area School District, 2013 U.S. Dist. LEXIS 47371 (M.D. Pa. April 2, 2013), for the proposition that absent a state-created danger, the state owes no duty to protect a private citizen from the acts of private individuals. Monn, citing Sanford v. Stiles, 465 F.3d 298, 303-304 (3d Cir. 2006), citing Deshaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 198-200 (1989). Allegations that the School District failed to prevent future bullying after initial complaints cannot be characterized as an affirmative misuse of authority. Monn, 2013 U.S. Dist. LEXIS 47371, at *18-19, citing D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1373 (3d Cir. 1992); Brown v. School District of Philadelphia, 456 F. App'x 88, 91 (3d Cir. 2011)(non-precedential) *See, also*, Nicini v. Morra, 212 F.3d 798, 806 (3d Cir. 2003)("a state's failure to protect an individual against private violence does not constitute a violation of due process") and Brown v. Commonwealth of Pennsylvania Department of Health Emergency Medical Services Training Institute, 318 F.3d 473, 483 (3d Cir. 2003) ('there is no federal constitutional right to rescue services, competent or otherwise). Consequently, this claim must fail.

Property Rights in Education

Alembe Dunia, and others similarly situated, brought claims against the District because they were allegedly denied enrollment in violation of the Fourteenth Amendment's constitutional protection of their property interests in their educations. Defendant agrees that the Pennsylvania legislature created property rights in education through the Article III of the Pennsylvania Constitution and a legal right to a free public education from ages 6-21, through the provisions of Chapter 11 of the Pennsylvania Public School Code. The Defendant, and the Plaintiffs who are enrolled students, further agree that at least based upon their pleadings, they are all within the ages of 17-21, which would entitle them to a free public education in Pennsylvania and within the School District of Lancaster and all of whom have property rights in their educations.

Where the parties differ is in the construction and application of these laws. "The state is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct, without adherence to the minimum procedures required by that Clause." K.A. o/b/o her minor child, J.A. v. Abington Heights School District, 28 F. Supp. 3d 356, 367 (M.D. Pa. 2014), citing, Goss v. Lopez, 419 U.S. 565, 574 (1975). Since Alembe is not an enrolled student, he does not have a property interest in an education. His claim is that he was refused enrollment. But Alembe has failed to state whether or not he received any education credits prior to attempting to enroll with the School District of Lancaster. Alembe has further failed to state whether attending the accelerated program at the Phoenix Academy would have allowed him to achieve the necessary and sufficient credits to graduate from the School District of Lancaster. And finally, Jack Blackman, the Coordinator of Counseling and Drop-Out Prevent testified that, following enrollment, Alembe failed to keep his appointment with Mr. Blackman for placement.

He testified on re-direct that he injured his knee playing soccer, that his injury did not affect his ability to work, but "played only in his decision to stay home because I couldn't go to school [because] my knee was bothering me."

Where the parties further differ is in the notion that persons of certain national origins have been turned away at the door of the School District of Lancaster, on account of those national origins. Fascinating in its suggestion is the allegation that Alembe's brother, Anyemu, was accepted for enrollment into the District and that the siblings are logically of the same national origin. Alembe does not specify in his pleading how the District selects which foreign nationals upon which it will slam its doors and refuse enrollment. One might infer, however, that persons under 21 who have already graduated, would not be entitled to enroll at a public school. One might also infer that persons under 21 who have no interest in participating in an accelerated educational program might themselves refuse enrollment. There are many other explanations for why persons 21 years of age and younger are not enrolled, or do not enroll, in a public school for education and graduation, none of which have anything to do with the national origin of the student, including "soccer injuries to their knees."

On the basis of the foregoing, it is unlikely that Alembe, and other Plaintiffs claiming a "refusal of enrollment" can show a substantial likelihood of success on the merits of their claims of 14th Amendment violations.

Procedural Due Process Rights

Alembe and others have claimed that the District affords no appeal rights to students who are not enrolled or who are assigned to the Phoenix Academy following the completion of the enrollment process. Pennsylvania law provides the board of education with the unfettered discretion to assign students to buildings within the District where, in the Boards' collective

judgment, that student will best be educated. 24 P.S. §13-1301, et seq. The School Code does not provide a right to an appeal by the student for the placement of that student at a particular building, unless a disability is claimed. Id.; K.A./J.A. v. Abington Hgts S.D., supra.

Because Plaintiffs have failed to show that appeal rights exist under the applicable procedural due process laws or state legislation governing entitlements to enrollment, or entitlements to refuse to enroll due to compulsory education requirements, Plaintiffs have shown no substantial likelihood of success on their procedural due process claim.

(D). Plaintiffs claim under 24 P.S. §13-1301 and 22 Pennsylvania Code Chapter 11 must be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6)

Qualification for enrollment in a Pennsylvania public school district is governed by 24 P.S. §13-1301, et seq., which states, in pertinent part:

"Every child, being a resident of any school district, between the ages of 6-21 years, may attend the public schools of his district, subject to the provisions of this Act...and who has not graduated from high school..." Id., 13-1301.

At §13-1302, the law states, again, in pertinent part:

"(a) A child shall be considered a resident of the school district in which his parents or the guardian of his person resides... Before such child may be accepted as a pupil, such resident shall file with the secretary of the board:

- (1) Appropriate legal documentation to show dependency or guardianship;
- (2) A sworn statement that he is a resident of the district;

At §13-1303(a)...[a child must receive] proper immunization; and

At §13-1310, relating to Assignment of pupils to schools, the law provides:

"The board of school directors of every school district... shall, for the purpose of designating the schools to be attended by the several pupils in the district... subdivide the district... in such manner that all the pupils in the district shall be assigned to, and reasonably accommodated in one of the public schools in the district... or may classify and assign the pupils in the district to any

school or schools therein as it may deem best, in order to properly educate them...It shall be unlawful for any school directors... to make any distinction whatever, on account of, or by reason of, the race or color of any pupil or scholar who may be in attendance upon, or seeking admission to, any public school maintained wholly or in part under the school laws of the Commonwealth." Id.

Three key points come from a review of the foregoing provisions – first, a Pennsylvania public school district's obligation to educate children within its borders ends at (1) the culmination of sufficient credits to receive a diploma and graduate, or, (2) at the end of the child's 21st year or the end of that school year. Secondly, the inherent discretionary power of school boards regarding the assignment of students is properly limited *only by orders of the Human Relations Commission. School District of Pittsburgh v. Rankin*, 396 A.2d 856, 858 (Pa. Commw. 1978). The School Code includes the federal prohibition against unlawful discrimination based upon a protected status. Thirdly, this statute applies to all students, regardless of where they previously resided and were educated, or how much education they actually received before their enrollment in a Pennsylvania school. The statute makes no special provisions for refugee children.

It is well-established in Pennsylvania that students have no entitlement to be enrolled at any age unless they present evidence of proper immunizations. Id.; 22 Pa. Code §11.20. Plaintiffs Khadidja Issa and Qasin M. Hassan both delayed presenting proper immunization paperwork to the District enrollment officers. However, when through the assistance of their resettlement agents, they were able to produce proper evidence of immunization, they were enrolled.

Alembe Dunia, as he testified above, was not enrolled because he did not follow with Mr. Blackman and appear for his appointment. He testified that he injured his knee playing soccer and could not attend school.

It is respectfully submitted that the Plaintiffs cannot establish a substantial likelihood of success on the merits of this claim, and therefore, their request for a Preliminary Injunction should be denied.

(4) Transferring Plaintiffs, who are over-aged and under-credited, from Phoenix Academy to McCaskey High School is not in the public interest.

The Pennsylvania legislature has promulgated the following legal requirements for public school students, regardless of their national origin or English-speaking abilities.

22 Pa. Code §4.11(b) provides that the purpose of a public education is to "prepare students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens."

22 Pa. Code §4.11(d) provides, "The academic standards describe the knowledge and skills that students will be expected to demonstrate *before graduating* from a public school.

22 Pa. Code §4.23(a), relating to High School education, provides: "Instruction in the high school program must focus on the development of abilities needed to succeed in work and advanced education through planned instruction." (emphasis added.)

22 Pa. Code §4.23(g) provides, "School districts....shall determine the most appropriate way to operate their high school programs to achieve the purposes of subsection (a) and any additional academic standards as determined by the school entity."

22 Pa. Code §4.4 General Policies.

(a) It is the policy of the Board that the local curriculum be designed by school entities to achieve the academic standards under §4.12 and any additional academic standards as determined by the school entity.

(b) It is the policy of the Board that local school entities have the greatest possible flexibility in curriculum planning consistent with providing quality education and in compliance with the School Code, subjects to be taught in the English language (24 P.S. §15-1511) courses adapted to the age, development and needs of the pupils (24 P.S. §15-1512), minimum school year of 180 days and minimum of 900 hours of instruction at the elementary level and 990 hours of instruction at the secondary level (24 P.S. §§15-1501 and 15-1504; employment of sufficient numbers of qualified professional employees (24 P.S. §11-1106) and superintendents to enforce the curriculum requirements of State law (24 P.S. §10-1005) and this part. (Emphasis added.)⁵

22 Pa. Code §4.42 relating to grade structure does not require educational programs to be organized in traditional grades according to students' chronological ages or academic achievement levels. But the Rules of the State Board of Education recognizes individual grade levels K-12 (Organization of Schools, Requirement a., 0520-1-3-.02) with requirements for student evaluations in Grades K-8, and compulsory attendance until age 17 or to the student's 18th birthday unless he/she has received a diploma or other certificate of completion of high school. (Administration of Schools, Requirement B., Rule 0520-103.03)(emphasis added). Clearly, separating children in public education through grade levels commensurate with some age-related expectations for academic achievement have been considered by the Board in promulgating its Rules.

⁵ See, also, Lau v. Nichols, 414 U.S. 563 (1974) (public schools must take affirmative steps in the areas of language acquisition and academic content development by local schools and the state, but leaves the methodology up to the local expertise.)

The School District of Lancaster has placed Plaintiffs, and all similarly-situated young adults at the Phoenix Academy without regard to their national origin or abilities to speak English.

Here, the Plaintiffs, none of whom presented evidence of having been formally educated before reaching the City of Lancaster, and the School District of Lancaster, have had no early preparation through grades K-8 for achievement in high school, the last milestone before graduation. Therefore, those Plaintiffs who have no ability to graduate before reaching age 21 cannot possibly benefit from the academic challenges at either the Phoenix Academy or the McCaskey High School that their same-age peers have overcome in order to become "self-directed, life-long learners and responsible, involved citizens." Without the instruction, repetition and structure of an education longer than 12 months, they cannot be goal-directed towards employment or secondary education. Consequently, they become nothing more than warehoused in a dead-end program with students who do not share their levels of emotional or intellectual maturity, interests, or goals.

Plaintiffs, like any other students who are English speakers and are between the ages of 17-21, who presented without transcripts of prior education at the time of enrollment, including diplomas or other certificates of completion, have all been placed in 9th grade at the Phoenix Academy, which is the lowest level of high school in which the required accumulation of 24 credits towards graduation begins. The 9th grade level is where a typical Pennsylvania public school student enters at ages 13-14 at the McCaskey High School. Moreover and more importantly, these Plaintiffs, who are now young adults at ages 17-21, have entered the District at Phoenix Academy when the same-aged peers have begun to leave and graduate from McCaskey. Therefore, there are very few, if any, same-aged peers in high school, much less the

9th grade classrooms. Further, the typical 17-21 year old student that receives a diploma at graduation has already moved on to college, a full-time job, or the military. However, these Plaintiffs, at the same age as their peers who have left the District following graduation, cannot move forward to any of those same goals upon entering a public school district in the 9th grade. If they wish to graduate with a diploma, they must remain in school until their 24 credits have been accumulated. Because Pennsylvania does not compel a teenager's public school attendance after reaching the age of 18 (22 Pa. Code §11.13 relating to compulsory school age under 17 or graduation from high school, whichever occurs first), students who are already parents and/or bread-winners will likely become frustrated and quit, frequently because daily attendance and academic achievement place stress upon their time to attend to their other priorities.

Such being the case, this Court must look at the consequences of placing over-aged young adults at ages 17-21, some of whom have no graduation goals to accomplish, in the same classrooms at McCaskey with 13-14 year old 9th grade students. The Court must evaluate the differences in emotional and intellectual maturity levels, sexual awareness and activity, the differences or commonalties in after school interests, including whether some of them are married, parents, or already working to support families. Clearly, there is a huge disparity between students of these ages because the legislature saw fit to transfer control of a student's decision about whether or not to attend school upon the student's 18th birthday. The 9th grade students of ages 13-14 do not have that same control over their futures because they remain controlled by their parents or guardians. More critically, the Court must take notice of the severe consequences of those 17-21 young adults who are accepted into the Pennsylvania public schools in their quest for a better life, who may unintentionally or otherwise, take advantage of their

younger classmates in their attempts to socialize.⁶ In fact, 18 year olds in Pennsylvania can vote, legally emancipate from their parents and buy tobacco products. If they have graduated, they can register for armed service. 21 year-olds can legally purchase and consume alcohol. This age typically coincides with the age when most students are graduating from college; however, the Pennsylvania Legislature, by virtue of the Pennsylvania Public School Code, 24 P.S. 13-1301, for reasons that are altogether unclear, has aligned the end of a student's entitlement to a free public education to coincide with its legal drinking age -21.

The Programs at Phoenix Academy and the International School at McCaskey are identical in curriculum. The structure of English language instruction and support is the same or similarly in content and quality, but different in duration in each building.

The Pennsylvania Department of Education recommends at least 2 hours of English language instruction per day, in order to assist English Learners to overcome language barriers to comprehend instruction and to perform to the academic standards of the District and the Department of Education. The Phoenix-Plaintiffs' argument that the English Language instruction and supports available to other non-native English speakers in the one-year International School at McCaskey is "better for them" is only useful to this Court if the Court finds that the English language instruction and supports at the Phoenix Academy are not based upon sound educational theory, are not implemented with ESL instruction and supports; and are not working. Castaneda, supra. However, there is no evidence based upon actual observations by any Phoenix-Plaintiffs, or the Plaintiffs' expert consultant that the ESL language and supports at the Phoenix Academy are non-existent; the testimony was that McCaskey was better, although

⁶ See, Commonwealth v. Samarin, (citation omitted), wherein on August 26, 2016, 23-year-old Artur Samarin, a Ukranian national, posed as a 19-year-old student and was enrolled in the Susquehanna Township School District, pled guilty to a host of federal charges including, but not limited to, statutory rape for having sex with a 15-year-old classmate identified as "E.F." (See Exhibit A for details.)

none of them had personal knowledge through observations of building, classrooms, or interviews with staff, that the International School Program was *actually* better than those provided by the Phoenix Academy staff in the accelerated program.

Defendant, The School District of Lancaster, argues that it is not in the public interest to place all entering non-English speaking students ages 17-21 at the "one-year International School program" at the McCaskey High School because the education, while "sheltered" for some classes, especially English Language (ESL) Instruction, does not guarantee "sheltered instruction" for the duration of the year. Following the end of that year, students are then integrated with the general population of native English speakers with only "push-in" support for assistance.

On the other hand, entering students ages 17-21 already enrolled at the Phoenix Academy have the additional supports of a full 80-minute exclusive ESL class taught by an ESL-certified instructor, additional ESL direct instruction through a dually-certified Communication Arts and ESL instructor, and push-in support in every content class, together with additional assistance in Sixth Period Resource Class where the ESL instructor provides 1:1 assistance to the EL. Push-in supports include technological assistance in the nature of a computer-assisted training, I-Pads, "Google Translator" and Language Line, a specialty telephone-assisted translation company that locates and delivers translation services in even rare languages, such as in this case, Fur, Arabic, and Hahka Chin. These services and supports exceed PDE's recommended 2 hours of ESL per day, and are provided *throughout the student's entire education at Phoenix, as needed*. Moreover, students at Phoenix rarely exceed 350 in number, so that the students are educated from the first day to the last day before graduation in a small learning community, with the same language and/or education level peer groups.

Finally, it is not in the public interest for this Court to substitute its judgment for the judgment of the administrators and professional staff of the School District of Lancaster, whose efforts are exercised every day, all year, to maximize every student's ability to achieve success, to attend school safely, and to graduate with a diploma that is the gateway to becoming "self-directed, life-long learners and responsible, involved citizens."

PROPOSED FINDINGS OF FACT

Current and Former Resettlement Agents

Sheila Mastropietro, (N.T. Aug. 16, 2016, A.M. session)

1. Sheila Mastropietro is the current Director of the Lancaster Office of Church World Service, Immigration and Refugee Program. (N.T. Page 53, ln. 14-15).
2. Church World Services is a refugee resettlement agency contracted by the Department of State to perform certain things for refugees upon arrival to Lancaster, including, inter alia, register children in school, find English as a Second Language classes for adults... the idea is self-sufficiency with 90 days. (N.T. p. 56, ln. 15-25.)
3. Most of the groups CWS brings over now do not have a high number of children that speak English, have educations in refugee camps to ninth grade, without usable records to verify their education. (N.T. pp. 62-64.)
4. The contract between CWS and the State Department requires children to be enrolled within 30 days of arrival. (N.T. p. 69, lns. 13-22.)
5. Her experience with the District since 2010 was that over-aged young adults were not enrolled with the School District of Lancaster because of age [maturity] differences (N.T. pp. 72-73, and because of improper immunizations (N.T. p. 73, lns. 16-24.)

6. In 2015, there continued to be problems with delayed enrollment and [she] wasn't convinced that Phoenix Academy provided the education these students needed. (Id. at p. 77, lines 14-25.)
7. She was told by students that they were not enrolled because they were "too old" but she did not follow up with anyone at the District to confirm that information. (N.T. pp. 106-107.)
8. Two out of four refugee students she enrolled at SdoL were ages 17-19, and placed at Phoenix Academy because they were "overaged and undercredited." (N.T. p. 78, lns. 11-24.)
9. Ms. Mastropietro and an employment specialist from Lutheran Resettlement Services, Elise Chesson, agreed that they were having similar issues with enrollment and scheduled a meeting with the District Superintendent on March 17, 2016. (N.T. pp. 83-85.)
10. At the meeting of March 17, 2016, Dr. Rau, the Superintendent, was advised that there "wasn't much ESL given, there wasn't as much at Phoenix as there was at McCaskey, that the atmosphere at Phoenix was more punitive that it is at McCaskey." (N.T. p. 87, lns. 9-14).
11. Neither Ms. Mastropietro nor Ms. Chesson raised enrollment as an issue at that time, rather, [why] over-aged refugee kids are sent to [Phoenix.] (Id. at lines 17-21).
12. Ms. Mastropietro admitted that [school] brought it up that, although she didn't know how they knew, some of the kids didn't want to go to school, that they were older, wanted to work and should apply for a GED. (N.T. p. 87, ln. 25, p. 88, lines 1-5.)
13. Ms. Mastropietro said that Dr. Rau indicated that she would look into all of their allegations, familiarize herself with what was going on at Phoenix Academy and they

would have another meeting after school ended in June of that year. That was an acceptable answer to Ms. Mastropietro. (N.T. p. 88, lines 23-25); p. 89, lines 1-14).

14. Ms. Mastropietro attended a meeting of the Refugee Service Providers Coalition on April 6, 2016, where she met Amber Hilt, SDoL's ESL Coordinator, who confirmed that over-aged and undercredited students go to Phoenix Academy. (N.T. p. 89, lines 20-25; pp. 90-91.)
15. Ms. Mastropietro admitted that her resettlement coordinator who attended an orientation at Phoenix did not find it as punitive as [Ms. Chesson said.] (N.T. p. 93, ln. 25; p. 94, lines 1-11.) The students were not walking around the halls repressed or any other way different than regular students. (Id.)
16. Ms. Mastropietro testified to another meeting on July 13, 2016, with Valentina Ross from her office because by then, Lutheran Refugee Services had closed its doors. (N.T. p. 95, lines 2-15.)
17. Ms. Mastropietro and Ms. Ross expressed concerns that ESL wasn't adequate, enrollment was late, students were patted down, took no homework from Phoenix and "just the issue of why the kids are sent to Phoenix and not to the international school." (Id. at lines 16-25.)
18. She was told by District officials attending the meeting that Phoenix students are given two to three hours of ESL, co-teaching, and that there were many ways to learn English which don't count as "direct hours." (N.T. p. 96, lines 13-25.)
19. **Ms. Mastropietro has no independent information about what is taught or how it is taught at Phoenix.** (N.T. p. 97, lines 1-5.) **She does not know when the time for placement ends before a semester begins.** (N.T. pp. 108-109.)

20. At the end of the meeting, Dr. Rau said that the orientations would be presented so that the refugee students were more comfortable, they would consider allowing children to bring in backpacks and their own feminine products if they wished, rather than using the ones provided by the school. (N.T pp. 100-101.)
21. Dr. Abrom told her that the [District's] goal or mission is to get these kids graduated, get them a high school diploma. He emphasized the importance of having a high school diploma and getting a job. (N.T. pp. 101, lines 19-25, 102, lines 1-2.)
22. Dr. Abrom explained that the older kids including refugees are sent to the Phoenix Academy's accelerated program so that they can earn more credits that they need to graduate, because at McCaskey they can only earn 7 (per year), but at Phoenix they could earn more. (N.T. pp. 102-103).
23. Ms. Mastropietro talked to a lot of school age refugee kids and had concerns that they were in an accelerated class but did not speak English well. (N.T. p. 105).
24. Ms. Mastropietro did not have any knowledge about whether or not a student could receive 80-minutes per day of ESL and graduate from the Phoenix Academy. (N.T. p. 111.)
25. Ms. Mastropietro does not believe that all students at Phoenix Academy receive an inferior education, that success depends on the student, (N.T. pp. 113, 114), the student's effort and initiative. (Id. at lines 1-6.)

ELISE CHESSON, N.T. AUGUST 17, 2016, AM SESSION

26. Elise Chesson is a former resettlement agency, current unemployed. (N.T. p. 120, lines 12-15.)

27. She acknowledged that one of her former clients, Faissa Hasson, came to the District with several school age children, but that Qasin's older siblings chose not to enroll. (N.T. p. 120, pp. 19-23.)
28. She acknowledged that when Qasin turns 18, he can refused to enroll in public school. (N.T. pp. 121, lines 2-6.)
29. She was not his case manager, does not know how old he was entering the country or his birthdate. (N.T. pp. 122, 123.)
30. She was unaware that the District's records showed that Qasin's age was 19 at the time he presented for enrollment. (N.T. p. 124-125.)
31. She was aware of an email showing that the District had a discrepancy in its records. (N.T. p. 130, lines 1-7.)
32. She was aware that Mr. Blackman discussed pathway options with older students. (N.T. Id. at lines 21-25.)
33. She agreed that it was difficult for students to get "anywhere", or a job without a high school diploma, and believes that Qasin should be in school if that's the choice he wants to make. (N.T. p. 137, lines 12-23.)
34. She agreed that a GED would help him as well, did not know that he could transfer his certificate for an SdoL diploma after one year. (N.T. p. 138.)
35. With respect to Khadidja's reluctance to ask anyone for a feminine hygiene product, Ms. Chesson believes it is the School District's job to help her get over that, not hers. (N.T. p. 142, 143.)

36. Ms. Chesson learned that Dr. Rau had the District's ESL program evaluated by one of her own expert consultants and was looking into various ways to resolve problems. (N.T. pp. 144, 145.)

The Plaintiffs

Khadija Issa; N.T. August 16, 2016, PM SESSION

37. Khadija speaks Arabic, was born in Sudan, moved to Chad to live in a refugee camp, which she left at age 17. (N.T. pp. 9, 10.)

38. She attended school until sixth grade, learned to speak Arabic, some English and French. (N.T. p. 10, lines 8-18.)

39. When she arrived in the U.S. she could not read or write English. (N.T. p. 10.)

40. Her sister has learned English at McCaskey, and other students in her class at Phoenix have learned English. (N.T. pp. 17-19.)

41. She understands math because math is mostly numbers. (Id. at p. 20.)

42. Mrs. Ortiz, the ESL teacher, comes into her classes to help her. (Id. at p. 22, 23.)

43. If she has a question in class, her teacher helps her. (Id. at 23, 24.)

44. If she takes tests in class, her teachers help her. (Id. at 25.)

45. At enrollment, Bilal (her resettlement worker) interpreted for her. (Id. at 27.)

46. He only told her she was too old to enroll, did not tell her there were problems with her immunization papers. (Id.)

47. She could have graduated in Chad, but was short one semester at age 17. (Id. at p. 29).

48. She doesn't want to graduate, she just wants an actual education. Now, even if she graduates, she knows nothing. (Id. at p. 30).

49. She is taught mathematics in English. (Id. at 30).

50. She does not understand what she writes in English. (Id. at 30-31)

51. When shown, Khadidja identified a hat, a heart, a camera, and a bed – in English. (Id. at 31.)

Qasin M. Hassan

52. Qasin was born on September 9, 1998, is 17 years old now, and will be 18 in September. (N.T. p. 35, 36.)

53. He was born in Somalia, went to Egypt where he lived from the time he was 12 years old. (Id.)

54. He did not enroll in school, "took private school" at home. (Id.)

55. At home, he learned the Arabic language, to read and write a little bit. (Id.)

56. He came to the U.S. on September 9, 2015. (Id. at 37.)

57. He tried to enroll into school, got tired of waiting. He waited about 5 months. (Id. at 37.)

58. He said the first meeting he met Mr. Blackman who told him that he did not speak English and could not enroll in either McCaskey or Phoenix. (Id. at 39, 40.)

59. Megan tried so hard to enroll him, it took three months. (Id. at 41.)

60. He enrolled at Phoenix but no one spoke Somali or Arabic. (Id.)

61. He took five classes, really only understood the English teacher. (Id. at 42).

62. He tried to learn as much as he could, but it was hard. (Id.)

63. Most people in English class could speak English better than him and Khadidja. (Id. at 43.)

64. His teacher helped him a lot. (Id. at 44.)

65. He understood what was happening in English class 100%. (Id.)

66. He was bullied. Several students at a time were present in the bathroom and kicked the door. (Id. pp. 54-55.) He said a security guard came in and told everyone to return to their classes. (Id.)
67. A girl pulled his hair. He told her not to. She stopped. (Id. at 56.) It bothered him a lot. (Id.)
68. He stopped going to school. (Id. at p. 57).
69. He wants to be a policeman. (Id.)
70. He has never been to school in his life, nor have his siblings. (Id. at 63.)
71. He attended school at Phoenix for 1 ½ months, felt he gave it enough time to decide that he didn't like it. (Id.)
72. He doesn't recall telling anyone from the school who came to his home that he wanted to work. (Id. at 64.)
73. He worked before enrolling in school at a market where he sold produce. (Id.) He did not know the name of the market. (Id.)
74. He says it's impossible to become a police officer, because it's [] education. (Id. at 66.)
75. Phoenix Academy was not supporting or helping him. (Id.)
76. He feels he would do better at McCaskey because it has a better reputation. (Id. at 67.)

Van Ni Lang

77. Van Ni was born on October 30, 1998, in Xaio Pai, Chin State. (Id. at 76, 77.)
78. She speaks Hahka Chin, some Burmese, no English before coming to the U.S. (Id.)
79. She goes to Phoenix school because she wants to be educated. (Id. at 79.)
80. Her sister, Sui Hnem, also attends at Phoenix. (Id. at 80).
81. Her favorite class is ESL, she likes to learn English. (Id. at 83.)

82. Her sister also speaks Hahka Chin. (Id. at 84.)
83. She receives English tutoring outside of the home, once a week. (Id. at 85.)
84. She learns about the moon, stars, rocks, and the sun, in science class. (Id. at 84).
85. She knows that there are only two people at McCaskey that speak Hahka Chin, and two people at Phoenix Academy (she and her sister) who speak Hahka Chin. (Id. at 87).
86. There are no interpreters at either school. (Id. at 84, 87.)
87. Her education at Phoenix Academy is "not bad." (Id. at 89.
88. She believes it is more important to get more minutes of English instruction a day than to attend a school where she gets less English instruction. (Id. at 92).

SUI HNEM SUNG

89. Sui Hnem is Van Ni's sister, was born October 19, 1996, lives in Burma, the Chin State. (Id. at 95, 96.)
90. She was 19 years old at the time she enrolled, was placed at Phoenix Academy. (Id. at 99.)
91. She likes ESL class, the teacher was very good at teaching. (Id. at 100.)
92. All other classes are taught in English. (Id.)
93. She has outside tutoring at home. (Id. at 101.)
94. She wants to go to McCaskey because she believes she will get more ESL and it is closer to her home. (Id. at 102.)
95. She can walk to McCaskey and didn't know that she can take a bus to Phoenix. (Id. at 104.)
96. She attended summer school at Phoenix, does not stay after school for extra credit. (Id.)

97. She doesn't feel that she receives enough ESL instruction at Phoenix, but never told anyone because she doesn't speak English and can't tell them. (Id.)

ALEMBE DUNIA

Notes of Testimony, August 17, PM SESSION

98. Alembe was born in Tanzania on November 11, 1995, will be 21 years old in November. (N.T. p. 9).

99. His family left Tanzania and arrived in Mozambique in 2003 where they lived in a refugee camp. (Id. at 11.)

100. Alembe attended school in the refugee camp, but it was difficult because Tanzania is an English-speaking country. (Id. at 11, 12.)

101. He had to learn Portuguese in Mozambique and it was difficult for them. (Id. at 12.)

102. He learned basic English in Mozambique while in school. (Id. at 12.)

103. His family came to the U.S. in 2014. (Id.)

104. He didn't know English when he arrived. (Id. at 12,13.)

105. He tried to enroll in school, was accompanied by Bilal, his resettlement worker. (Id. at 14.)

106. He said he understood some of the conversation during enrollment, but Bilal told him after six months that he was too old to go to school. (Id. at 14.)

107. He thought it would be a waste of time to take free English classes outside of school because he heard they were not very good. (Id. at 17.)

108. He knows if he enrolled at school at age 20 he could not earn enough credits to graduate by the time he turns 21. (Id. at 18.)

109. He injured his knee playing soccer [a long time], doesn't remember the date. That played a role in why he stayed home and didn't go to school because his knee was bothering him. (Id. at 20).

ANYEMU DUNIA

110. Anyemu was born on September 18, 1997, arrived in Lancaster in November of 2014 at age 17. (Id. at 21.)

111. He learned after enrollment that he was assigned to attend Phoenix Academy. (Id. at 23, 24.)

112. He understood some of the content of his classes in Skills Preparation, ESL, Communication Arts, Counseling, Math and Chemistry. (Id. at 24, 25.)

113. In computer class, it would take an hour to explain to the class what to do, and then they would work on computers. (Id. at 25, 26.)

114. He thought it was hard to communicate with teachers. (Id. at 30.)

115. They used an iPad to translate sometimes. (Id. at 31.)

116. Today, he writes and reads in English better than he did when he began at Phoenix. (Id. at 40.)

117. He graduated on August 16, 2016. (Id. at 45.)

118. He had a good relationship with his teachers at Phoenix. (Id. at 48.)

119. He enjoyed the summer school program. (Id.)

120. He received report cards; would know if he didn't pass a class. (Id.)

121. He would like changes at Phoenix for people coming after him. He doesn't want the school to focus on helping them get the degrees, but to help them learn instead of

going fast and to graduate to get a diploma when they can do nothing with the diploma. (Id. 60).

122. He doesn't want to go back to high school. He wants to move on to college. (Id. at 61.)

FORMER TEACHERS

Jandy Rivera – August 18, 2016, AM Session

123. Jandy Rivera is currently unemployed, worked at Phoenix Academy from 2011 to 2013 as a 9th and 10th grade Communication Arts/English teacher. (N.T. p. 11-12).

124. Phoenix provides an accelerated credit recovery program that has five 80 minute periods a day. (Id. at 13-15).

125. It was impossible for her to teach a year's worth of curriculum in half a year at Phoenix. (Id. at 15.)

126. She understands the concept of differentiated teaching, where she needs to modify or change the curriculum based on each student's individual needs. (Id. at 39.)

127. She found that impossible to do. (Id.)

128. At some point, she was placed on a performance improvement plan to assist her with her teaching at Phoenix. (Id. at 40.)

129. Towards the end of that plan, she was ready for something else and found a new job. (Id. at 40.)

130. She did not have professional development training, but acknowledged the trainings could have been held on days she didn't come to work. (Id. 44.)

131. She gave credit to students for actually showing up to class and sitting there, so a portion of the grade was given for that. (Id. at 54.)

132. She didn't see a lot of effort from the top focusing on unique challenges of the refugee students to overcome language barriers, but saw that more from the ESL teacher, Ms. Ortiz, who went "above and beyond" in trying to meet the unique needs of the refugee students. (Id. at 54.)
133. While she did not think the accelerated program at Phoenix produced results that the language barriers were overcome, she had no idea whether or not they would be able to do so at McCaskey. (Id. at 54, 55.)

Marianne Ortiz – N.T. August 22, 2016 (4:13 pm to 5:45 pm.)

134. Ms. Ortiz is a former ESL teacher at Phoenix Academy. (N.T. p. 43.)
135. She worked there from 2009-2016. (Id. at 44.)
136. Some students were non-refugee immigrant students with limited or interrupted schooling, one from Ethiopia, some from the Dominican Republic and some from Haiti. (Id. at 44, 45.)
137. She felt that these students were better placed at the International School at McCaskey because to her understanding, it doesn't have an accelerated program. (Id. 45.)
138. At Phoenix Academy, she delivered 80 minutes of direct ESL instruction. (Id. 47.)
139. She also provided a resource period for middle school students and a resource period for high school students for ESL learners who needed assistance. They could come to her and she would help them understand what they had to do. (Id. at 52.)
140. Those students could be considered "pull-out" students for ESL instruction. (Id. at 53.)

141. She also provided push-in services to ESL students for math and other content classes. (Id. at 54.)

142. Ms. Weathers also provided push-in services to developing students. (Id. at 55.)

143. Ms. Ortiz never taught at McCaskey and has no direct knowledge of anything that goes on in those buildings. (Id. at 78.)

144. She never co-taught, however, Ms. Weathers did. (Id. at 8).

145. She went to Qasin's home on a home-school visit and he told her "No school. Work." (Id. at 81.)

HELAINÉ MARSHALL, PH.D.

Notes of Testimony, August 18, 2016, AM and Partial PM Session

146. Dr. Marshall was qualified as an expert in "TSOL," "ESL" and meeting the needs of "students with limited or interrupted formal education." (N.T. p. 96.)

147. Dr. Marshall has never taught a single class of ESL. (Id. 90, lines 5-9).

148. She has never interacted with anyone at the Pennsylvania Department of Education. (Id. at 93.)

149. Dr. Marshall opined that the School District has not produced evidence that the program (at Phoenix) indicates that language barriers confronting these particular students are being overcome. (Id. at 59.)

150. Dr. Marshall opined that all of the students in this case and those similarly situated could benefit from being placed at McCaskey. (Id. at 59.)

151. In fact, she said it was "very clear" that is where these students would thrive. (Id.)

152. In a "snapshot" of looking at data, she opined that "if you look at the two schools, they're going to be different, but it didn't look that different when you looked at the

overall distribution of levels." When she separated out literacy, in this snapshot, she found the McCaskey students doing better in reading and writing. (Id. at 58.)

153. In preparing her reports and her testimony, she received some records from the District which were provided to her primarily by an attorney for the plaintiffs, some WIDA information from the website, which she did not print, State of Pennsylvania documents, and federal regulations. (Id. at 65, 66.)

154. She looked at the Phoenix Academy website, did not use the material in her report. (Id. at 67.)

155. She looked at the School District of Lancaster website, did not use the material in her report. (Id.)

156. Other than the documents provided to her by Plaintiffs' counsel, she did not rely on any documents concerning the Phoenix Academy program or the International School at McCaskey. (Id.)

157. She interviewed all of the Plaintiffs, but did not where she was when she interviewed them. (Id. at 72.)

158. She interviewed Sheila Mastropietro, Meghan Brown and Jandy Rivera by phone. (Id. at p. 69, 77).

159. She spoke with no one at the Phoenix Academy. (Id. 79.)

160. She knows that Megan Misnik is the Executive Director of the Phoenix Academy but "did not know it was appropriate or expected for [her] to [contact] her. She did not know that was something possible for her to do. (Id.)

161. She did not know if it was appropriate or expected of her to speak with the Principal at Phoenix Academy. (Id. at 80).

162. She did not know if it was appropriate or expected of her to speak with Dr. Rau, the Superintendent of Schools at The School District of Lancaster. (Id. at 81.)
163. She acknowledged that she did not know it would be appropriate or expected of her to speak with the administrators at The School District of Lancaster. (Id.)
164. SLIFE students may or may not have trauma or stress in their past experiences, may or may not have limited (in terms of quality of books, conditions in the country that do not allow for serious focus on school) access to education, may or may not have come from war-torn countries, may be refugees, may be immigrants. (Id. at 83-85.)
165. SLIFE students might be American children who speak English, like Jamaicans. (Id. at 85.)
166. **Her opinion that the students at Phoenix Academy do not receive an equal educational opportunity with the students at McCaskey is based upon the delivery of ESL instruction and supports through the accelerated model.** (Id. at 86.)
167. With respect to Khadidja Issa, she did not believe she receives at the Phoenix Academy an equal educational opportunity to her sister is educated at McCaskey High School, based upon the records she reviewed and her interview with the Plaintiff. (Id. 89).
168. Interestingly, Dr. Marshall did not have Khadidja's work samples at the time she interviewed her, she did not receive them until later. Neither, apparently, she did ask for any demonstrations of Khadidja's knowledge at the time she interviewed her. (Id. 90-91.)
169. Dr. Marshall did not interview of the other 12 potential class members at Phoenix Academy (immigrants and refugees 17-21 years old who have arrived and were placed in Phoenix Academy instead of being given a choice to go to another school. (Id. at 99.)

170. She opined that they would not be able to learn in the accelerated model at Phoenix Academy, even supported with experts. (Id. at 100.)
171. In rendering that opinion, she did not meet with any focus groups of ELL teachers to survey their needs. (Id.)
172. In rendering that opinion, she did not conduct one or more walk in classroom observations to get a feel for the instruction at Phoenix. (Id.)
173. She asked the attorneys if she was able to observe at Phoenix. She was told "No." (Id. at 101.)
174. Dr. Marshall did not know the names or backgrounds of the District's educational consultants, but thought it was good to bring in consultants to help improve the program. (Id. at 108).
175. Dr. Marshall testified that the Pennsylvania Department of Education standard for ESL instruction is two hours, that it is an expectation of the DOE. (Id. at 115.)
176. Dr. Marshall does not focus on graduation as an end goal, but rather on "prioritizing overcoming language barriers and accessing the core curriculum." (Id. at 118.)
177. **Dr. Marshall does not believe ESL students should be educated with native English speakers... "that is the deal breaker." The 80 minute block schedule, i.e., the accelerated program "doesn't matter." What matters is that "they're with mainstreaming students in a mainstream curriculum with a teacher without ESL training, very special training you need to even work with SLIFE even beyond the regular ESL. Phoenix just isn't going to be able to do that."** (Id. at 121.)

THE SCHOOL DISTRICT OF LANCASTER

Notes of Testimony, August 19, 2016 A.M. Session

AMBER HILT

178. Amber Hilt is the Coordinator of K-12 ESL and World Language for the School District of Lancaster. (N.T. p. 10).
179. Ms. Hilt also served as an Assistant Principal for the McCaskey Campus for approximately 3 ½ years. (Id. at 11.)
180. As Assistant Principal, she was responsible for, inter alia, discipline. (Id. at 12.)
181. Discipline involved referrals from teachers, day-to-day incidents and urgent matters. (Id.)
182. One incident involved police officers using physical restraint of a student, on the ground, who was deemed to be a threat to himself or others. (Id. at 13)
183. In addition to police officers, hall monitors are also utilized at McCaskey High School. (Id.)
184. The police officers can cite, arrest and use weapons they carry (guns and tasers.) (Id. at 14.)
185. Phoenix Academy does not have SROs. (Id. at 15.)
186. Ms. Hilt is a member of CAL, the Center for Applied Linguistics, receives periodicals called "Bridging Youth" and "Migration Policy Update". (Id.)
187. She belongs to an internal refugee working group involving teachers that teach ESL and schools that have high populations of refugee students, etc. that meet monthly to discuss how we can further support refugees and their families coming to their school. (Id. at 15.)

188. She is active with the Refugee Community Center at SdoL Reynolds Middle School that provide access for refugee students and their families to health and medical services, ESL on site, counseling, case management, document review for all refugees regardless of whether or not they are enrolled with the District. (Id. at 16).
189. She was invited to present at the Philadelphia Urban seminar as a success story and was awarded the SdoL Unsung Hero Award for going above and beyond the call of duty as an ESL teacher at Hand Middle School. (Id. at 17.)
190. She assists with grant writing for Refugee Funding. (Id. at 18.)
191. She is involved in quarterly refugee meetings with community partners such as the resettlement agencies workers including Sheila Mastropietro and Elise Chesson. (Id. at 19.)
192. She has a collaborative relationship with all community partners. She believes this litigation was started because the agencies would not wait to get back into a discussion with Dr. Rau at the end of the school year. (Id. at 19.)
193. She knows Plaintiffs Qasin Hassan and Khadidja Issa personally. (Id. at 21.)
194. She met with Qasin in a few meetings, the first at enrollment when he refused to participate in the meeting, did not approach the table or engage in conversation. (Id. at 21.)
195. She met with Qasin again at Phoenix Academy when he complained that he was bullied. She prepared for him a plan to contact five individuals he felt safe speaking with in order to allay his concerns about continued bullying. (Id. at 21.)
196. Her understanding from the first meeting was that Qasin's mother wanted him to enroll, but he did not want to. (Id. at 23.)

197. He was eventually enrolled, placed at Phoenix Academy at age 17, although at the time, it was thought that his age was 19. (Id. at 23, 24).
198. Her understanding was that Qasin's goal was to work. (Id. at 24.)
199. She was advised that a home-school visit was made because Qasin never came back to school after the second meeting. No interpreter was present except for the Language Line. (Id. at 25.)
200. Following the home visit, the teachers received a rather aggressive phone call from Elise Chesson who thought the District was kicking out Qasin from school. (Id. at 26.)
201. An investigation was conducted by the head behavioral interventionist, with interviews of all teachers and some students. No confirmation of bullying was made. (Id. at 29.)
202. Qasin's student file reflected that he came in to Phoenix as an "entering level" ESL student, able to learn English, uses Arabic and Somali to speak primarily at home. (Id. at 43.)
203. Qasin was receiving 2 to 3 hours of literacy support. (Id. at 45.)
204. Qasin's schedule for his first semester was appropriate for a student coming from a background with no prior education. (Id. at 45.)
205. Qasin had a lot of unexcused absences which would cause gaps in his availability to learn and earn credits. (Id. at 47).
206. If his schedule was transferred to McCaskey's international school, Qasin would have only 48 minutes of each subject, including ESL. (Id. at 48.)

207. He would stay in the International School until he tested as a beginner or one-year. (Id.)
208. The international school program was reviewed by expert consultants hired by the District, Vivian Fialo and Secora Herrera, who consulted with the administrators, providing professional development training for the teachers. Prior to those evaluations, the District sought assistance from Ana De la Pena from PDE's training network, PaTTAN and technical assistance advisors through PDE for the migrant and refugee populations. (Id. at 51.)
209. Ms. Herrera provided training to the District's ESL staff on culturally relevant biography driven instruction, a research-based theory, which was also discussed by Dr. Marshall. (Id. 52.)
210. Phoenix Academy is designated by PDE as a magnet school, meaning that it is held separate and accountable to PDE on its performance. (Id. at 52.)
211. Ms. Hilt reviewed Dr. Marshall's report and observed that Dr. Marshall did not seek information directly from the District (Id. at 53.), did not speak with District staff, District students other than the Plaintiffs, (Id. at 54).
212. Ms. Hilt met with Dr. Herrera 6 to 8 times a year for her review of their entire program including materials, curriculum, demographics, and parent involvement. (Id. at 55.)
213. PDE does not endorse "dual immersion" strategies where English is taught in two languages, nor does it endorse translation for non-native English speakers. (Id. at 57.)

214. Translators are not considered best practices. According to many theorists, it's about the strategies teachers bring to the classroom for entering level students such as visuals, gestures, songs and chants. (Id. at 58.)
215. Interpretation is not considered best practice for teaching ESL students.
216. Both Phoenix and McCaskey utilize netbook cards (small computers), iPads and computer labs for English learners. (Id. at 60.)
217. Ms. Hilt disagreed that Dr. Marshall's opinion that "ESL was being taught without evidence of adaptation of content" because Dr. Marshall never reviewed lesson plans or made classroom observations. (Id. at 62.)
218. Ms. Hilt observed classroom techniques during this summer's program and also observed Sui, Anyemu and Khadidja's sister, Noursham, as students there. (Id. at 65.)
219. Ms. Hilt testified that some students received their instruction with English speakers, through an educational theory called "sheltered immersion." (Id. at 66.)
220. Sheltered immersion typically occurs in mathematics or art classes. (Id. at 67.)
221. Ms. Hilt disagreed with Dr. Marshall's opinion that the Phoenix instructional block schedule was inappropriate to teach English Learners (Id. at 68) because 80 minutes of ESL accrue to the PDE expectation of provided at least 2 hours of ESL instruction per day. (Id.)
222. The same instruction time for ESL occurs at McCaskey for entry and beginning levels. (Id. at 68,69).
223. "Can Do" descriptors, per WIDA and PDE requirements, sets goals for what a student can do within an 80 minute block, a single class, as opposed to the classes in the International School, that run only 48 minutes daily. (Id. at 71.)

224. Ms. Hilt has actually taught ESL classes and has delivered differentiated instruction to the students. (Id. at 74-75.)
225. She explained there are many ways to deliver differentiated instruction within a classroom of students learning at varying levels, including the rotation model, 1:1 instruction, visuals, word banks, etc. (Id. at 75.)
226. Ms. Hilt testified that the student-teacher ratio for ESL instruction is about 40:1 at McCaskey's International School. (Id. at 78.)
227. Ms. Hilt testified that the student-teacher ratio for ESL instruction is about 30-1 at Phoenix Academy. (Id. at 7y9.)
228. Ms. Hilt testified that there are approximately -y 1800-1900 ELLs in the District with approximately 525 in high school. (Id. at 87.)
229. Ms. Hilt testified that all extra-curricular activities at McCaskey High School are available to Phoenix Academy students. (Id. at 94.)
230. Ms. Hilt testified that some, but not all students at the International School are SLIFE. (Id. at 101.)\

NOTES OF TESTIMONY – AUGUST 19, 2016 P.M. SESSION

231. Ms. Hilt testified that, in her experience, SLIFE or refugee students sometime needs to transfer to Phoenix from McCaskey to assist their families as caregivers, as bread-winners, and from time to time drop out of school completely from the larger environment at McCaskey. (Id. at 33.)

DR. DAMARIS RAU

232. Dr. Rau's vision for the District since coming aboard is to graduate students, have them college or career ready. (Id. at 38.)
233. Research has demonstrated that without a high school diploma, the changes of positive outcomes for students is negligible. Dr. Rau observed that if one does not have a high school diploma, one is more likely to get a low wage paying job, which results in not having adequate health insurance which results in not having adequate health care. (Id.)
234. Students needs diplomas to have options and opportunities. (Id.)
235. Her vision of graduating students to get them college or career ready is co-extensive with the expectations of the Department of Education. (Id. at 39.)
236. Five or six schools, including McCaskey, within the District, are on PDE's "priority" or "focus" list for the state to monitor. (Id. at 39.)
237. These schools are monitored by PDE with a plan for improvement. (Id. at 40).
238. Dr. Rau just began her position with the District when she was introduced to Elise Chesson and the refugee resettlement agents that assist refugees to enroll in the District. (Id. at 44.)
239. Dr. Rau listened to all the concerns, advised that she would look into them, and suggested that the group reconvene in the summer after school had ended. (Id.)
240. She was very disappointed that the group did not wait to meet with her, but rather commenced litigation instead. (Id. at 45.)

241. Dr. Rau did speak with the administrators at Phoenix to encourage their assistance to lessen the impact of orientation on entering refugees and to allow more freedom with bringing items in and out of school. (Id. at 52.)

242. Dr. Rau learned that some students were not enrolled within five days of presentation as required by law and instructed her Director of Enrollment to move students eligible for ELL services into their placement immediately. (Id. at 61.)

243. Dr. Rau testified that students are placed at the international school if they are able to graduate before reaching age 21. If they cannot, they are placed at Phoenix Academy, unless they are 20 years old and cannot earn enough credits to graduate. (Id. 95.)

244. However, Dr. Rau testified that the District cannot expect a student who has never to been to school or had very limited education who is 18 to come to us and learn the depth of understanding of a native speaker. (Id. at 96.)

JACQUES BLACKMAN

Notes of testimony, August 22, 2016 A.M. Session.

245. Mr. Blackman is the current Coordinator of Counseling and Drop Out Prevention for the School District of Lancaster. (N.T. pp. 5-6).

246. Both the Phoenix Academy and the McCaskey High School use Small Learning Community models to educate students. The only difference between the International School at McCaskey and the Phoenix Academy is that Phoenix is used for credit recovery. (Id. at p. 8.)

247. The students are the same ages, generally, at both schools, except that Phoenix delivers instruction to students who need credit recovery because of their lack of credits. (Id.)
248. The same extracurricular activities are provided, except that no student is able to participate in PIAA sports after the age of 18. (Id. at 9.)
249. Dropout prevention is based upon nationwide best practices and the District works hard at their own data to make the best decisions for students to get to graduation. (Id. at 11.)
250. Students at age 17 are interviewed to assist them to make the best decision for their college or career goals. If they have no credits, they are assigned to Phoenix Academy. (Id. at 12.)
251. Mr. Blackman personally believes that a high school diploma is the gateway to future opportunities. (Id. at 13.)
252. Compulsory education in Pennsylvania occurs between ages 8-17. (Id. at p. 13).
253. English language instruction and supports are the same at both schools. (Id. at 15.)
254. Mr. Blackman's understanding of a public school education is to get as many students as possible to graduation. (Id. at 16.)
255. Students without a high school diploma or equivalency are at an educational dead end. (Id. at 20,21.)
256. Alembe Dunia was never denied enrollment. Mr. Blackman never met with him. He never appeared for his appointment with Mr. Blackman. (Id. at 21, 22.)

257. Once a student provides appropriate paperwork through enrollment, they have been cleared to be placed. (Id. at 26.)
258. Qasin Hassan would not participate in the enrollment meeting. (Id. at 37.)
259. Enrollment appointments with him for two plaintiffs in the litigation were delayed, which he acknowledges is a problem that must be corrected. (Id. at 39.)
260. His understanding was that Qasin wanted to work, not attend school. (Id. 50.)
261. No plaintiff in this lawsuit ever asked him to transfer to McCaskey's international school. (Id.)
262. Alembe Dunia's enrollment was complete, but he failed to show for his placement meeting. (Id. at 51. He was not refused enrollment.
263. He respectfully disagrees with Dr. Rau's testimony that he has a policy requiring students to wait for an appointment with him. (Id. at 51-52.)
264. It is important that students graduating from the District are self-motivated adults, that can support their families. Without a diploma, a student cannot get into the military or enter college. For people to be in school and leave without a diploma is a failure as a system, for the district, for the school, for him, personally. (Id. at 52,53.)
265. Older students who share classrooms with younger students get discouraged, embarrassed and leave school. (Id. at 56.)
266. PDE standards and federal laws require schools to improve their graduation rates and in order to do that, a school must find alternative pathways to cover credits more quickly before students lose interest or "life happens." (Id. at 58.)
267. Some young men get young ladies pregnant, leave to support their families, and all sorts of circumstances that knock them off track. Credit recovery at Phoenix allows

them to come back to McCaskey and finish with their four-year cohort to graduation. (Id. at 58.)

268. Public high schools traditionally are not designed for older students. (Id. at 60, lines 11-15.)

269. If there is an attempt to educate students of disparate ages, i.e., 13 and 17, his research says that neither side is successful. Some older students are embarrassed to be there. (Id. at 61.) 18 year olds think about different things than 13 year olds. (Id. at 62.)

270. Additionally, SLIFE students with traumatic histories may do better in the smaller learning community at Phoenix than at the larger complex at McCaskey which houses up to 2900 students. (Id. at 67.)

AURA HEISEY

271. Ms. Heisey is the former principal/academic lead at the Phoenix Academy, a part of the School District of Lancaster. (Id. at 69,70).

272. As an academic lead, she was responsible for any relating to teaching, and learning including teacher observations, testing, progress monitoring, ensuring delivery of curriculum consisted with the School District's high school curriculum. (Id. 71.)

273. Teachers are expected to make lesson plans, accommodations to the plans for in-class activity which must be aligned to the academic standards and core curriculum of the District. (Id. at 71.)

274. Accommodations can be made for EL students but will also be appropriate for all students in the class. (Id. at 72.)

275. Instructional models must target students for readiness for career or college. (Id. 70).

276. Those instructional models include delivery of strategies that target differentiated learning including scaffolding, collaborative group work, questioning, classroom talk and literacy groups. (Id. at 73).
277. The curriculum at Phoenix is the same as the curriculum at McCaskey High School. (Id.)
278. Curriculum pacing guides are available to all teachers to outline a roadmap for the delivery of the core curriculum and common core standards. (Id. at 74.)
Accommodations and changes are made when necessary, but it all ties back to what the expectations are for the student to have finished and learned by the end of the course. (Id.)
279. Students are generally able to keep up with 80 minutes class periods because it gives the teacher more instructional time, the students more time to complete their assignments and teachers available to answer questions firsthand. (Id. at 75).
280. Ms. Heisey is familiar with three Plaintiffs, Anyemu, Sui and Van, and Khadidja's sister, Noursham. (Id. at 76).
281. She had all three students in the summer program where they earn additional credits towards graduation and additional English instruction. (Id.)
282. The summer program is designed for refugee students to add three additional credits toward graduation by the end. (Id. at 77.)
283. Ms. Heisey was unaware that these Plaintiffs were unhappy with their educations at Phoenix Academy until the lawsuit was released. (Id. 79.)

284. She had an open relationship with Anyemu Dunia, met three separate times to talk about his credits, that if he wanted to come back in the fall, he could, but he expressed to her that was ready to move on to college and trying to work at the same time. (Id. at 80).
285. Ms. Heisey observed Khadidja in class and greeted her every morning. (Id. at 81.)
286. Ms. Heisey was told by some of Khadidja's teachers that she was not advancing at the same rate that some of her other students coming in at the same level. (Id. at 82.) She was given 1:1 supports, 1:1 assistance in class. (Id.)
287. Ms. Heisey was told that Khadidja's effort was not always the same, that there seemed to be barrier toward her progress. (Id. at 82, 83.)
288. Qasin Hassan only attended 20-30 days of school at Phoenix. (Id. at 85.)
289. Her ESL teacher performed a home visit and was told that Qasin wanted to work. (Id. at 86.)
290. Following shortly was an angry phone call from Elise Chesson who told her that Qasin was being bullied at school and did not want to attend. (Id. at 87.)
291. After a meeting with Qasin when he was given a plan to assist him with communicating his concerns, Qasin did not return to school. (Id.)
292. Ms.Heisey observed Sui and Van in their summer classrooms. (Id. at 88.)
293. Ms. Heisey testified that every student receives 80 minutes of ESL instruction per day with their ESL teacher, a communication arts class taught by a highly qualified ESL teacher, skills prep – an analog to the class taught at the International School at McCaskey; and push-in supports and co-teaching. (Id. at 89.)

294. ESL, English as a Second Language, is an educational theory implemented at both high schools, with Phoenix modeled from the International School, which is working at Phoenix. (Id. at 90). Looking at ACCESS scores, students can be exited from the ESL program, looking at graduation rates, as well. (id.)

295. Anyemu Dunia is not the only student to graduate; there have been approximately 30 students who have graduated , including, Sonta, a friend of Anyemu's. (Id. at 91)

NOTES OF TESTIMONY, August 22, 2016 PM Session

MEGAN MISNIK

296. Ms. Misnik is the Executive Director of Phoenix Academy. (N.T. p. 68.)

297. Phoenix Academy is a magnet school that is sanctioned by the Pennsylvania Department of Education. (Id. at 70).

298. The accelerated program delivery is the basis for the "magnet" identification and is a research-based model. (Id.)

299. Teachers are provided professional development by SdoL and by Camelot corporate levels. (Id. at 71.)

300. Teachers at Phoenix participate in PDE professional development trainings. (Id. at 72).

301. Phoenix is a small setting of 350 students. Ms. Misnik knows every single student at the student. (Id. at 81).

302. No translators are used for non-English students, but a variety of different methods overcome language barriers, including buddy systems, Google Translate, iPads. (Id. at 80).

303. Language Line has been used in the past. (Id. at 87.)

304. Although Khadidja testified she just sat in class all day, not engaged, Ms. Misnik testified that students are not expected to come and fill a seat. It is the responsibility of the student to be an active, engaged learner. (Id.)
305. Orientations were usually conducted by Ms. Falcon or Ms. Ortiz. (Id. at 88.)
306. A dress code is enforced, but clothing is given to students who need it. (Id. at 89.)
307. ESL is an educational theory, provided to their students by qualified staff. The program is working; Phoenix has many students that have graduated. (Id. at 91.)
308. Recent graduates have gone on to enroll at Millersville University and HACC (Harrisburg Area Community College.) Id. at 92.
309. 80-minute block scheduling in the accelerated model allows the teachers to get into depth of subject matter with their students. (Id. at 95.) Teachers provide an introduction, an instruction, group or guided instruction, and follow up. (Id.)
310. Phoenix is not a dead-end, warehouse for incorrigible students. While Phoenix supports the SdoL's graduation initiative, Phoenix goes further by helping the student set up a post-secondary plan, or a job. (Id. at 100,101.)
311. She felt that Qasin's lack of candor about the bullying at Phoenix was upsetting. She knew he conveyed that he was surrounded by a group of boys in the lavatory, but that the Phoenix accelerated structure allows for two boys at a time to leave and come back quickly. There are no large groups in the bathrooms. (Id. at 104).
312. Phoenix Academy is a Middle States accredited school which allows for campus improvements and growth. (Id. at 111.)
313. One recent target is attendance, which is always an issue with older students. (Id.).

314. One students are no longer overaged and under credited, they can return to McCaskey; some want to stay. (Id. at 113.)

Notes of Testimony, August 22, 2016, PM session

Dr. Arthur Abrom

315. Dr. Abrom is the acting Director of Pupil Services for the School District of Lancaster. (N.T. p. 6.)

316. As such, he oversees Jack Blackman, the Coordinator of Counseling and Drop Out Prevention. (Id. at 7.)

317. He is aware that Dr. Rau's mission is ensure that all students graduate with a diploma, and are ready for the workforce, the military or college. (Id.)

318. The general purpose of a public school education is to ensure that students receive a high school diploma. (Id.)

319. Challenges of the District include ELL students, refugee students of 39 different languages represented across the District; a poverty rate of 87-90%. (Id. at 8.)

320. Refugees bring unique challenges by not having any credits, school experience at all and trying to determine what's best for them. (Id.)

321. The District tries to place students with their age-appropriate peers, but older students have none. (Id. 9.)

322. Piaget's theory observes that a person at age 8 is a different person at age 18. That is a developmental process. Another process is where a person at age 17-21 is in life. He may be the bread-winner; she may be pregnant; some have arranged marriages; all of which make it difficult to concentrate on school. (Id. at 10).

323. Placement of students upon enrollment requires consideration of the student's goals and how best to get them to graduate. (Id. at 13.)
324. He is aware of a meeting with community partners, i.e., Elise Chesson and Sheila Mastropietro, regarding their issues with Phoenix Academy including the searches, homework, backpacks and cell phones. (Id. at 16).
325. He is aware that Qasin had reported bullying, but that an investigation conducted which involved interviews of nine different teachers, and students, revealed that someone had knocked on the bathroom stall and someone else had pulled his hair. (Id. at 18.)
326. He responded to Ms. Chesson's concern with a written letter that provided the legal definition of bullying and advising Ms. Chesson that it did not appear to have occurred. (Id. 19)
327. Another meeting with Ms. Chesson concerned her request to transfer the refugee students to McCaskey. (Id. at 20).
328. Dr. Abrom expressed his concern that all students receive equal educational opportunities. They cannot assign refugee students to Phoenix differently than they would any other student. He expressed that the District must treat students the same, realizing that segregating students completely, or for too long, was not preferred. (Id. at 24.)
329. Students with life challenges, who need credit recovery, are placed at Phoenix; not students with discipline and behavioral problems. (Id. at 35.)
330. Students at age 21 and students at ages 13-14, beginning 9th grade, are vastly different levels of maturity. Students at age 21 can purchase and consume alcohol;

students age 18 can disenroll from student, buy cigarettes, or assume their own FERPA rights from their parents. (Id. at 18).

331. Plaintiff Alembe Dunia, after enrollment, did not appear for his appointment with Jack Blackman and testified that he did not attend school because of a soccer injury to his knee;
332. Plaintiff Hassan did not return to school because he wanted to work and not because of alleged complaints of bullying, which were unfounded following an investigation;
333. Students, ages 17-21, should not be educated at the International School at McCaskey in classes with students who have not yet reached the same level of maturity, interests and goals, but rather, should remain in an age-appropriate cohort where additional supports may be provided to them in a smaller learning environment in an accelerated model which leads to graduation, and post-graduation plans for their career, college or military readiness, along with their same-aged peers.

CONCLUSIONS OF LAW

1. Plaintiffs, and each of them, have failed to show that they will suffer irreparable harm if they are not immediately transferred to the McCaskey High School's International School on August 29, 2016.
2. Plaintiffs, and each of them, have failed to show that they have a substantial likelihood of success on the merits of their claims for the following reasons.
3. Plaintiffs' Motion requesting a preliminary injunction is therefore DENIED.

Respectfully submitted,

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Dated: August 25, 2016

CERTIFICATE OF SERVICE

I, Sharon M. O'Donnell, Esquire, do hereby certify that, on this 25th day of August, 2016, I served a true and correct copy of the foregoing document, via electronic filing, upon the following:

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