

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

**Khadidja Issa; Q.M.H.**, a minor, individually,  
by and through his parent, Faisa Ahmed  
Abdalla; **Alembe Dunia; Anyemu Dunia;**  
**V.N.L.**, a minor, individually by and through  
her parent Mar Ki; **Sui Hnem Sung; and all  
others similarly situated,**

Plaintiffs,

v.

**The School District of Lancaster,**

Defendant.

Civil Action No. 16-cv-3881

HON. EDWARD G. SMITH

CLASS ACTION

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**PLAINTIFFS' POST-HEARING FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**FINDINGS OF FACT**

**I. Plaintiffs Are Immigrant ELLs with Limited or Interrupted Formal Education**

1. The School District of Lancaster serves a significant immigrant population. Answer, ECF No. 23, ¶ 42.
2. The Named Plaintiffs are all immigrants aged 17-21.
3. Khadidja Issa is 18 years old, born January 1, 1998. Ex. 15 at LSD20 (State Department travel record).
4. Qasin Hassan (Q.M.H.) is 17 years old, born September 9, 1998. Ex. 48 at LSD56. (Department of State document listing Qasin's date of birth as 9/1/1998).
5. Alembe Dunia is 20 years old, born September 11, 1995. Ex. 51 at LSD79.
6. Anyemu Dunia is 18 years old, born September 18, 1997. Ex. 50 at LSD85.
7. Van Ni Iang is 17 years old, born October 30, 1998. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 76:19-22.

8. Sui Hnem Sung is 19, born October 19, 1996. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 95:25-96:3.
9. They were all granted official refugee status<sup>1</sup> after fleeing home countries of unrest where they experienced trauma and persecution. *See Answer*, ECF No. 23, ¶ 2.
10. All refugee children have experienced trauma. They have all left their home and culture. Some have been through civil war or breakdown in their country's government; some have lived in refugee camps for all or most of their lives; some have lost their parents. N.T. Aug. 16, 2016, 9:44 AM–12:16 PM, 62:7-62:23 (Mastropietro testifying).
11. Alembe and Anyemu Dunia are brothers born in Tanzania. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 9:15 (Alembe testifying); *id.* 53:15-18 (Anyemu testifying). The children of a Congolese father and a Tanzanian mother, their parents were forced to leave the Congo because of war. *Id.* 9:23-10:4 (Alembe testifying); *id.* 53:19-22(Anyemu testifying). In Tanzania, their father continued to flee persecution, and life was “very bad[.]” *Id.* 10:5-8 (Alembe testifying). In 2003, the family again fled out of fear for their safety, this time for Mozambique. *Id.* 10:16-25 (Alembe testifying); *id.* 54:5-13. They lived in a refugee camp in Mozambique where life was “very difficult[.]” *Id.* 11:1-11.
12. Qasin’s family is from Somalia, but fled after Qasin’s father was killed by Al-Shabaab terrorists. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 36:5-9 (Qasin testifying). Before they fled Somalia, life was very unstable and his mother had to hide the children away so they would not be harmed. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 69:5-11 (Qasin testifying).
13. Khadidja’s family fled their home in Sudan when she was five years old because of insecurity under President Bashir. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 9:10-17 (Khadidja testifying). She lived in refugee camps in Chad until she was 17. *Id.* at 9:15-25.
14. Van Ni’s and Sui Hnem’s father was forced into labor in Burma. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 78:3-9 (Van Ni testifying).

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<sup>1</sup> *See* Article 1 of the Refugee Convention of 1951, as amended by the 1967 Protocol, which defines a refugee as “a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

15. The Named Plaintiffs and putative Class Members also had limited or interrupted formal education before arriving in Lancaster.
16. Refugee children generally have gaps in their formal education. N.T. Aug. 16, 2016, 9:44 AM–12:16 PM, 63:9-21 (Mastropietro testifying).
17. Khadidja Issa’s only prior schooling before coming to the United States was in refugee camps. She learned Arabic while studying in refugee camps. N.T. Aug. 16, 2016, 1:29 PM–5:27 PM, 10:8-12 (Khadidja testifying).
18. Qasin Hassan was unable to attend school while he was in Egypt after fleeing from his home in Somalia and was only able to have private lessons at home. N.T. Aug. 16, 2016, 1:29 PM–5:27 PM, 36:12-18 (Qasin testifying).
19. Alembe and Anyemu’s schooling prior to coming to the United States was limited to schooling in the refugee camp in Mozambique. In Tanzania, life had been so unstable that Alembe and Anyemu were unable to attend school. N.T. Aug. 17, 2016, 2:06 PM–3:56 PM, 10:9-15 (Alembe testifying). They attended school for five or six hours a day in the refugee camp in Mozambique, where they were taught in Portuguese—a new language—which made learning difficult. *Id.* 11:12-12:2.
20. In Burma, Van Ni completed eighth grade, and her sister Sui Hnem completed ninth grade. N.T. Aug. 16, 2016, 1:29 PM–5:27 PM, 77:9-12 (Van Ni testifying); *id.* at 96:8-11 (Sui Hnem testifying).
21. All of the Plaintiffs qualify as students with limited or interrupted formal education (“SLIFE”). According to Plaintiffs’ expert, Dr. Helaine Marshall, SLIFE are a sub-group of ELLs who share the following common characteristics: (1) two years or more behind assigned grade level, N.T. Aug. 18, 2016, 9:42 AM–2:11 PM, 95:24-96:10; 97:25-98:1 (Marshall testifying); (2) limited or no literacy, *id.* at 98:3-4; (3) limited or interrupted education, *id.* at 98:9-10; and (4) stressful experiences and acculturation issues, *id.* at 99:8-15. These students may be refugees or immigrants. *Id.* at 99:4-7 and 99:16-18. SLIFE is a type of student and is not determined by level of English proficiency. *Id.* at 161:10-11. A student could “be a level two and be a SLIFE,” as was the case for Plaintiff Anyemu Dunia. *Id.* at 39:4-14.
22. The Plaintiffs spoke and understood little to no English upon arrival, and qualified as “Entering” level ELLs when they sought to enroll in school.
23. Many refugees enter the United States with limited English ability, and most refugee students in the District are beginner-level ELLs. Hilt Dep., 24:8-24:9.

24. Khadidja’s first language is Fur. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 8:6-8, 8:23-24 (Khadidja testifying). She learned to speak Arabic in the refugee camps, but could not read, write, or speak English when she arrived in the U.S. *Id.* at 10:8-10, 10:19-23.
25. Khadidja scored 0 on the speaking, listening and reading portions of her W-APT test and 1 on the writing portion, making her an “Entering” level English Learner. Ex. 15 at LSD26-27, 30-33.
26. Qasin spoke only a few words of English upon arrival. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 37:3-5 (Qasin testifying).
27. Alembe and Anyemu grew up speaking Swahili. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 54:20-25 (Anyemu testifying). In the refugee camp in Mozambique, Alembe and Anyemu studied only very basic English consisting of simple greetings and nouns. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 12:3-6 (Alembe testifying); *id.* 55:10-13 (Anyemu testifying). They arrived in Lancaster knowing only the rudimentary English they had both acquired in the refugee camp school. *Id.* 12:24-13:5 (Alembe testifying); *id.* 21:17-21 (Anyemu testifying).
28. Van Ni and Sui Hnem both scored level 1 (“Entering”) on their W-APT tests. Ex. 46 at LSD178-79 (Van Ni records); Ex. 47 at LSD234-35 (Sui Hnem records).
29. Van Ni and Sui Hnem did not speak or understand English when they arrived in the United States. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 77:17-24 (Van Ni testifying); *id.* at 97:6-11 (Sui Hnem testifying).
30. All of the Named Plaintiffs arrived in the U.S. with enthusiasm, hope, and dreams.
31. Qasin testified that he was the “happiest person” in the world when he found out he was coming to America, because America is “number one” in his mind. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 71:8-14 (Hassan testifying). When he came here, he wanted to pursue his education and help his family. Eventually he wants to be a policeman. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 57:7-10 (Qasin testifying). *See also* N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 86:2-3 (Van Ni testifying that she wants to become a doctor); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 102:12-14 (Sui Hnem testifying that she wants to be a school teacher); N.T. Aug. 17, 2016, 2:06 PM–3:56 PM, 37:24-38:4;(Anyemu testifying he wants to be a biologist); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 102:12-14 (Sui Hnem testifying that she wants to be a school teacher); N.T. Aug. 17, 2016, 2:06 PM–3:56 PM, 15:13-19 (Alembe testifying his goal is to learn English); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 11:21-23 (Khadidja testifying that her goal when she came to the United States was to get a better education).
32. More than anything, the Plaintiffs wanted to learn. *See Answer, ECF No. 23, ¶ 2;*

- See* N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 25:17-18 (Khadidja testifying that she recognized, “In America if you don’t get an education you’ll have a very hard life and it’s very important to get an education.”); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 79:17-19; 79:22-23 (Van Ni testifying that she wanted to go to school in the U.S. because she wants to be educated); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 98:2-6 (Sui Hnem testifying that she wanted to go to school because without an education, one does not have a good future); N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 13:10-11 (Anyemu testifying that “education would open doors for me”); N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 19:14-17 (Alembe testifying that he would rather get some schooling, even if he couldn’t graduate on time, than no schooling at all); N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 15:13-19 (Alembe testifying that he wanted to learn); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 68:9-11 (Qasin testifying that he wanted to learn).
33. Even after Phoenix graduated Anyemu, he still wants to continue his schooling—just not at Phoenix, where he feels he was not learning effectively. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 50:22-51:1 (Anyemu testifying that “I’d love to continue [in school], but not there . . . Not that school.”); *id.* 58:22-2 (“It would be good for me to learn more to stay in school [until I’m 21] and learn as much as I can.”); *id.* 62:23-63:3 (Anyemu testifying that he would like to continue receiving public education because he does not have means to pay for college).
  34. An experienced refugee resettlement caseworker testified that refugee children, including older school-age refugees, generally want to go to school. N.T. Aug. 16, 2016, 9:44 AM, 64:9-13, 66:12-67:2 (Mastropietro testifying).
  35. In particular, the Plaintiffs wanted to learn *English*. *See* Answer, ECF No. 23, ¶ 2.
  36. Van Ni’s favorite class is ESL because of her desire to learn English. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 82:21-25. To supplement the inadequate ESL that she receives at Phoenix, Van Ni’s caseworker arranged for her to get English language tutoring at home once a week. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 85:2-8.
  37. Other categories of immigrants share similar obstacles and expectations.
  38. Ms. Matropietro, manager of Lancaster’s branch of the international resettlement agency, Church World Service, testified that among the 500-700 immigrants they have resettled annually over the past two years are Cuban and Haitian entrants, most of whom speak no or very little English. N.T. Aug. 16, 2016, 9:44 AM, 68:3-25 (Mastropietro testifying). These Cuban and Haitian entrants are not refugees but share characteristics of limited English ability. *Id.* at 59:6-60:14. Former Phoenix ESL teacher, Mary Ann Ortiz, testified that her entering and emergent level classes included students from Ethiopia, Haiti and Dominican Republic. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 44:18-45:3 (Ortiz testifying). Many but not all of these students are SLIFE, but they share the most important characteristic with refugee students in that they are at the lower levels of English proficiency and need a “runway” in order to reach a threshold level of proficiency that will enable them to master core subject content. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 119:1-120:25 (Marshall testifying that “students who are behind

academically and can't handle grade level and don't understand English cannot be expected to go faster through content when they haven't reached a threshold of English. The best way to explain that, I believe is like a plane taking off on a - - a plane needs kind of a runway to take off...").

39. But when the Plaintiffs arrived in Lancaster, the School District dampened their hopes by denying them enrollment, delaying their enrollment, and placing them at an inferior high school that has not enabled them to overcome their language barriers.
40. Sui Hnem told that Court that she "sometime[s] want[s] to give up." N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 101:11-17 (Sui Hnem testifying). Qasin testified that learning at Phoenix is "impossible." N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 57:15-17 (Qasin testifying). *E.g.*, N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 49:24-50:6 (Anyemu testifying "I wasn't fully happy [at Phoenix], because I felt like I wasn't getting what I was supposed to get like education-wise, you know. I didn't get enough education there to prepare me to do what I want to do."); *id.* 50:17-20 (Anyemu testifying "So what I meant by saying I get a good education there was that sometimes I ask a teacher for help, come to help you, but the material wasn't there . . ."); *id.* 60:4-15 (Anyemu testifying "I think changes need [to be made] in Phoenix School. . . I want to make sure changes happen so people who would come after me, refugees come after me they can be in better shape than me."); N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 57:24-58:2 (Anyemu Dunia testifying that he and Alembe were both deeply upset when the District denied Alembe the chance to go to school). N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 40:19-20 (Qasin testifying that he was very disappointed after the meeting with Blackman at which he was denied enrollment).

## **II. SDOL Has a Pattern and Practice of Delaying or Denying Enrollment for Older Immigrant ELLs**

### **A. Enrollment and Placement Process**

41. SDOL's Enrollment Center, headed by Marsha Riddick, is responsible for reviewing the paperwork of students who seek to enroll in the District. Riddick Dep. 5:1-21; Ex. 6 at LSD281 (SDOL Policy 201, "Admission of Students").
42. Once the student's paperwork is complete—and only after the paperwork is complete—the student is either referred for ESL testing, if appropriate, or referred to Mr. Blackman for placement. *See* Riddick Dep. 72:17-73:15.
43. The District enrollment date, and the state and U.S. enrollment dates constitute the record of a student's official enrollment in the District. Those dates trigger the flow of funds to the District from the state and federal government. N.T. Aug. 19, 2016, 1:29 p.m., 54:23-55:7 (Rau testifying); N.T. Aug. 19, 2016 9:32 a.m. – 12:19 p.m., 130:12-131:3 (Hilt); Ex. 48 at LSD 57 (Qasin records).

44. Mr. Blackman is the District's coordinator of counseling and dropout prevention. N.T. Aug. 22, 2016, 9:27 AM-12:34 PM, 5:24-6:2 (Blackman testifying).
45. Enrollment Center staff lack the authority to place someone at Phoenix without Mr. Blackman's approval; the Center can only enroll high school students in McCaskey, the default school. *See* Riddick Dep. 83:4-21. No one is placed at Phoenix without Mr. Blackman's involvement. Riddick Dep. 14:20-15:10; Misnik Dep. 18:4-12. Mr. Blackman alone is responsible for the decision as to whether to place someone at Phoenix instead of McCaskey. Riddick Dep. 47:14-48:11.
46. All 17- to 21-year-old students who do not have enough credits to be on grade level with their same-age peers must meet with Mr. Blackman, who makes the decision about whether to place them at Phoenix or McCaskey. Riddick Dep. 44:12-45:4, 81:1-82:5; *see also id.* 14:12-15:10; 47:14-48:11; N.T. Aug. 22, 2016, 9:27 AM-12:34 PM, 26:17-29:2 (Blackman testifying); Ex. 83 (Email re Khadidja Enrollment); N.T. Aug. 22, 2016, 9:27 AM-12:34 PM, 32:12-15 (Blackman testifying).

### B. Delays

47. Pennsylvania regulations require that a "school district . . . shall normally enroll a child the next business day, but no later than 5 business days of application." 22 Pa. Code § 11.11(b). Official District policy is to enroll eligible school-age students the next business day, or no later than five days after application. Ex. 5 at LSD278 (SDOL Policy 200, "Enrollment of Resident and Nonresident Students").
48. However, 17- to 21-year-old under-credited students are not enrolled in school as soon as their paperwork is complete, because they must wait for a meeting with Mr. Blackman. Riddick Dep. 61:15-62:5.
49. Appointments with Blackman can be delayed or unavailable for weeks. Ex. 52 at ISSA16 (Q.M.H. Family Case File) (noting that on November 13, 2015, Megan Brown was informed that no meetings with Blackman were available until December 10, 2015).
50. Students whom Blackman places at Phoenix must then also wait for Phoenix to schedule an orientation before beginning school. Riddick Dep. 61:15-62:5.
51. The result is that many older immigrant students experience significant delays between when they apply for enrollment in the District and when they are ultimately placed in school (or denied enrollment) by Blackman.
52. For example, Van Ni enrolled in the District on November 18, 2015; and the District reported her enrollment date to state and federal agencies as November 15, 2015, but she did not actually start at Phoenix until December 22, 2015. Ex. 46 at LSD173, LSD156 (Van Ni student records); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 80:23-2 (Van Ni testifying).
53. Similarly, her sister, Sui Hnem, went to the District Enrollment Center in November 2015 to enroll, with the assistance of her case worker, but did not start school until February 2016, several months after her sister began at Phoenix. N.T. Aug. 16, 2016, 1:29 PM-

5:27 PM (Sui Hnem testifying), 98:10-98:25; Ex. 47 at LSD225, LSD207 (Sui Hnem student records).

54. Khadidja's paperwork was submitted in November 2015 and she met with Mr. Blackman in November 2015, but did not start school until February 2016. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 13:16-18 (Khadidja testifying); Ex. 15 at LSD21 (listing "District Enrollment Date" as 11/18/15); Ex. 15 at LSD5 (showing Khadidja as a "new entry" student at Phoenix on 2/17/16); *see also* N.T. Aug, 17, 2016, 9:32 AM-12:43 PM, 60:17-22, 61:8-18 (Chesson testifying that LRS was trying to get Khadidja into school for months).
55. It took Qasin five months of trying to enroll in school before he was finally placed at Phoenix on January 20, 2016. Ex. 48 at LSD57; 49.
56. The enrollment delays at SDOL have been a problem since 2010. N.T. Aug. 16, 2016, 9:44 AM-12:16 PM, 69:23-73:5 (Mastropietro testifying that immigrants were denied enrollment because of lack of records or disputes about immunizations). Ms. Mastropietro met with District officials to resolve the problems but nothing changed. *Id.* at 75:17-76:2.

### C. Denials

57. Every child who has not graduated from high school has a right to attend the public schools in her district until the end of the school year in which she turns 21. 24 Pa. Stat. § 13-1301; 22 Pa. Code § 11.12. A "child's right to be admitted to school may not be conditioned on the child's immigration status." 22 Pa. Code § 11.11(d).
58. SDOL has denied older immigrant students enrollment in the District based on several illegal considerations.
59. First, SDOL has admitted denying enrollment based on SDOL employees' subjective impression that the student is not sufficiently motivated, or speculation that the student would rather work.
60. Mr. Blackman has steered many older immigrant ELLs to Literacy Council, GED programs, or Job Corps when they attempted to enroll in school. *See, e.g.*, Brown Dep. 29:2-10 (testifying that Blackman said Qasin should try options other than school like Job Corps or ESL classes at Literacy Council); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 40:15-17 (Qasin testifying that he was referred to the Literacy Council by Mr. Blackman);<sup>2</sup> N.T. Aug. 16, 2016, 9:44 AM-12:16 PM, 78:10-80:9 (Mastropietro testifying that District suggested Sui Hnem take GED courses).

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<sup>2</sup> Literacy Council is a nonprofit ESL organization that caters to adults, and is only available to adults over the age of 18. Thus, at the time that District officials referred Qasin to classes at Literacy Council instead of enrolling him in school, he was too young to qualify for their services. Brown Dep. 32:20-33:1.

61. Mr. Blackman testified that he initially denied Qasin enrollment because Qasin did not participate in the meeting with Mr. Blackman, and Blackman thus could not “develop an academic graduation plan” for him. N.T. Aug. 22, 2016, 9:27 AM-12:34 PM, 33:24-35:5 (Blackman testifying).
62. Others testified that District officials cited Qasin’s body language during the meeting as a reason for denying him enrollment. N.T. Aug. 17, 2016, 9:32 AM-12:43 PM, 41:12-17 (Chesson testifying); *Id.* at 9:32-12:43, 40:5-11 (Chesson testifying that during January 4 conference call regarding Qasin’s enrollment, Hilt and Blackman stated that Qasin’s body language at enrollment meeting suggested that he is not eager to go to school).
63. Second, the District denies enrollment to older immigrant students under the age of 21 if District officials believe they would not graduate by the year in which they turn 21.
64. Alembe Dunia is a clear example of this.
65. After arriving in Lancaster in November 2014, the Dunia brothers attempted to enroll in school. They submitted all the paperwork necessary to verify their eligibility. *See* N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 13:18-23 (Alembe testifying); Ex. 50 at LSD93-LSD114 (Anyemu student records).
66. At the time of application, Alembe Dunia had just turned 19 years old. *See* N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 9:16-17 (Alembe testifying that he was born November 11, 1995); Ex. 51 at LSD79 (Alembe student records) (Birthdate: 11/11/1995).
67. The District denied Alembe enrollment in the District. Compl., ECF No. 1, ¶¶ 22, 136, 137, 138; Answer, ECF No. 23, ¶¶ 22, 136, 137, 138; N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 14:16-22, 15:24-16:2 (Alembe testifying).
68. District officials stated that Alembe was denied admission because, in light of his limited prior schooling and age, the District did not believe he could graduate high school by age 21. Compl., ECF No. 1, ¶¶ 136, 137; Answer, ECF No. 23, ¶¶ 136, 137.<sup>3</sup>
69. The District did not provide an interpreter or translate any documents to assist the Dunias during their enrollment process. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 13:24-14:8, 19:10-13 (Alembe testifying).

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<sup>3</sup> Plaintiffs note that the District belatedly filed a Motion on August 25, 2016 to amend its Answer admitting that Alembe was denied enrollment. *See* Def.’s Mot. to Amend (ECF No. 31). Such Motion was made after the close of evidence in this hearing thus denying Plaintiffs the opportunity to put on additional evidence in support of this allegation and should be denied for this reason alone. Moreover, the District has admitted elsewhere in its Answer that it denied Alembe enrollment. *See* Answer (ECF No. 23) P 22 (“It is admitted that Alembe was denied enrollment when he presented for a free public education at the age of 20.”). The District further has admitted both in its answer and through its witnesses that it was the District’s pattern and practice to deny enrollment to persons under the age of 21 whom they deemed unable or unlikely to graduate before reaching the age of 21. *See* Answer P 34. Alembe has testified that he was denied enrollment as a result of his age, matching the experience of other Plaintiffs. N.T. Aug. 17, 2016, 2:06 p.m. – 3:56 p.m., 14:16-22 (Alembe testifying). Finally, while the records of both Alembe and his brother Anyemu reflect a purported missed meeting with Mr. Blackman on January 6, 2015, *see* Ex. 50 at LSD87; Ex. 51 at LSD81, Anyemu began attending Phoenix on February 9, 2015, supporting the conclusion that the District did, in fact, deny enrollment to Alembe as a result of his age.

70. Because the Dunias could understand very little that District officials said to them in English, their refugee resettlement caseworker, Bilal Al-Tememi, accompanied them throughout the enrollment and placement process. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 13:18-14:24, 17:22-18:7, 19:4-13 (Alembe testifying); *id.* 22:5-11 (Anyemu testifying).
71. Bilal explained to Alembe that a District official had said he was too old to go to school. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 14:16-22, 17:22-18:7, 19:4-13 (Alembe testifying).
72. Similarly, prior to placing Qasin at Phoenix, District officials related to Megan Brown, Qasin’s caseworker, that he would not be enrolled because he was too old. Brown Dep. 28:9-14; N.T. Aug. 17, 2016, 9:32 AM-12:43 PM, 29:20-23 (Chesson testifying). He was only enrolled after his caseworkers challenged the denial. *Id.* at 39:1-43:10 (Chesson testifying).
73. The District also did not want to enroll Sui Hnem at all because she was too old and wouldn’t have time to graduate. N.T. Aug. 16, 2016, 9:44 AM–12:16 PM, 78:10-80:9 (Mastropietro testifying). *See also*, N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 99:1-11 (Sui Hnem testifying that the 3-month delay in enrolling her in school—months longer than it took her younger sister—was due to the fact that she was 19 and the District made it difficult for older students to enroll in school).
74. Khadidja was told in her November enrollment meeting that she was too old to go to school. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 14:1-3 (Khadidja testifying). Khadidja’s younger sister was enrolled and started school at McCaskey before Khadidja was allowed to begin at Phoenix. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 15:1-4 (Khadidja testifying).

#### **D. Barriers to Participation in the Enrollment and Placement Process**

75. SDOL’s enrollment and placement process is structured in a way that makes it difficult for ELLs to advocate for themselves.
76. SDOL enrollment forms are all in English. *See, e.g.*, Riddick Dep. 35:18-37:17, 87:19-88:5, 89:13-90:7, 103:8-12, 105:17-106:3.
77. The District routinely fails to provide interpreters to help LEP families navigate the enrollment and placement process.
78. PDE guidance makes clear that school districts must provide interpretation and translation services to allow LEP students and families to “understand the enrollment process and enroll the student in school promptly.” Ex. 4 at LSD274 (“Enrollment of Students” Basic Education Circular).
79. The District does not provide in-person or over-the-phone interpreters to assist ELLs in understanding what is happening during placement meetings with Mr. Blackman or to assist them in communicating their educational goals. *E.g.*, Blackman Dep. 67:16-68:1; N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 14:6-10 (Khadidja testifying); N.T. Aug. 17,

- 2016, 2:06 PM-3:56 PM, 23:22-24:7 (Anyemu testifying). ELLs are routinely unable to participate in these meetings or understand anything that is said. *See id.* 24:3-7 (Anyemu testifying). Indeed, Qasin testified that at the enrollment meeting with Mr. Blackman, the only thing he understood was when his name was spoken. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 39:17-21.
80. Despite the lack of Swahili speakers on staff, the District did not procure an interpreter or translate any documents to assist the Dunias during their enrollment and placement process. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 13:24-14:8, 19:10-13 (Alembe testifying); *id.* 22:7-9, 23:22-24:2 (Anyemu testifying).
81. Enrollment and placement decisions are highly discretionary.
82. Applications are evaluated on a case by case basis by one person—Mr. Blackman—without any clear criteria to constrain his exercise of discretion. *See, e.g.*, Ex. 16 (email from Blackman stating that “decisions are made on a case by case basis.”).
83. As a result, Mr. Blackman has made placement decisions based on his mood, or on his perceptions of attitude, which do not account for cultural differences.
84. Sheila Mastropietro testified regarding Mr. Blackman’s flippant attitude and statements such as “I’m feeling good today, I’m going to enroll you.” N.T. Aug. 16, 2016, 9:44 AM–12:16 PM, 79:2-9.
85. Ms. Hilt admitted that one of the reasons Mr. Blackman refused to enroll Qasin was their perception of Qasin’s behavior at the enrollment meeting. N.T. Aug. 19, 2016, 9:32 AM-12:19 PM, 127:4-127:8, 128:16-21 (“He was not sitting at the table with us and interacting” and seemed “disinterested”); *cf.* N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 39:21-40:2 (Qasin testifying that Mr. Blackman was not paying attention to Qasin or his family during the meeting, which only lasted a few minutes before Mr. Blackman referred Qasin to Literacy Council); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 40:19-20 (Qasin testifying that he was very disappointed after the meeting with Blackman at which he was denied enrollment).
86. Cultural barriers, rather than disinterest, can lead to the body language Qasin expressed during his enrollment meeting. N.T. Aug. 17, 2016, 9:32 AM-12:43 PM, 41:21-42:3 (Chesson testifying); N.T. Aug. 19, 2016, 9:32 AM-12:19 PM, 127:9-128:15 (Hilt admitting that she did not know at the time of the meeting what Qasin’s background, the circumstances of his journey to the U.S., what he had been through, and that his standoffish behavior was not necessarily surprising given what he may have been through).
87. SDOL does not document its enrollment or placement decisions.
88. Mr. Blackman does not complete any paperwork or electronic database entries when he makes a placement decision. Blackman Dep. 84:4-95:16. He might send an email to Phoenix, but does not make an effort to save these and does not do this in all cases. *Id.*

89. No Plaintiff received any paperwork reflecting the fact that they had been denied enrollment or placed at Phoenix or explaining the reason for the District's decision. *E.g.*, Brown Dep. 29:16-18, 35:6-9.
90. There was no consistent practice of recording when placement meetings occurred, or even if they did. Blackman Dep. 77:7-20.
91. The SDOL Enrollment Center has never notified a family about the process for complaining about an enrollment decision to the Pennsylvania Department of Education. Riddick Dep. 108:17-109:13. Mr. Blackman never told students they had a right to appeal his placement decision. Blackman Dep. 45:13-20.
92. Many immigrants must rely on the advocacy of their resettlement caseworkers to overcome the barriers to enrollment in SDOL. *E.g.*, N.T. Aug. 19, 2016, 9:32 AM-12:19 PM, 151:12-151:19 (Hilt admitting that Khadidja was enrolled in Phoenix only as a result of the advocacy by her case worker, Bilal).
93. Refugee agency caseworkers are often involved in the SDOL enrollment process, and are generally familiar with the enrollment process and know what documents are required to enroll. Riddick Dep. 19:7-20:3.

**III. SDOL Has a Pattern and Practice of Placing Older Immigrant ELLs at Phoenix Instead of Their Assigned High School, McCaskey.**

94. Official policy approved by the school board is to assign students to classes and schools "consistent with the educational needs and abilities of students and the best use of district resources." Ex. 7 at 1 (SDOL Policy 206, "Assignment Within District"). Officials are directed to assign incoming transfer students "to schools, grades, and classes that afford each student the greatest likelihood of realizing his/her educational potential and academic goals." *Id.* Official policy also forbids "discrimination" in school assignment. *Id.*
95. The McCaskey Campus is the default high school placement for high school students living in the District, and enrolls the vast majority of the District's high school students. *See Answer*, ECF No. 23, ¶ 44.
96. Plaintiffs are all geographically assigned to McCaskey. Riddick Dep. 83:4-21.
97. Phoenix is supposed to be a "choice" school that parents and students can opt into. N.T. Aug. 22, 9:27 AM-12:34 PM, 19:11-23 (Blackman testifying about request and agreement by family). About 85% of the students at Phoenix transfer from McCaskey, a process wherein Mr. Blackman discusses options with the student and parents. N.T. Aug. 22, 9:27 AM-12:34 PM, 18:20-19:23 (Blackman testifying that about 85% are transfers from McCaskey). The student has a choice whether to attend Phoenix. N.T. Aug. 22, 9:27 AM-12:34 PM, 19:11-23 (Blackman testifying).
98. However, older immigrant ELLs are not given a choice about whether to attend McCaskey or Phoenix. *E.g.* N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 14:16-21 (Khadidja testifying that she was told Phoenix was her only option); N.T. Aug. 16, 2016, 1:29 PM-

- 5:27 PM, 99:12-14 (Sui Hnem testifying that she had no option to attend McCaskey); Blackman Dep. 95:4-10 (Blackman admitting that Sui Hnem and Van Ni were not given a choice between Phoenix and McCaskey).
99. Indeed, the District has admitted that placement at Phoenix is the only option available to under-credited students who are older than their grade-level peers. Rau Dep. 77:12-78:10.
100. This policy applies even to seventeen-year-olds who still have five years of legal schooling remaining in which to complete high school at McCaskey. N.T. Aug. 22, 9:27 AM-12:34 PM, 57:3-58:13 (Blackman testifying that he does not consider this fact).
101. The District's policy of placing older immigrant ELLs at Phoenix is *not* based on the language needs or individual educational goals of these students. *E.g.* N.T. Aug. 19, 2016, 1:29 PM, 94:6-13 (Rau testifying that District does not take language proficiency or whether a student has had interrupted schooling into consideration in deciding to place a student at Phoenix); Abrom Dep. 16:20-17:22 (placement decision depends exclusively on age and credits; English proficiency is not considered); Rau Dep. 77:12-78:10 (placement decisions for older, under-credited students do not take into consideration language proficiency or newcomer status); N.T. Aug. 19, 2016, 9:32 AM-12:19 PM, 86:7-86:14, 132:9-132:16 (Hilt testifying).
102. Mr. Blackman does not consider differences in English language instruction between McCaskey and Phoenix. Blackman Dep. 43:2-44:19.
103. Mr. Blackman also does not take into account a student's academic potential and capabilities in making placement decisions. Blackman Dep. 47:3-9.
104. The District has offered varying reasons for this policy, but they all fall into one of several categories: 1) prioritization of a diploma above all other educational concerns, 2) stereotypes about older immigrant students, and 3) considerations of the needs of McCaskey students.

#### **A. Prioritization of a Diploma**

105. Several District officials testified that under-credited ELLs aged 17-21 would be unlikely to obtain a high school diploma if they went to McCaskey. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 35:2-13 (Abrom testifying).
106. Rather than give under-credited ELLs a choice between pursuing a faster, easier diploma at Phoenix and studying at McCaskey, the District substitutes its judgment for that of the immigrant families and places them all at Phoenix. N.T. Aug. 22, 2016, 9:27 AM- 12:34 PM, 12:13- 13:14. (Blackman testifying when any older refugee comes in with no credit we assign them to Phoenix. If they ask not to go there, we explain it is the best chance for them to graduate.) *Id.* at 19:20-20:3. (Blackman testifying that about 85% of student at Phoenix end up there after an agreement is made with the student and their family, and that is not the case students who are older and under-accredited entering the district).

107. Immigrant ELLs do not all share the District’s view that the chief goal of their education should be attaining a high school diploma.
108. *E.g.*, N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 60:9-15 (Anyemu testifying “I want to make sure changes happen so people who would come after me, refugees come after me they can be in better shape than me. . . I don’t want the school to focus on helping us to get the degrees, but they need to help us learning instead of going fast and to graduate to get the diploma and then they cannot do nothing with the diploma.”); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 30:7-8 (Khadidja testifying that “I don’t just want to graduat[e], I want to receive an actual education. Now, even if I graduate, I know nothing.”).
109. However, agreement by the family is not a requirement for placement at Phoenix for students 17 or older. Mr. Blackman simply makes the decision for them. N.T. Aug. 22, 2016, 9:27 AM-12:34 PM, 19:20-20:8 (Blackman testifying).
110. The pretextual nature of this purported rationale is highlighted by the fact that the District does not enable older immigrant ELLs to transfer to McCaskey after they acquire sufficient credits at Phoenix to enable them to graduate from McCaskey.
111. Megan Misnik admitted that “very few” students leave Phoenix for McCaskey. N.T. Aug. 22, 2016, 12:27 PM, 117:22-25.
112. She explained that while some middle school Phoenix students are able to get back on track and transfer to McCaskey, high-school age Phoenix students usually graduate from Phoenix and are not eligible to transfer to McCaskey because they are still “overage” and under-credited relative to their age-level peers. Misnik Dep. 84:1-16; N.T. Aug. 22, 2016, 12:27 PM-4:01 PM, 118:9-25 (Misnik testifying).
113. Plaintiffs were not offered the option to transfer to McCaskey. *E.g.*, N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 33:11-13 (Khadidja testifying that no one ever told her that she could transfer to McCaskey); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 57:18-20 (Qasin testifying that no one told him that he could transfer to McCaskey eventually).
114. Though Anyemu amassed credits rapidly at Phoenix and was only 18 when he graduated, at no point did any District or Phoenix staff ask him if he wanted to transfer to McCaskey. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 37:20-23 (Anyemu testifying). Anyemu at no point expressed a desire to graduate from Phoenix rather than continuing his schooling at McCaskey. *Id.* 51:13-20.
115. The District has also ignored or flat-out refused requests to transfer from Phoenix to McCaskey from older immigrant ELLs. *See* Ex. 26 (ACLU letter demanding that Qasin be transferred to McCaskey); N.T. Aug. 19, 2016, 1:29 PM, 76:1-77:3 (Rau testifying that she received ACLU letter regarding problems with Qasin’s enrollment but did not look into his file); Abrom Dep. 32:14-19; 35:7-15 (District did not respond to ACLU letter or enroll Qasin in McCaskey); N.T. Aug. 22, 2016 4:13 PM-5:45 PM, 33:1-7 (Abrom testifying that after receiving ACLU letter, District turned it over to their counsel and did nothing else in response).

## B. Stereotypes About Older Immigrant Students

116. SDOL’s official judgment that all older immigrant ELLs are best served by obtaining a diploma quickly is informed by several stereotypes about immigrant students. Testimony by District officials made plain that District policy is shaped by officials’ beliefs that older immigrant students generally:
- a. Need to work to support their families. *E.g.*, N.T. Aug. 22, 2016 4:13 PM-5:45 PM, 10:15-22 (Abrom testifying that older immigrant students are frequently the “only breadwinner that’s in the family”).
  - b. Would rather work than be educated. *E.g.*, N.T. Aug, 17, 2016, 9:32 AM-12:43 PM, 86:8-10 (Chesson testifying that Rau and Abrom stated at March 17, 2016 meeting that some refugees come in better suited for employment and ESL classes).
  - c. Want to go to school primarily so that their families can get TANF benefits. N.T. Aug. 19, 2016, 9:32 AM-12:19 PM, 22:10-13 (Hilt testifying that it was the primary concern for Qasin’s enrollment). This perception seems to be based on a misunderstanding about the nature of support provided by refugee resettlement agencies. N.T. Aug. 22, 2016, 9:27 AM- 12:34 PM, 54:23-24 (Blackman testifying that resettlement agencies stop providing services at ninety days).
  - d. Are often in arranged marriages. *E.g.*, N.T. Aug. 22, 2016 4:13 PM-5:45 PM, 10:15-22 (Abrom testifying).
  - e. Are likely to have children before the age of 21. *E.g.*, N.T. Aug. 22, 2016 4:13 PM-5:45 PM, 10:15-22 (Abrom testifying).
  - f. Would be overwhelmed in a large school setting. N.T. Aug. 22, 2016, 9:27 AM-12:34 PM, 67:8-14 (Blackman testifying that he wonders how they would do in a larger environment, a smaller environment is better due to the trauma they have experienced).
  - g. Are likely to quit school. N.T. Aug. 22, 2016, 12:27 PM, 64:17-65:9. (Heisey testifying if life gets in the way for refugees at McCaskey they are more likely to quit school because it will take longer to graduate).

### **C. Considerations of the Needs of McCaskey Students**

117. Several District representatives expressed concerns about the older immigrants mixing with younger McCaskey students. *E.g.* N.T. Aug. 22, 2016 4:13 PM-5:45 PM, 37:13-18 (Abrom testifying that mixing older immigrants with 13- or 14-year-olds “can be viewed as just not appropriate . . . would I want that 21 year old [to] go to school every day with a 13 year old? It’s too much of an age disparity.”); N.T. Aug. 22, 2016 4:13 PM-5:45 PM, 37:4-6 (Abrom testifying that “the state law maximum of 21 was really put into place originally for students that had special needs.”).

118. Impact on the majority students. N.T. Aug. 19, 2016, 1:29 PM, 42:18-43:12 (Rau testifying that she has to think of all the students; If you make changes for small group there's ripple effect on bigger group).

### 1. Budgetary Concerns

119. The District saved several million dollars by giving Camelot the contract to run Phoenix. N.T. Aug. 19, 2016, 1:29 PM, 91:15-17 (Rau testifying that is due to no employee pension or health-insurance payment).
120. Phoenix is less expensive to operate than McCaskey. Rau Dep. 74:17-20; N.T. Aug. 19, 2016, 1:29 PM, 91:11-22 (Rau testifying).
121. The District thus spends less money per pupil on Phoenix students than on McCaskey students.
122. In addition, keeping Phoenix enrollment at 100% of capacity (350 students) keeps the District's costs down. N.T. Aug. 19, 2016, 1:29 PM, 96:19-97:7 (Rau testifying); Ex. 9 at p.11 Section 2.6.5 (Master Operating Agreement for Phoenix).
123. Phoenix is currently under-enrolled. Ex. 94 at 1 (PDE School Performance Profile for Phoenix showing enrollment of 323 students).

### 2. Concerns About District "Drop-Out" Rates

124. The District's predominant consideration, however, seems to be a desire to maintain the highest possible graduation rate. N.T. Aug. 19, 2016, 1:29 PM, 39:1-13, (Rau testifying that if graduation rate not high enough that will attracts lots of issues, e.g., state monitoring; phoenix considered separate from McCaskey); N.T. Aug. 19, 2016, 1:29 PM, 78:5-7, (Rau testifying that districts are held accountable by state for graduating students). N.T. Aug. 19, 2016, 1:29 PM, 81:18-22, (Rau testifying that the District did not want to be known as a "dropout factory.")
125. The Pennsylvania Department of Education counts a student who fails to graduate before the final year of eligibility as a drop out, but by refusing to enroll older students SDOL avoids depressing its graduation rate. N.T. Aug. 19, 2016, 1:29 PM, 74:19-22, (Rau testifying that if a student doesn't enroll, there is no dropout noted when ages out.)
126. The Superintendent has candidly expressed that its enrollment and placement practices with respect to older immigrant ELLs are based in part on a desire to safeguard the District's graduation rates. *E.g.*, N.T. Aug. 19, 2016, 1:29 PM, 81:8-22 (Rau testifying that overriding goal of Phoenix placement is to get new refugee students to graduate, in part because District does not want a "drop-out factory"); Rau Dep. 82:15-83:11 (overriding goal is to get new refugee students to graduate in part because District is evaluated based on the number of students they graduate). *See also* N.T. Aug. 22, 2016 4:13 PM-5:45 PM, 39:2-4 (Abrom testifying regarding District's concern about more kids dropping out and not graduating).

127. If a student ages out of school without graduating, that will count as a “drop out” and affect the District’s graduation rates. N.T. Aug. 19, 2016, 1:29 PM, 72:3-15 (Rau testifying); Rau Dep. 83:13-17.
128. However, if a student is never enrolled (such as Alembe), that will not affect the District’s graduation rates. N.T. Aug. 19, 2016, 1:29 PM, 74:15-22 (Rau testifying).

**IV. Phoenix Academy’s Environment Is Designed for Students with Behavioral Problems.**

129. Phoenix Academy is run by Camelot Education, a for-profit company that specializes in schools for students with a history of disciplinary problems and special education needs.
130. Until shortly before the commencement of trial, Camelot Education’s website consistently listed Phoenix as a “transitional” school, a Camelot model that “integrates behavior and academics[.]” Ex. 18 at 3, 7; Ex. 89 at ISSA54.
131. Camelot employs the same behavioral interventions at the AEDY schools it manages as it does at Phoenix. *See* N.T. Aug. 18, 2016, 9:42 AM-2:11 PM 22:3-4 (Rivera testifying that Phoenix uses standard Camelot policies).
132. Indeed, these behavioral interventions are central to Camelot’s operation of Phoenix Academy. Ex. 19 at SDOL\_RTK\_002303 (changing behavior from anti-social to social is a stated goal); *Id.* at SDOL\_RTK\_002308-002315 (behavior management and behavior levels are also part of the handbook); *Id.* at SDOL\_RTK\_002320 (behavior accounts for 10% of a student’s grade).<sup>4</sup>
133. Phoenix has a reputation in the community as a school “where the bad kids go,” and where kids get beat up and slammed into the walls with no police recourse. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 47:22-23, 48:3-8 (Rivera testifying).
134. SDOL’s Operating Agreement with Camelot, signed April 15, 2014, for a three-year term, specifies that “Camelot will operate an alternative education program at the Phoenix Academy....” Ex. 9 at 1. Under the Agreement’s “Student Eligibility Criteria,” students must exhibit, “to a marked degree, any or all of the following”: (i) overage for their appropriate grade; (ii) significantly behind in credits earned toward graduation; (iii) previously dropped out of high school; (iv) exhibit one of more characteristics of “At-Risk Students”; or (v) habitual truancy. *Id.* at 7. The Agreement defines “At-Risk Students” as having a grade of F in Math or Language Arts, attendance below 80%, or earned less than 2 credits in an academic year. *Id.* at 1-2.

**A. Security Protocols**

135. Phoenix has severe and restrictive security protocols not in place at McCaskey.

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<sup>4</sup> The Phoenix Handbook is an accurate description of the school and how it operates. Misnik Dep. 22:4-7 (referring to Ex. 19).

### 1. Pat-Downs

136. Phoenix students are frisked every day by staff upon entering the building. *E.g.* N.T. Aug. 18, 2016, 9:42 AM-2:11 PM 26:22-23 (Rivera testifying); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 99:15-23 (Sui Hnem testifying that she was searched every day, and that staff use their hands to check her body); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 50:7-14 (Qasin testifying that staff search students with their hands on students' bodies).
137. McCaskey students are not frisked every time they enter the building. N.T. Aug. 19, 2016, 9:32 AM-12:19 PM, 81:4-81:8 (Hilt testifying).
138. The Phoenix pat-down involves staff placing their hands "all the way down the side of the body by the arm pit," touching the bra strap in between girls' breasts to make sure they aren't hiding anything in their bra, touching down the legs and up the thighs, on the front and back of the students' bodies. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 27:16-25 (Rivera testifying). Staff also search students' collars, pockets, belt area, and socks. Misnik Dep. 30:18-22.
139. All staff at Phoenix are trained to perform these daily pat-down searches. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 27:4-6 (Rivera testifying).
140. Students are also directed to remove their shoes and shake them upside down to make sure there is nothing hidden in them. *See* Misnik Dep. 31:4; N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 29:5-9 (Rivera testifying); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 99:17-20 (Sui Hnem testifying that students must remove their shoes during daily pat-downs); N.T. Aug. 17, 2016, 9:32 AM-12:43 PM, 76:17-19 (Chesson testifying that students form single file line for pat-downs and are required to take off their shoes).
141. Dr. Rau did not know initially that Phoenix students were physically patted down daily and only came to understand this was an issue sometime after February 2016. N.T. Aug. 19, 2016, 1:29 PM, 103:12-104:22 (Rau testifying). Dr. Rau still expressed confusion over whether Phoenix students are patted down every day. N.T. Aug. 19, 2016, 1:29 PM, 105:5-15 (Rau testifying).

### 2. Prohibition on Personal Belongings

142. At Phoenix, students are prohibited from bringing anything in or out of the school. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 28:23-24 (Rivera testifying).
143. This means that Phoenix students are not allowed to take home books to study, nor can they bring their own books into the school. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 17:10-11 (Khadidja testifying).
144. Camelot's agreement with SDOL requires Camelot to pay for "replacement of any lost or damaged textbooks." Ex. 9 at 14 (¶ 3.4.1.)
145. Phoenix students are not permitted to bring homework assignments into or out of the school. *See, e.g.* N.T. Aug. 17, 2016, 9:32 AM-12:43 PM, 75:13-20 (Chesson testifying

- that at orientation, Phoenix officials explained that there is no homework because students are not allowed to bring anything in or out of school); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 17:13-15 (Khadidja testifying).
146. Phoenix students are not permitted to bring to school *any* personal belongings, including bags, books, papers, and other articles – to or from school. Ex. 19 at SDOL\_RTK\_002305 (Phoenix Student Handbook); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 17:8-9 (Khadidja testifying).
147. District guidelines regarding rights of students not in effect at Phoenix. Ex. 92 at Issa\_000326-000333 (listing student rights, including rights to make their own choices regarding dress and grooming. and free expression); Ex. 19 at SDOL\_RTK\_002305 (Phoenix Student Handbook) (regulating student appearance).

## **B. Harsh Disciplinary Interventions**

### **1. “Handle with Care” Behavioral Correction System**

148. The “Handle with Care” system of “verbal interventions” and “physical interventions” is central to life at Phoenix.
149. All Phoenix staff are trained in “Handle with Care” methods. N.T. Aug. 22, 2016, 12:27 PM-4:01 PM, 145:18-22 (Misnik testifying). In addition, Phoenix employs dedicated “behavioral specialists.” N.T. Aug. 22, 2016, 12:27 PM-4:01 PM, 145:18-25 (Misnik testifying).
150. The “Handle with Care” escalating intervention levels are demonstrated to new students at orientation, using a student as a volunteer. N.T. Aug, 17, 2016, 9:32 AM-12:43 PM, 71:23-72:5 (Chesson testifying); Misnik Dep. 54:12-15.
151. “Handle with Care” is a harsh system designed for kids with history of behavioral problems.
152. The system is implemented at Camelot’s Alternative Education for Disruptive Youth (AEDY) schools. Misnik Dep. 68:15-20.
153. “Handle with Care” involves seven levels of intervention to be used on students who are being non-compliant. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 22:22-24 (Rivera testifying); *see generally* Ex. 19 at SDOL\_RTK\_2316-2317 (Phoenix Student Handbook); N.T. Aug. 22, 2016, 12:27 PM-4:01 PM, 107:8 (Misnik testifying). The lowest levels of intervention involve friendly or concerned verbal or non-verbal cues to the student who is not following the rules. *See* N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 22:24-23:2 (Rivera testifying). The highest level of intervention is a physical restraint with the student being pressed up against wall with their hands behind their back. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 23:2-6 (Rivera testifying); N.T. Aug, 17, 2016, 9:32 AM-12:43 PM, 72:1-3 (Chesson testifying).

154. McCaskey does not use “Handle with Care” or demonstrate restraints at new student orientation. N.T. Aug. 19, 2016, 9:32 AM-12:19 PM, 80:17-81:3, 81:9-81:12 (Hilt testifying).
155. Indeed, at Phoenix, students disrupted classroom teaching and had to be removed from the classroom “like every day.” N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 42:18-43:4 (Anyemu testifying). Ms. Rivera testified that she frequently observed staff members using physical interventions without first attempting the lower-level interventions. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 23:16-19. She explained: “Staff members would suddenly pick up a child for no reason, slam a child against a wall, slam a child against a door, scream at a child, yell at a child, curse at a child. More often than not I saw these seven levels not handled properly, but handled improperly.” N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 23:19-24.

## 2. Behavioral Ranking System

156. Phoenix encourages “confrontations” between students, identifying confrontation of peers as the number one “step to success” at Phoenix. Exh. 19 at SDOL\_RTK\_002309 (Phoenix Student Handbook).
157. Consistent with the “Handle with Care” model, Phoenix policy encourages “confrontations” between students: Phoenix requires students to “confront[] the negative behavior of their peers,” and identifies confrontation of one’s peers as the number one “step to success at Phoenix. Exh. 19 at SDOL\_RTK\_002309; SDOL\_RTK\_002313. To advance further in the behavioral rankings, a Phoenix student must fill out a “Pledge Log” so that school personnel can review “who they have been confronting, [and] the reason for the confrontation[.]” Exh. 19 at SDOL\_RTK\_002315. Only students who are consistently documented “confronting and enforcing the normative culture at Phoenix” can earn the highest behavioral ranking. Exh. 19 at SDOL\_RTK\_002315-002317.
158. *See also* N.T. Aug. 17, 2016, 9:32 AM-12:43 PM, 77:14-16 (Chesson testifying that Becky Falcone stated at orientation “We are a very confrontational school.”); N.T. Aug. 22, 2016, 12:27 PM-4:01 PM, 102:21 (Misnik testifying that confrontation is something that is done all the time at Phoenix Academy).
159. Students who regularly confront the negative behavior of peers are rewarded with status and privileges. Exh. 19 at SDOL\_RTK\_002313; N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 25:18-26:5 (Rivera testifying); Misnik Dep. 27:7, 19-21; N.T. Aug. 22, 2016, 12:27 PM-4:01 PM, 78:13-17 (Misnik testifying).
160. Phoenix did not distinguish between peer-to-peer confrontations with a negative tone (telling another student to “shut up,” for example) and those with a positive tone. Students were routinely rewarded with advancement to a higher behavioral ranking for confronting their peers in any manner at all, even negatively. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 26:13-18 (Rivera testifying).

161. The Phoenix dress code is designed to reinforce the student hierarchy based on behavior. Students are rewarded with different colored uniform shirts as a behavioral incentive. *See* N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 25:16-21 (Rivera testifying); N.T. Aug. 22, 2016, 12:27 PM-4:01 PM, 127:7-9 (Misnik testifying).

#### **D. Pervasive Bullying**

162. Language barriers make it difficult for ELLs to ask for help dealing with bullying. N.T. Aug. 17, 2016, 9:32 AM-12:43 PM, 107:10-13 (Chesson testifying that Qasin told her that it was difficult for him to communicate with anyone at school because no one spoke his language).
163. Refugees' heightened fear of retaliation makes them less likely to ask for help. Many refugees come from countries where people are often retaliated against for speaking up and reporting injustices. N.T. Aug. 17, 2016, 9:32 AM-12:43 PM, 105:18-106:2 (Chesson testifying).
164. Qasin did not tell anyone at Phoenix about the bullying because he feels alone at the school and was worried about retaliation by his classmates. He also does not know the process for reporting. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 53:15-54:2 (Qasin testifying).
165. Qasin tried to avoid using the bathroom in order to avoid his bullies. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 54:12-13 (Qasin testifying).

#### **E. Limited Curriculum and Programming**

166. At Phoenix's orientation, Becky Falcone explained that Phoenix offers only general education courses needed for graduation. N.T. Aug. 17, 2016, 9:32 AM-12:43 PM, 78:15-21 (Chesson testifying).
167. Phoenix has fewer course options than McCaskey. There are no Small Learning Communities, and no diversified occupations program at Phoenix. N.T. Aug. 22, 9:27 AM-12:34 PM, 138:23-152:11 (Heisey testifying); Ex. 21 at 7, 19-21 (McCaskey Curriculum).
168. Most of the courses listed in McCaskey's 104-page Curriculum Guide are not available to students at Phoenix. N.T. Aug. 22, 2016, 9:27 AM-12:34 PM, 138:23-150:4; 151:10-152:11 (Heisey testifying).
169. Phoenix offers no extra-curricular activities or sports.
170. The District has not reported any Phoenix students playing any sports for McCaskey. N.T. Aug. 22, 2016, 9:27 AM-12:34 PM, 153:1-155:21 (Heisey testifying); Ex. 86 at 1 (Phoenix Academy, Interscholastic Athletic Opportunities Disclosure Form 15.6, 2014-15 School Year) (listing zero Phoenix student participants in interscholastic athletic activities and failing to indicate on page 4 of 4 that any Phoenix students participate at other schools, such as McCaskey).

171. Phoenix did not inform its ELLs of any opportunity to participate in sports or extracurricular activities at McCaskey. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 32:23-33:1 , 33:14-16 (Anyemu testifying); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 48:6-8 (Qasin testifying).
172. Anyemu would have been eager to play on the soccer team, since he played the game before coming to the U.S., loves it, and is good at it. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 33:2-33:13 (Anyemu testifying). It is also an activity that has allowed him to overcome language barriers and successfully form bonds with English speakers. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 46:4-22 (Anyemu testifying).<sup>5</sup>
173. Phoenix does not prepare students for college.
174. Phoenix does not offer students any meaningful college counseling. N.T. Aug. 17, 2016, 2:06 PM– 3:56 PM, 38:6-18 (Anyemu testifying).
175. Phoenix students do not graduate “college ready.” N.T. Aug. 17, 2016, 2:06 PM– 3:56 PM, 38:6-18 (Anyemu testifying; Ex. 94 (PDE “college ready” stat)).
176. Phoenix generally ranks worse than McCaskey in every measure of performance tracked by the Pennsylvania Department of Education, such as number of highly qualified teachers, drop-out rates, college preparedness, and student academic performance. N.T. Aug. 22, 12:27 PM, 39:14-51:7 (Heisey testifying); *see generally* Ex. 94 (School Performance Profiles for Phoenix and McCaskey).

**V. Phoenix Academy’s Environment Negatively Impacts the Ability of Students Who Are SLIFE to Learn**

177. Students—particularly students who are SLIFE—need to be in an environment where they feel safe and welcomed in order to learn. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, at 99:8-15 (Marshall testifying). In the absence of such a safe and welcoming environment, their affective filter is raised, causing students to feel anxiety and stress that undermines learning. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 106:2-23 (Marshall testifying); *see also id.* 106:13-18 (Marshall testifying that “If you're not comfortable in your learning situation, you have any anxiety, you’re not going to be a risk taker and your affective—your feelings are blocking your ability to access learning, and to be motivated and interested and engaged in learning. And you kind of shut down.”).
178. The school environment at Phoenix undermines learning. It is inappropriate to assume that SLIFE need behavioral adjustment because, while “these . . . newcomers . . . may not [all] be refugees and they may or may not have had . . . stress and trauma . . . [they are

<sup>5</sup> Phoenix is aware of the transformative power of soccer, which is why they built it into the structure of the optional, grant-funded summer program for refugee students. *See* N.T. Aug. 19, 2016, 9:32 AM-12:19 PM, 92:22-93:4, 93:14-93:21 (Hilt admitting that participation in activities of interest is helpful for new immigrant students to become integrated into the school community). However, they limited the soccer to 15 minutes, once a week. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 48:6-10 (Anyemu testifying).

nevertheless] brand new to the country and for them from day one to be put in a situation where [they are] made to feel that they need to adjust their behavior” is inappropriate.

N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 15:15-21-16:1-4 (Marshall testifying).

179. Acculturation is “tied very closely to . . . language acquisition.” N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 16:18-19 (Marshall testifying). In fact, “what really works well and what the literature says about bicultural [students] is that [students] who maintain their control, not assimilate completely, become acculturated, become bicultural, learn English better and do better in school in general.” N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 17:3-7 (Marshall testifying).

#### **A. Impact of Pat-Downs**

180. The daily pat-downs made many of the Plaintiffs feel uncomfortable, or feel like they were suspected of wrongdoing.
181. Former Phoenix teacher Jandy Rivera testified that immigrant students would “stiffen immediately” when someone they didn’t know was touching them. It seemed as though they felt uncomfortable being touched in the pat-downs. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 28:4-20 (Rivera testifying).
182. The pat-down at Phoenix was Khadidja’s first experience of this kind. She said “I was never patted down like that and I’ve never even witnessed or heard of patting down like this.” N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 16:20-21 (Khadidja testifying). “I have never seen a place where they pat you down in order to enter school and they actually do it every day,” she stated. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 16:24-17:1 (Khadidja testifying).
183. Qasin testified that the pat-downs made him feel bad about himself, like a “bad person,” because pat-downs are generally used on people suspected of having illegal things, and that the pat-downs made him hate the school and the system. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 50:1-51:2.
184. ELLs lack the English skills to answer questions posed to them during searches, which causes stress.
185. Staff were unable to explain to ELLs what was happening with the pat-downs, like they could with English speaking students. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 28:9-17 (Rivera testifying).
186. Van Ni testified that she is sometimes afraid during the daily pat-down searches because when she gets questioned, she is unable to explain herself to the security guards. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 81:11-82:6.
187. Sui Hnem likewise testified that she is afraid during pat-down searches when she is questioned by staff and isn’t able to explain why her clothing has a “bump” in it. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 99:24-100:3.

#### **B. Impact of Prohibition on Personal Belongings**

188. The prohibition on bringing anything into the school was particularly stressful for female ELLs. Cultural, religious, and language barriers make it uncomfortable for many girls to ask for feminine hygiene products from teachers and staff. N.T. Aug, 17, 2016, 9:32 AM-12:43 PM, 76:9-12 (Chesson testifying).
189. Phoenix’s restrictive security protocols also mean that immigrants can’t bring bag lunches to school, and thus have no access to food they are familiar and comfortable with. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 49:14-17 (Qasin testifying that he would like to bring his own food to school).<sup>6</sup>

### **C. Impact of Disciplinary Interventions**

190. The “Handle with Care” restraints and confrontational techniques central to life at Phoenix can be upsetting for trauma victims.
191. Jandy Rivera testified that in her year and a half at Phoenix, teachers (including ESL-certified teacher Kelleher in particular) would often “yell” at students during “Town House,” using the daily meetings as a “venting session for teachers who were frustrated about a specific class that hadn’t gone well the day before.” N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 30:4-25. She regularly observed immigrant ELLs “hunched over, heads down, eyes on the floor, shoulders forward, and they appeared to be terrified” because they didn’t understand what the teacher was yelling or screaming about. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 31:16-24.

### **D. Impact of Bullying**

192. Bullying undermines victims’ ability to learn. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 57:15-17 (Qasin testifying that it is “impossible” to learn at Phoenix); N.T. Aug, 17, 2016, 9:32 AM-12:43 PM, 112:5-10 (Chesson testifying that her clients feared for their safety at Phoenix, didn’t feel supported, and that Qasin told her that if he had to choose between Phoenix and prison, he would choose prison).
193. Bullying also contributes to drop-out. Indeed, Qasin testified that he stopped going to school because of the bullying. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 54:6-7.

### **E. Impact of Limited Curriculum and Programming**

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<sup>6</sup> Phoenix is aware of the importance of culturally appropriate meals, and thus tailored all of the meals at the grant-funded summer refugee program to what the students were used to eating at home. Heisey admitted that during the school year, school-mandated lunches do not provide this level of familiarity and comfort for immigrants. N.T. Aug. 22, 9:27 AM-12:34 PM, 77:19-78:15 (Heisey testifying).

194. Students who are SLIFE must have access to grade-level content instruction from the beginning and need to fill in gaps in learning. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 101:9-20 (Marshall testifying). To ensure access to grade-level content, the school must provide appropriate scheduling of content classes in light of the needs of students to fill gaps. *Id.* at 102:18-25.
195. In contrast, the environment at Phoenix, characterized by a lack of opportunities for engagement with the school community, heightens isolation and undermines enthusiasm. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 22:11-18:5 (Marshall testifying).
196. Phoenix's lack of attention to college preparation leaves immigrant ELLs, who are at a disadvantage in trying to pursue higher education without help navigating the system, are without meaningful college prospects or guidance. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 37:24-38:14 (Anyemu testifying that he did not feel prepared to go to college to study biology and that no one at Phoenix advised him on how to apply to college); *id.* at 51:5-10 (no one helped him fill out college applications, including in Skills Prep or Counseling).

**VI. Phoenix's "Accelerated Credit Recovery" Model Undermines Immigrant ELLs' Ability to Learn.**

**A. Accelerated Credit Recovery**

197. Phoenix Academy offers an "accelerated curriculum" in which students accrue credits faster than they could in a regular school environment. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 13:14-20 (Rivera testifying); Misnik Dep. 12:9; N.T. Aug. 22, 2016, 12:27 PM-4:01 PM, 140:14-21 (Misnik explaining that "accelerated means faster").
198. Phoenix's "accelerated" program is designed to allow 16- to 21-year-old students to complete high school in 2.5 years or less. Ex. 84 at 2 (Camelot website description of accelerated programs); Answer, ECF No. 23, ¶ 47.
199. At McCaskey, if a student attended one of the summer programs, they could accrue 24 credits in two years. N.T. Aug. 22, 9:27 AM -12:34 PM, 107:18-108:12 (Heisey testifying).
200. At Phoenix, a student can obtain 5.5 credits per semester. Misnik Dep. 90:10-12; Ex. 19 at SDOL\_RTK\_002303 (Phoenix Student Handbook).
201. Phoenix operates on a block scheduling system, with five 80-minute class periods instead of seven 48-minute class periods, and Phoenix purports to cover the same content in one semester that McCaskey covers in a year. Heisey Dep. 29:10-30:12; *see also* N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 14:18-21 (Rivera testifying).
202. Phoenix teachers did not receive any guidance from Phoenix about how to adapt the district curriculum to its accelerated model. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 17:13-16 (Rivera testifying).

203. Administrators did not verify how much of the district curriculum was actually covered in Phoenix classes. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 17:13-16 (Rivera testifying).
204. Students at Phoenix do not receive any more instructional time per year than students at McCaskey do.
205. Phoenix and McCaskey operate on an identical academic calendar and, thus, provide students the exact same number of instructional days. N.T. Aug. 22, 9:27 AM-12:34 PM, 116:22-117:2 (Heisey testifying that she understands PA law mandates 180 school dates and Phoenix does not provide excess of the minimum). The two schools also offer approximately the same number of instructional hours each day. N.T. Aug. 22, 9:27 AM-12:34 PM, 117:15-20 (Heisey testifying that assuming McCaskey is open 7:30-3:00 she agrees that the two schools provide the same amount of instructional time). Phoenix is open from 7:30 a.m. to 3:15 p.m. Ex. 89 at ISSA55. First period class does not begin until approximately 8:15 or 8:30 a.m., and classes do not begin at the same time each day. N.T. Aug. 22, 9:27 AM-12:34 PM, 111:12-112:19 (Heisey testifying).
206. The reality is that Phoenix provides substantially *less* instructional time to students for every credit earned than does McCaskey.
207. Students at McCaskey receive a total of 24 more hours of instruction per credit than Phoenix students, which amounts to an additional *thirty* 48-minutes class periods at McCaskey for each course. N.T. Aug. 22, 9:27 AM -12:34 PM, 122:10-124:23 (Heisey testifying).
208. Since Phoenix students are given 24 hours less instructional time per class credit, Phoenix necessarily must accelerate the pace of instruction and students must learn the material more quickly.
209. Former teachers Jandy Rivera and Mary Ann Ortiz both testified that the material is covered more quickly and less thoroughly at Phoenix than at McCaskey.
210. Phoenix teachers were given the District's "school year at a glance" curriculum materials and told "you need to teach this double time." N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 14:1-7 (Rivera testifying).
211. Rivera found it "impossible" to cover a year's worth of district curriculum material in half the year at Phoenix. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 15:22-25 (Rivera testifying). N.T. Aug. 22, 2016, 4:13 PM- 5:45 PM, 60:11-22 (Ortiz agreed that it was difficult for ELL students to be in an accelerated model and believed, rather, that their learning should be slowed down).

### **1. Computer-Based Learning**

212. Phoenix's accelerated program relies in part on computer-based learning. Camelot's contract notes that Phoenix utilizes "a basic academic curriculum which focuses on the mastery of essential knowledge and skills in English language arts and mathematics through computer-driven and teacher-driven instruction." Ex. 9 at § 2-1 (Master Operating Agreement for Phoenix).

213. “Skills Prep” class, one of 5 daily courses for many Phoenix ELLs, focused on computer-based learning with minimal teacher instruction. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 26:8-11 (Anyemu testifying); N.T. Aug. 22, 2016, 4:13 PM – 5:45 PM, 58:13-20 (Ortiz testifying that Skills Prep is a computer-based class that helps with math and communication arts).
214. Skills Prep is not an ESL course. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 58:16-17 (Ortiz testifying).
215. Computer-based learning is not susceptible to adaptations for ESL students. Indeed, Anyemu could understand “some word[s]” his teacher said during the short instruction portion of the class, but “only a little bit” and “didn’t learn much in the class.” N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 26:3-16 (Anyemu testifying).

## 2. Rapid Grade Advancement

216. At Phoenix, students are promoted quickly from one grade to the next.
217. Anyemu Dunia’s school records demonstrate how quickly students can be promoted at Phoenix. His transcript lists him as a ninth grader during the 2014-15 school year, and a twelfth grader during the 2015-16 school year. Ex. 50 at LSD115. Anyemu Dunia began ninth grade on February 9, 2015. The fall term ended on June 4, and on August 24, he began a new school year as a tenth grader. He completed tenth grade on January 14, 2016, and on January 19, 2016, he started his first day of eleventh grade. He completed eleventh grade on May 23, 2016. Remarkably, Anyemu started twelfth grade on May 24, 2016, and graduated on June 2, 2016. Ex. 50 at LSD87 (Anyemu Dunia Entry/Withdrawal List); *see also* Ex. 50 at LSD115 (Student Transcript showing “Graduation Date: 6/2/2016”).<sup>7</sup>
218. Khadidja was also promoted to the next grade level after less than one semester, since she did not start classes until February 17, 2016, a month after the start of the semester. Ex. 15 at LSD5 (Entry Withdrawal List).
219. Qasin was advanced to the next grade despite not attending class since early April. Ex. 48 (Student Records) at LSD74-75; Ex. 49 (Student Records).

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<sup>7</sup> Heisey suggested that Anyemu may have been able to graduate so quickly only because he received credits for the two optional summer refugee programs he completed in summer 2015 and summer 2016. N.T. Aug. 22, 2016, 12:27 PM, 53:17-54:13 (Heisey testifying). If it is the case that Anyemu did not graduate until completion of the summer 2016 refugee program in late July, then it would appear that Phoenix and the District marked Anyemu as a District graduate on official school records before he actually obtained the necessary credits. Moreover, if Anyemu was within 3 credits of graduation at the time of the filing of this lawsuit, then Defendant should have granted his request to transfer to McCaskey for the remainder of his schooling, as was explicitly demanded in the Complaint.

220. Each Phoenix class serves students in a range of grade levels. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 16:1-11 (Rivera testifying); *see also* N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 34:13-17 (Anyemu testifying).
221. Because of the rapid and irregular promotion from grade to grade and the mix of grades in each class, Phoenix students are often unaware of what grade they are in. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 34:13-17 (Anyemu testifying that he didn't know what grade he was in because his classes had students from all different grade levels); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 104:15-18 (Sui Hnem testifying that she did not know how many credits she had because she doesn't speak English and does not know how to ask).
222. In Khadidja's case, even her school records are unclear regarding what grade she is in. Her enrollment form dated November 2015 suggests she be placed in twelfth grade. Ex. 15 at LSD21 (Enrollment Form). Khadidja was told she was started in eleventh grade, N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 15:9-11, but her last semester transcript reports she completed tenth grade. Ex. 15 at LSD35 (Student Transcript).

### **3. Summer Program for Refugees**

223. The District's summer program for refugees is not part of the Phoenix English language program.
224. It is not mandatory. N.T. Aug. 19, 2016, 9:32 AM-12:19 PM, 83:24-84:1 (Hilt testifying).
225. It does not appear to be graded. Ex. 46 at LSD186; Ex. 47 at LSD264 (transcripts not referring to summer program).
226. It is limited to refugees, and not available to all immigrant newcomer ELLs. Misnik Dep. 90:17-20.
227. And it is not exclusively for Phoenix students; rather, it is a mix of students from Phoenix and McCaskey. N.T. Aug. 22, 9:27 AM -12:34 PM, 104:12-18 (Heisey testifying that McCaskey students who are refugees and who qualify can fully participate in the summer program).
228. Indeed, only three of the Named Plaintiffs at Phoenix attended the program this summer: Anyemu, Van Ni and Sui Hnem. *See* N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 105:12-16 (Sui Hnem testifying); N.T. Aug. 17, 2016, 2:06 PM – 3:56 PM, 35:18-20 (Anyemu testifying).

### **B. Phoenix's Accelerated Curriculum Allows Immigrant ELLs to Advance Without Understanding Material**

229. Plaintiffs and two former teachers agree that the accelerated teaching pace at Phoenix is too fast for students new to the American school system and the English language to allow them to overcome their language barriers and meaningfully participate.

230. As Rivera observed, the accelerated pace of the curriculum makes it more difficult for teachers to accommodate the range of different grade and learning levels and special needs, such as language assistance, within each classroom. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 16:1-14 (Rivera testifying).
231. Phoenix staff received limited professional development on working with ELLs. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 21:1-7 (Rivera testifying that, from 2011-2013, she was aware of only one twenty-minute professional development training on ELLs); N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 68:4-23 (Ortiz testifying that she “tweaked” trainings from the district down to 20-30 minutes).
232. This brief presentation on best practices and demographics was not sufficient training to ensure content teachers could make effective accommodations to ELLs in their classrooms. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 69:2-8 (Ortiz testifying).
233. None of the professional development trainings focused on how to teach ELLs in an accelerated setting. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 21:10-14 (Rivera testifying).
234. Ms. Ortiz observed that her colleagues teaching content classes did not implement best practices for ESL accommodations. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 59:6-25 (Ortiz testifying that it was likely difficult for content teachers without training to provide ELL accommodations).
235. Both students and teachers at Phoenix felt that the pace was too fast for immigrant ELLs to effectively learn the material. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 25:12-14 (Khadidja testifying that “[t]he classes move fast, but I don’t understand anything.”); *id.* at 29:20-22 (Khadidja testifying that “Phoenix Academy the classes go very fast and I do not understand anything and I’m not benefiting so I want a school that is slower in pace so I can understand.”); *see also* N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 29:9-21 (Anyemu testifying); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 44: 5-7 (Qasin testifying); N.T. Aug. 16, 2016, 1:29 PM –5:27 PM, 100:16-20 (Sui Hnem testifying); N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 18:1-9 (Rivera testifying that “At the fast pace and the atmosphere at Phoenix, [the ELL students] were not able to learn or master the material. They would have needed a regularly paced atmosphere or perhaps even an extended learning atmosphere in order to master the material.”); *id.* at 18:10-13 (testifying that, in her opinion, the accelerated model did not work for newly arrived ELLs). N.T. Aug. 22, 2016 4:13 PM-5:45 PM, 60:11-22 (Ortiz testifying that “you want students in extended program and slowed down,” not accelerated).
236. As Dr. Marshall concluded based on her review of interviews with students and a careful examination of their education records and work products, it is clear that Plaintiffs’ transcripts do not “reflect[] . . . mastery of the classes that were taught double time with mainstream teachers and mainstream students.” N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 22:7-16 (Marshall testifying).

237. SLIFE students at Phoenix are “not understanding what’s happening, they’re not really progressing, they’re not moving forward.” N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 172:18-20 (Marshall testifying).
238. Phoenix students are graded and promoted based in large part on “seat time,” meaning how often they attend class, rather than their grasp of material or meaningful class participation. *See, e.g.*, N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 53:14-17, 54:3-8 (Rivera testifying); N.T. Aug. 16, 2016, AM,PM,9:44 AM–12:16 PM, 103:12-104:1 (Mastropietro testifying that Superintendent Rau stated at July 13 meeting that at Phoenix, credits are earned by “seat time,” meaning simply being present in class).
239. Principal Heisey testified that Khadidja’s strong grades and top class rank were partly the result of Phoenix’s grading rubric, which rewards class attendance. *See* N.T. Aug. 22, 9:27 AM-12:34 PM, 83:20-84:7 (Heisey testifying).
240. The program goals at Phoenix do not relate to academic proficiency. They include recovering credits for graduation, changing anti-social behavior, and developing skills that will help sustain that change. Ex. 19 (Phoenix Academy student handbook); *see also* N.T. Aug. 22, 9:27 AM -12:34 PM, 134:12-138:10 (Heisey testifying); Misnik Dep. 24:4-22.
241. Perhaps unsurprisingly, then, Phoenix students can advance to the next grade and even graduate without appropriate mastery of core curriculum.
242. Anyemu, who could explain no content that he acquired at Phoenix, graduated sixth in his class at Phoenix. Ex. 50 at LSD115 (Anyemu Dunia Student Transcript showing rank of 6/107); *see also* N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 36:9-12 (Anyemu testifying).
243. Khadidja was promoted to the next grade level after a semester even though she did not understand her classes. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 25:12-14 (Khadidja testifying).

**C. Phoenix’s Accelerated Instruction Model Is Not Based on Sound Educational Theory Supported by Experts in the Field and Is Fundamentally Inappropriate For Students Who Are SLIFE.**

244. Dr. Marshall’s testimony that Phoenix’s instructional model is not based on sound educational theory supported by experts in the field is un rebutted in this case.
245. A credit-recovery model is inappropriate for SLIFE because SLIFE have not “fallen behind”: “[it is] not as if [SLIFE] have been in this country for all these years and . . . haven’t accumulated credits, we’re not remediating, we’re teaching them for the first time and so it seems . . . [that] this approach is . . . not designed . . . for [SLIFE].” N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 15:4-14 (Marshall testifying).
246. These students, who are SLIFE, need to learn how to learn in the United States. In the U.S. we teach critical thinking skills and use decontextualized tasks, such as multiple choice and matching, but the school experience of these students is often limited to

- recitation and memorization. In an accelerated program, there is little time to explain these fundamental concepts. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM at 104:4- 105:17 (Marshall testifying). Ms. Ortiz similarly testified that students with limited prior schooling have not developed a strong enough foundation in their own language so it will be harder for them to try to learn in the English language. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 62:5-10 (Ortiz testifying).
247. In her testimony regarding the basis of this opinion, Dr. Marshall explained: “students who are behind academically and can't handle grade level and don't understand English cannot be expected to go faster through content when they haven't reached a threshold of English.” N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 119:18-22 (Marshall testifying). “You have to go more slowly and build, build the language, build the literacy and reach certain threshold, and then also fill in the gaps. And eventually you will have success.” *Id.* at 120: 4-8. Students like Plaintiffs need “a runway” to take off from with a solid foundation in English language acquisition. An accelerated pace requires students to jump into the air at full speed which they cannot do in light of their very low levels of English proficiency, low literacy and lack of formal schooling. “The best way to explain that, I believe is like a plane taking off on a -- a plane needs kind of a runway to take off, and so what it seems to me is that the accelerated recovery program at Phoenix is asking them to just (indicating) we're up in the air, and you can't do that with this population.” *Id.* at 119:23-120:3.
248. Teaching students who are SLIFE takes time. A subject teacher needs time to explain and reinforce a concept through the use of pictures, gestures, and oral presentation because they are teaching both English and content at the same time. As explained through the example of the owl pellet, a teacher needs to use multiple strategies to communicate a lesson in both basic and academic English while expanding a student’s understanding of idioms that are entirely new to students who is SLIFE. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 130:18-132:9 (Marshall testifying).
249. This view is supported by experts in the field. “Uniformly the field in talking about this population talks about going more slowly, building in redundancy, building in repetition, and having them become familiar with material in many different ways in order for them to learn it, and not to go at double time.” *Id.* at 120:11-16. Researchers, such as Gohungl, Lazino (ph) and Short and Boison who have studied SLIFE uniformly conclude that “the key is to take your time, take your time, present it in a variety of ways, make sure they get it.” *Id.* at 126:5-12. This view is “uniformly accepted” in the field and there is no opinion to the contrary. *Id.* at 126: 21-23 and 126:24-127:2. Accelerating the curriculum “backfires, it’s misguided.” *Id.* at 127:13.
250. The language instruction model at Phoenix is not informed by a sound educational theory because an accelerated credit-recovery model is contraindicated for SLIFE; in fact, “[i]t is the opposite of what they need.” N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 5:16-25

(Marshall testifying). SLIFE “need a slow start.” N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 5:1 (Marshall testifying).

251. While Phoenix is known as an accelerated model, it is “holding back” SLIFE because they are not understanding the content in their classes and not getting enough English language instruction. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 172:12-21 (Marshall testifying).
252. Computer-based learning is also inappropriate for SLIFE. Students who are SLIFE from an oral tradition are the program’s reliance on computer-based learning is ineffective for them. They need learning to be provided through in-person oral communications and the use of pictures, gestures etc. This means that “their most comfortable way of learning is from people, from interaction, not from written material, not from worksheets, or even from the computer. They learn with oral transmission.” N.T. Aug. 18, 2016, 9:42 AM-2:11 PM at 129:2-6 (Marshall testifying).

## **VII. Phoenix Lacks Sufficient Language Support for Immigrant ELLs**

253. Phoenix’s language program is under-resourced. N.T. Aug. 17, 2016, 9:32 AM-12:43 PM, 80:2-7 (Chesson testifying that Falcone stated after orientation that she and the head of ESL for the district were overwhelmed by the refugee population at Phoenix and they felt Phoenix was not the best placement for them).

### **A. Inadequate Direct ESL Instruction**

254. At Phoenix, direct instruction in ESL consists of only one 80-minute class period with Ms. Ortiz. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 47:11-15 (Ortiz testifying).
255. Ortiz is the only ESL certified teacher at Phoenix who actually teaches direct ESL instruction. N.T. Aug. 22, 2016, 12:27 PM, 23:1-4 (Heisey testifying).
256. Entering level ELLs with limited or interrupted schooling need more support and ESL instruction than just 80 minutes. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 61:24-62:3, 76:8-10 (Ortiz testifying). An Entering Level I ELL needs 2-3 hours of direct ESL instruction. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM at 137:1-4 (Marshall testifying); Ex. 8 at 4. This is a federal and state standard and reflected in the SDOL’s policies. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 137:1-4. Ex. 8 at 4. SLIFE students at Phoenix are thus “not getting enough language” instruction; they need more direct English instruction. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 172:8-14 (Marshall testifying).
257. Plaintiffs did not find one 80-minute period to be sufficient English instruction each day to overcome their language barriers. *E.g.*, N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 43:12-18 (Qasin testifying).
258. Phoenix’s model does not permit sufficient English language instruction for students with the limited literacy. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 119:6-11 (Marshall testifying). These students, who are SLIFE, need “intensive” ESL instruction and strong

basic literacy components. *Id.* at 99:22-24. One research study by Browder examined the standardized test scores of 200 secondary school students who are SLIFE to determine the relationship between language level, language acquisition, and success in learning content as measured by standardized tests. He concluded that students who are SLIFE need significant amount of ESL instruction in order to be successful. The students who had several periods of ESL and the rest of the day, in their content areas did significantly better. The more ESL classes they had “the better they did on the content area, math, science, social studies...” *Id.* at 122:6-125:24. Essentially, they are likely to learn content once they have reached a threshold level of English that they can leverage in learning the subject areas.

### **B. Understaffing**

259. For years, Phoenix had only one teacher devoted to direct ESL instruction. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 54:24-55:1 (Ortiz testifying she was the only ESL certified person at Phoenix prior to 2013); N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 20:19-22, 34:6-13 (Rivera testifying that from 2011-2013, Ms. Ortiz was the only ESL teacher identified to her by Phoenix).
260. Ms. Ortiz has since left the school. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 42:20-43:6 (Ortiz testifying).
261. Even after Phoenix acquired a second ESL teacher, the ratio of direct ESL teachers to students was higher at Phoenix than McCaskey. Phoenix has approximately 100 ELLs at any given time, and one full-time ESL teacher, Ortiz. Another teacher, Ms. Weathers, teaches two ESL classes (for third-level “developing” ELLs), along with Communication Arts classes. The ratio of ELLs to teachers offering direct ESL was thus 50:1. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 55:8-17, 57:21-58:2 (Ortiz testifying).
262. Mr. Kelleher, a third ESL-certified teacher, did not teach any direct ESL instruction. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 57:11-13 (Ortiz testifying); N.T. Aug. 22, 2016, 12:27 PM, 21:21-22:5 (Heisey testifying).
263. Camelot’s Operating Agreement provides funding for only two ESOL teachers. Ex. 9 (Exhibit “A”).
264. Ms. Weathers’ Communication Arts class was not direct ESL instruction. She did not offer English instruction or assistance with English language acquisition every day. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 52:9-20 (Anyemu testifying). Nevertheless, Ms. Heisey testified that Phoenix students receive more than one period of ESL because she would count the period spent in Communication Arts class taught by a ESL-certified teacher. N.T. August 22, 2016, 12:27 PM, 10:18-22 (Heisey testifying). She admitted that she was not familiar with state guidance to the contrary. N.T. August 22, 2016, 12:27 PM, 16:21-25 (Heisey testifying).
265. The SDOL cannot count Ms. Weathers’ classes as both ESL instruction and a content class as these classes are separate and distinct. As Dr. Marshall explained, an ESL

instruction class teaches language. It is separate and distinct from a content class: “So direct English instruction means that you’re focused on the language, the grammar, the pronunciation and vocabulary...when you’re teaching a content you’re teaching a content area although you bring the language in to support it. In a sheltered model content class, it’s primarily a content course but you are using language to help access the content as opposed to per se teach the language.” N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 8:17-25 (Marshall testifying).

266. Ms. Weathers does not teach all ELLs, and students not in her class do not know her. N.T., Aug. 22, 2016, 12:27 PM, 22:14-16 (Heisey testifying that Ms. Weathers does not teach classes that are only ESL); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 23:18-20 (Khadidja testifying she does not know Ms. Weathers).
267. The Pennsylvania Department of Education guidance interpreting state law makes clear, “Direct English language instruction may not take place during other content classes.” Ex. 74 at 3 (PDE Guidance, Educating Students with LEP and ELL).
268. Ms. Hilt acknowledged the law requires that direct English language instruction may not take place during other content classes. N.T. August 19, 2016, 9:32 AM - 12:19 PM, 90:22-2 (Hilt testifying). Ms. Hilt verified that when “counting how many ESL hours a student receives, that’s got to be ESL hours not being taught by an ESL certified teacher in a content class.” N.T. August 19, 2016, 9:32 AM - 12:19 PM, 91:3-6 (Hilt testifying).

### C. Inadequate Supports in Content Classes

#### 1. Structured Immersion

269. Students at Phoenix “[receive] structured English immersion and pull out ESL.” N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 159:2-4 (Marshall testifying); *see also* Ex. 8 at LSD267 (SDOL Services for ELLs, describing Phoenix as offering “structured immersion”); N.T. Aug. 22, 12:27 PM, 27:2-20 (Heisey testifying that Phoenix classes are “structured immersion”).
270. In a “structured immersion” model, students are not grouped with students who are at the same Entering Level or very close to their English proficiency level, but rather are taught with a range of ELLs and native speakers. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM at 151:3-152:3 (Marshall testifying). This model requires content teachers to accommodate the needs of those students who are not native speakers in some way, such as being dually certified in ESL, or by providing push-in or pull out instruction to support teachers. *Id.* at 153:1-21. In Dr. Marshall’s opinion, the immersion model is not sound because there is too wide a range of English proficiencies, making even well-constructed differentiated teaching impossible. *Id.* at 160:23-162:3. “So to have SLIFE in a structured immersion program is definitely not appropriate.” *Id.* at 161: 16-18.
271. In a “structured immersion” model, ELLs take their classes together with English speaking students. *E.g., Id.* at 160:8-11; N.T. Aug. 19, 2016, 1:29 PM, 5:16-5:25 (Hilt testifying that Phoenix classes combine emerging and entering ELLs and native English

- speakers); N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 47:3-10 (Ortiz testifying); *Id.* at 46:19-25; N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 18:17-22 (Rivera testifying that her Communication Arts classes included students at “all ranges” of English proficiency, including fluent English speakers); N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 28:14-29:8 (Anyemu testifying that his content classes were overwhelmingly with English speaking classmates and just one or two ELLs); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 19:20-24 (Khadidja testifying that there are students in her content classes that speak English); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 44:22-45:5 (Qasin testifying that his content classes contained mostly English speakers).
272. The social studies class taught by Kelleher (one of the teachers certified in ESL<sup>8</sup>) likewise included a variety of levels of ELLs and native English speakers as well. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 75:12-14 (Ortiz testifying).
273. Furthermore, Phoenix ESL and content classes mix a range of English learning levels together. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 160:8-11 (Marshall testifying).
274. Khadidja testified that there are students in her ESL class with Ms. Ortiz that speak English better than she does. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 20:7-12 (Khadidja testifying). Qasin testified that other than himself and Khadidja, the other students in their ESL class seemed to speak much better English. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 43:19-44:1 (Qasin testifying).
275. The result of mixing “newcomers with very little English . . . in with fluid English speakers,” is that, “even if [the teacher] is good at differentiating . . . it becomes overwhelming for the lower level ELLs and it retards the progress of the [students] who are native speakers if accommodations are being made.” N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 160:15-22 (Marshall testifying). More specifically, SLIFE, which is a type of student not a level of ESL, “do not belong . . . with regular level one student[s].” *Id.* at 161:11-14. Thus, “even if [a SLIFE] test[s] in level one, [he or she] should not be mixed with regular level one student[s].” *Id.* at 161:14-16.
276. Plaintiffs’ expert testified that Phoenix is too understaffed to support an effective structured immersion program. In determining whether a language program is supported and implemented, it is important to start by looking at staffing. N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 10:10-16 (Marshall testifying). Specifically, the inquiry relates to the number of “highly qualified ESL teachers” on staff. *Id.* at 10:18-19. Documents disclosed that Phoenix employed one certified *full-time* ESL teacher (Ms. Ortiz) to support 90 ELL students. *Id.* at 10:18-22. There are two additional teachers listed as ESL certified, but those teachers actually teach core content areas, like social studies, so

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<sup>8</sup> Ms. Weathers and Mr. Kelleher obtained their ESL certifications in 2013. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 54:17-20 (Ortiz testifying).

they are not spending the entirety of their day supporting ELLs. *Id.* at 11:1-25. This is insufficient staffing to support a structured immersion ESL model. *Id.* at 12:7-10.

## 2. Limited “Push In” and “Pull Out” and No “Co-Teaching”

277. Phoenix does not offer “push in” supports for ELLs in every class. N.T. Aug. 22, 9:27 AM -12:34 PM, 128:8-23, 130:14-18 (Heisey testifying).
278. “Push in” instruction refers to having the ESL teacher come into a content class and assist the ELLs while the lesson is going on. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 154:8-12 (Marshall testifying). It requires “very close coordination and collaboration” *Id.* at 155:2-3. It requires a formalized structure whereby the ESL teacher pushes into class on a regular basis. *Id.* at 155:22-156:1. In a push-in model, it is ideal that the ESL teacher stay for the entire class period. *Id.* at 156:2-4.
279. Ms. Ortiz did not have room in her schedule to provide push-in services. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 53:25-54:1, 69:12-17 (Ortiz testifying).
280. Khadidja testified that she has never seen Ms. Ortiz come into her content classes. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 23:15-17. Khadidja does not know who Ms. Weathers is. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 23:18-20.
281. Qasin likewise testified that neither the English teacher nor any other teacher ever came into his content classes to assist ELLs with the material. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 45:11-13, 45:20-23.
282. Phoenix has no formalized “pull out” language support system.
283. Pull-out instruction at the high school level means pulling ELL students out of content classes to teach them the content of their mainstream classes. This requires communication and coordination with a content teacher to modify the content lesson for an ELL student by “kind of slowing it down to their pace.” N.T. Aug. 18, 2016, 9:42 AM-2:11 PM at 153:24-154:18 (Marshall testifying). This is done by removing ELL students from the mainstream classroom to work in a structured setting with an ESL certified teacher to complete the material that the mainstream content teacher is covering in that particular lesson and then returning that ELL student to the mainstream content classroom. *Id.* at 154:8-12. “There has to be communication between the ESL teacher and the content teacher.” *Id.* at 154:17-18. It is recommended that the ESL teacher conducting pull out have access to the content material ahead of time, so that the ESL teacher can perform pre-teaching as part of the pull out and to ensure that the pull out instruction is not simply remediation instruction. *Id.* at 154:18-23.
284. Ms. Ortiz was only available during one “resource” period a day when high school students could come to her classroom for support with their content classwork. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 52:1-10 (Ortiz testifying).
285. Phoenix had no formalized system for coordinating this support with content teachers so that Ms. Ortiz could familiarize herself with what the students were learning or anticipate

- which students would be dropping by for help. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 53:11-15 (Ortiz testifying).
286. Very few students took advantage of Ms. Ortiz’s “open door” or “resource” period. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 53:2-10 (Ortiz testifying that numbers varied from 1 or 2 to sometimes 7 students).
287. Qasin was never allowed to leave class to get help understanding content from another teacher. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 45:6-10.
288. Phoenix did not offer “co-teaching” (pairing a content teacher with an ESL teacher) in any class. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 50:13-15 (Ortiz testifying); *see also* N.T. Aug. 22, 2016, 9:27 AM-12:34 PM, 130:14-18 (Heisey admitting there is not co-teaching or push-in for every content class).
289. Phoenix has no system for coordinating the provision of ESL services. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 47:25-48:3 (Ortiz testifying). Ortiz was not the ESL coordinator; she was an ESL teacher and the building contact but had no supervisory function or coordination-related title. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 48:4-19 (Ortiz testifying).

### 3. Interpretation and Translation

290. Phoenix has no policies regarding the use of interpreters or translation services to assist ELLs. N.T. Aug. 22, 2016, 12:27 PM-4:01 PM, 120:5-7 (Misnik testifying).
291. Phoenix never employs in-person interpreters to help ELLs understand or communicate. N.T. Aug. 19, 2016, 9:32 AM-12:19 PM, 58:15-58:18 (Hilt testifying that it is not a “best practice” to use interpreters so Phoenix does not do this). *See also* N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 84:2-3 (Van Ni testifying that there are never interpreters in any classes); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 100:21-23 (Sui Hnem testifying that the school never provides interpreters in her classes); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 45:14-16 (Qasin testifying that no teacher ever brought in an interpreter to help him understand something); N.T. Aug. 17, 2016, 9:32 AM-12:43 PM, 100:11-14 (Chesson testifying that home visitor and Phoenix teacher went to Qasin’s house without an interpreter to try to talk with him).
292. Phoenix did not provide an interpreter for Khadidja’s orientation, at which she was supposed to learn the school rules. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 15:15-18, 23-25; Id. 16:4-6 (Khadidja testifying).
293. No Phoenix staff ever used phone interpretation to communicate with Anyemu, Qasin, Van Ni, or Sui Hnem. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 30:21-24 (Anyemu testifying); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 45:17-19 (Qasin testifying); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 84:4-7 (Van Ni testifying); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 100:24-101:2 (Sui Hnem testifying).

294. Phoenix staff only used phone interpretation to communicate with Khadidja when she had a medical appointment. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 24:9-13 (Khadidja testifying).
295. In contrast, when Anyemu had a medical emergency at school, Phoenix staff opted not to use any interpretation assistance to communicate with his parents and instead relied on him to interpret. N.T. Aug. 22, 9:27 AM-12:34 PM, 79:19-80:9 (Heisey testifying).
296. In the six years that Ms. Ortiz worked at Phoenix, she called Language Line approximately 3 times. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 63:6-12 (Ortiz testifying).
297. Phoenix used computer or tablet interpreters or translation services only rarely.
298. Only one of Anyemu's teachers ever used a computer or tablet to translate for him, and this was only a few words on one or two occasions in ninth grade. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 30:25-31:13 (Anyemu testifying).
299. The school never used a computer or table to translate anything for Khadidja or Qasin. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 24:17-19 (Khadidja testifying); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 45:24-46:1 (Qasin testifying).
300. Camelot's Operating Agreement with the SDOL requires it to pay for computers, laptops and tablets for teachers and students, creating a financial disincentive to invest in more or updated technology. Ex. 9 at p. 14 (¶ 3.4.4.).
301. Phoenix only translates documents if a student or parent requests the translation. N.T. Aug. 22, 2016, 12:27 PM-4:01 PM, 120:22-25, 121:1-9 (Misnik testifying).
302. Neither the District nor Phoenix Academy makes a regular practice of translating any documents for Phoenix ELLs. *E.g.*, N.T. Aug. 22, 9:27 AM -12:34 PM, 132:12-134:10 (Heisey testifying that Phoenix Academy student handbook has not been translated into the languages the refugees speak); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 84:14-16 (Van Ni testifying that school documents are never translated in Hakha Chin).

#### **4. Class Instruction Not Adapted for ELLs**

303. All core classes are taught in English without modification for ELLs.
304. Core curriculum teachers do not regularly explain material to ELLs using pictures.
305. No Phoenix teacher used pictures to help Anyemu understand something they were saying. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 31:14-16 (Anyemu testifying). Qasin testified that only his ESL teacher used pictures to help him understand. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 46:2-4.
306. Phoenix teachers did not use hand gestures effectively to explain material.
307. Phoenix teachers did not use many hand gestures to help Anyemu understand something they were saying. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 31:17-22 (Anyemu testifying). Qasin testified that although his teachers used hand gestures, they did not usually help him understand any of the material. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 46:5-12.
308. At Phoenix, exams are not adapted for ELLs.

309. At Phoenix, ELLs were not provided interpreters or translated test materials for standardized tests such as the Keystone exams. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 32:7-16 (Anyemu testifying).
310. Normal class tests were also administered entirely in English without language supports. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 32:17-22 (Anyemu testifying); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 47:18-23 (Qasin testifying).
311. Accommodations for tests were limited to Spanish and Nepali languages. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 62:18-25 (Ortiz testifying).
312. Based on Dr. Marshall's interviews with students and review of records, she concluded that Phoenix was not making significant accommodations for ELLs in their core content classes. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 159:9-10 (Marshall testifying).
313. This supports the conclusion that Phoenix employed a "submersion" model of ESL instruction as opposed to "immersion." N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 159:11-14 (Marshall testifying).

### **5. No After-School Supports for ELLs**

314. At Phoenix, students are not allowed to take books, classwork, or tests home to study. *See, e.g.*, N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 33:23-34:3 (Anyemu testifying).
315. No one offered to make photocopies of books or class materials for ELLs to take home. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 34:4-6 (Anyemu testifying); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 48:13-25 (Qasin testifying).
316. Indeed, there is no policy at Phoenix of providing photocopies of schoolwork to students who request it. Rather, any such requests are weighed "on a case by case basis." Misnik Dep. 39:1-14.
317. No homework was ever assigned in any Phoenix classes. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 34:7-9 (Anyemu testifying); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 48:9-12 (Qasin testifying).
318. Megan Misnik testified that it was "not fair" to assign homework at Phoenix because the students are not able to feasibly do it on their own and this could "cause frustration and make them feel not pour or not, you know, confident in their work." N.T. Aug. 22, 2016, 12:27 PM, 134:14-135:16.
319. At Phoenix, instructional time was used to allow students to complete assignments that, at traditional high schools, would normally be given as homework. For example, because Phoenix did not allow students to bring books home or to school, a "significant amount" of class time in Communication Arts was devoted to allowing students to read the literature they were supposed to discuss, leaving less class time to analyze or learn from the material. *See* N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 16:22-17:12 (Rivera testifying).
320. Many students testified about their desire for homework assignments, and to take hom classwork, tests, and books in order to have extra time to continue learning at home. N.T.

- Aug. 16, 2016, 1:29 PM-5:27 PM, 82:14-20 (Van Ni testifying); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 100:4-8 (Sui Hnem testifying); N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 34:10-12 (Anyemu testifying); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 48:13-25, 49:14-21 (Qasin testifying); *see also* N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 60:7-9 (Anyemu testifying that Phoenix should start assigning homework, and that without homework, student sometimes just watch TV and sleep instead of learning).
321. Phoenix’s practice of not assigning homework to students limited ELL students’ exposure to the English language. N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 19:8-22 (Marshall testifying). ELL students are challenged to use English during the school day, but use their native language at home. N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 19:10-13 (Marshall testifying). “If [these students] leave English at the door of the school they’re not going to be reinforcing what they had learned that day and they’re not going to be furthering their English.” N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 19:13-16 (Marshall testifying). Phoenix is “retarding . . . [the] progress [ELLs] by not giving them homework because they could learn faster if they could take work home . . . .” *Id.* at 20:1-3.
322. Plaintiffs were unaware of any after-school language support offered by the school. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 33:17-19 (Anyemu testifying); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 47:24-48:5 (Qasin testifying).
323. Plaintiffs were also unaware of any teachers who would stay late to offer extra after-school help. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 33:20-22 (Anyemu testifying); N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 47:24-48:5 (Qasin testifying).
324. Mail sent home to parents of Phoenix students is almost always in English.
325. Neither the School District nor Phoenix ever translated documents pertaining to Anyemu into Swahili for the Dunias, though the family occasionally received mail in Swahili from the School District pertaining to his younger siblings at McCaskey. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 31:23-32:4 (Anyemu testifying).
326. Qasin testified that mail from school was sent home in English. School mail was never translated into Arabic, the language he can read best. The District sent one letter to his mother translated into Somali, but she cannot read Somali very well, and only understood about half of it. Qasin cannot read Somali at all. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 46:19-47:17.
327. Limiting the school’s communication with LEP parents limits students’ chances for success. In order for an ESL program to be effectively implemented, it is “very important that parents be involving in decision-making . . . .” N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 20:10-17 (Marshall testifying). Parents of Phoenix ELL students “did not understand completely . . . the different programs that were possible for . . . their children.” *Id.* at 20:18-21.

### **VIII. Phoenix Has Not Evaluated Its English Language Program**

328. Phoenix has not evaluated whether its ELLs are learning, and has no system in place to evaluate whether ELLs are learning at Phoenix.
329. Ms. Hilt acknowledged that it is a legal requirement and the school's responsibility to assess ESL programs to ensure they are working for students. N.T. Aug. 19, 2016, 9:32 AM-12:19PM, 107:5-12 (Hilt testifying); N.T. Aug. 19, 2016, 1:29 PM, 6:9-20 (Hilt testifying). **She testified that *Castaneda v. Pickard* is listed at the top of the Internal Review Survey because it is "one of the two most pertinent laws or cases that reflect in our law in our practice in ESL." N.T. August 19, 2016, 9:32 AM - 12:19 PM, 106:15-21 (Hilt testifying); Ex. 65 at LDS298 (ESL Dept. Internal Review Survey, 2015-16 McCaskey, citing *Castaneda*)**
330. The District has likewise not evaluated whether ELLs are learning at Phoenix.
331. Superintendent Rau testified that the District has not evaluated either the Phoenix ESL program or International School English language programs. N.T. Aug. 19, 2016, 1:29 PM-4:07 PM, 84:16-85:4, 88:12-89:1 (Rau testifying). While she has a goal of evaluating the International School in the next few years, she has no plans to evaluate Phoenix's ESL program. *Id.*
332. The District has not met its obligation to assess whether the accelerated model works for ELLs or SLIFE. N.T. Aug. 19, 2016, 1:29 PM-4:07 PM, 93:15-94:5 (Rau testifying).

#### **A. ACCESS Data**

333. Phoenix has the raw data, in the form of ACCESS tests, to do an analysis of whether Phoenix Academy's accelerated model helps students overcome their language barriers, but they have failed to disaggregate the data from McCaskey and thereby it cannot be determined how effectively Phoenix functions. N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 46:5-48:20 (Marshall testifying); *see also* N.T. Aug. 19, 2016, 1:29 PM, 10:7-19 (Hilt testifying that there is no data from which Phoenix could determine whether or not its ESL program is working).
334. The Superintendent testified that she does not believe the District has disaggregated data specifically on performance of ELL students, and has not examined Phoenix's effectiveness in teaching ELLs specifically. Rau Dep. 96:3-9, 98:3-12.

#### **B. Teacher Observations**

335. The SDOL also failed to evaluate whether the Phoenix program is overcoming language barriers by examining teacher effectiveness through teacher observations. The SDOL did not identify any teacher observation tool that it used regularly at Phoenix to assess ESL teachers to ensure that they are implementing an effective and appropriate instruction model. N.T. Aug. 18, 2016, 2:11 PM-5:07 PM at 48:18-49:14 (Marshall testifying).
336. While the SDOL produced numerous documents relating to teacher accountability measures and evaluation of student performance applicable to its ESL program at

McCaskey, there was only one document, dated January 13, 2014, relating to teacher accountability and student performance concerning Phoenix's program. Ex. 78 (ELL Second Marking Period Checklist); N.T. Aug. 18, 2016, 2:11 PM-5:07 PM at 53:10-19 (Marshall testifying). Phoenix's grading of ELLs is not a useful or accurate tool to determine whether the program is effectively overcoming language barriers.

337. Phoenix does not keep any records reflecting observations of ESL teachers. N.T. Aug. 19, 2016, 9:32 AM-12:19 PM, 83:17-20 (Hilt testifying).
338. Outside of the grant-funded summer refugee program, Ms. Ortiz was observed by a member of the ESL department at SDOL only once during the six years she worked at Phoenix. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 67:20-22; 66:3-9, 66:11-14 (Ortiz testifying that Kaitlin Bartlett observed her once). The only written feedback from the ESL department she ever received about her teaching performance was in relation to this 2014 observation by Kaitlin Bartlett. *Id.* at 66:16-67:2.
339. Ms. Ortiz was observed twice during the optional, grant-funded summer refugee program in 2014 and 2015 by Amber Hilt. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 66:9-10, 67:10-19 (Ortiz testifying).

### C. Informal Survey

340. Phoenix has not done a formal assessment of data regarding its English language program. Heisey Dep. 87:6-87:15; Hilt Dep., 106:19-106:22.
341. The only ESL survey Phoenix has undertaken is a self-survey that does not include any quantitative analysis. N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, 48:18-50:5, 53:10-55:1 (Marshall testifying).
342. The only form that Ms. Ortiz completed relating to evaluating Phoenix's ESL program was an internal review survey she completed at the beginning of each school year on which she listed "the positives of the program as well as things that needed to be worked on." N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 70:9-23 (Ortiz testifying).
343. Ms. Ortiz identified acquiring more staffing and technology as "needs." *Id.* at 70:22-24.
344. Follow-up meetings to these annual surveys were not long, only about 20 minutes. N.T. *Id.* at 73:2-4.
345. There was no program-wide or in-depth analysis of ACCESS scores in connection with the annual survey; only a general comment that writing and reading scores were low. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 73:5-10 (Ortiz testifying).
346. No one made any changes to ESL delivery at Phoenix as a result of an annual internal survey. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 73:11-15 (Ortiz testifying).
347. In order to assess an ESL program, it is important to examine quantifiable data such as ACCESS scores to determine whether there was growth for ELL students, whether and how quickly students are moving through the levels of English proficiency based on where they started and to assess the distribution of ELL students with regard to the four skills and examine how students are progressing in each of the four skill domains

- (reading, writing, listening and speaking). An evaluation should also consider how students are doing after they exit the ESL Program and how they are fairing once they are mainstreamed. N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, at 46:9-47:9 (Marshall testifying).
348. The only ESL survey relating to Phoenix’s program produced by the SDOL consists of a self-monitoring survey that does not include a quantitative analysis to permit an inquiry into whether the program is effectively overcoming language barriers. Rather, the “information in each category is suggestive and broad brush” and is not “robust” enough to determine whether the program is effective. There is no real breakdown or analysis of ACCESS scores to determine how students are doing. N.T. Aug. 18, 2016, 2:11 PM-5:07 PM at 56:18-57:1 (Marshall testifying).
349. A cursory review of 2015 “snapshot” data comparing McCaskey to Phoenix disclosed “a glaring difference” in reading and writing ACCESS scores. ELL students at Phoenix were at much lower levels in reading and writing while ELL students at McCaskey are “clearly doing a much better job of getting them through the levels in the reading and the writing” which is a critical issue reflecting how the program would impact students who are SLIFE. N.T. Aug. 18, 2016, 2:11 PM-5:07 PM at 57:21-59:5 (Marshall testifying).
350. “[T]he evidence shows that what they're doing is almost holding them back from making progress in the language, you know, it's detrimental what they're doing... they're not overcoming their language barriers and they are holding them back from progress they could be making in language N.T. Aug. 18, 2016, 2:11 PM-5:07 PM, at 59:15-20 (Marshall testifying).

**IX. Phoenix’s Method of Teaching ELLs in an Accelerated Credit Setting Did Not Produce Results Indicating that Language Barriers Were Being Overcome.**

351. Although Phoenix did not undertake any meaningful assessment of whether its program was successful in overcoming ELLs’ language barriers, all available evidence suggests that teaching ELLs in an accelerated credit setting with minimal ESL and language supports is not an effective way to overcome language barriers.
352. From a teacher’s perspective, the accelerated model at Phoenix made it more difficult to provide sufficient support to ELLs. N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 60:11-13 (Ortiz testifying). She explained that for ELLs, she would instead “want them to be in an extended program and things would have to be slowed down.” N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 60:17-22 (Ortiz testifying). It would be better to provide “more assistance, more time to learn things, possible have not just one teacher... There could be an aide in the classroom as well, and not to be in with various levels...their anxiety level is lower when they’re amongst students that they feel comfortable with.” N.T. Aug. 22, 2016, 4:13 PM-5:45 PM, 61:2-8 (Ortiz testifying).
353. Jandy Rivera agreed that the accelerated program utilized at Phoenix absolutely did not produce results indicating that language barriers were actually being overcome. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 54:21-25 (Rivera testifying); *accord* N.T. Aug. 22,

- 2016, 4:13 PM-5:45 PM, 75:17-22 (Ortiz testifying that Phoenix’s program is not effective at overcoming the language barriers for entering-level ELLs).
354. As a result of the insufficient language support, it is extremely difficult for Plaintiffs to communicate with their teachers or classmates.
355. Anyemu made a point of devoting 10 or 15 minutes a day to trying to speak with his classmates and teachers in order to improve his English, but when he needed to tell staff something or they needed to tell him something, communication was “very hard.” N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 30:4-20 (Anyemu testifying).
356. Khadidja testified that she does not understand her teachers and staff, or her classmates speaking English. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 19:14-24.
357. Qasin testified that he understood only his English teacher, and did not understand any other teachers or classes. N.T. Aug. 16, 2016 1:29 PM-5:27 PM, 42:17-20, 42:24-43:4, 44:9-17.
358. As a result of the insufficient language support, many students become disillusioned with school.
359. Khadidja testified that Phoenix is a “bad school” and a different school would be better than to go to Phoenix where “you don’t understand anything and just go and sit there.” N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 25:4-11. She understands that “[i]n America, if you don’t get an education you’ll have a very hard life...” N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 25:17-18 (Khadidja testifying).
360. Sui Hnem “sometimes want[s] to give up.” N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 101:12-13 (Sui Hnem testifying).
361. Qasin stopped attending Phoenix, but has asked, clearly and repeatedly, to continue his education at McCaskey. *E.g.*, Ex. 26 (ACLU letter demanding that Qasin be transferred to McCaskey).
362. Immigrant ELLs do not understand their core classes at Phoenix or what happens during the school day.
363. Khadidja could not explain what she studied in two of her classes because “they speak and write in English and I don’t understand.” N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 19:4-5, 8-11. She could also not understand what was happening in the daily “Town House” homeroom meeting. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 18:11-17 (Khadidja testifying).
364. Qasin did not understand anything being taught in class, except for Ms. Ortiz’s ESL course. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 42:17-20, 42:23-43:4, 44:9-17 (Qasin testifying). He responded to the Court’s question that he sat in class all day and did not understand anything. *Id.* at 73. He indicated that it was “impossible” to learn at Phoenix and that if he stayed there it would take him “10 years” to graduate. *Id.* at 57.
365. Anyemu could not explain what the point of the class was or remember a single thing he did in Counseling class. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 26:8-11 (Anyemu testifying).

366. Van Ni testified that she has trouble understanding what is being taught in core classes because she does not understand what is being said and finds it hard to understand the English speaking students. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 83:18-84:1. *See also* N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 100:16-20 (Sui Hnem testifying that her core classes are very difficult because everything is in English).
367. Some of the Plaintiff's schoolwork—including tests—reflects exercises they simply copied, or answered with the help of their teachers. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 23:1-6 (Khadidja testifying that she is instructed to copy material from the board but is not learning what any of the words or concepts mean); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 24:3-8, 24:23-25:3 (Khadidja testifying that when she does not understand an activity or a test, she asks for help, and teachers "help" by giving her the answers).

X. **McCaskey International School Has a Comparatively Strong English Language Program That Would Better Serve the Educational Needs of Plaintiffs and Class Members**

368. The International School provided at McCaskey is specifically designed for students like Plaintiff Class Members who are newly arrived SLIFE. It is described by the District as follows:

The International School located at McCaskey East for grades nine to 12 provides intensive ESL support and content based ESL instruction in a one year program, primarily for entering students. This unique, small, learning community introduces new cultural values and beliefs while respecting the cultural diversity brought by the students. Students participate in ESL, sheltered instruction in science, sheltered instruction in math, sheltered instruction in social studies and enrichment subject. Students develop a beginning level of English proficiency and prepare to enter another small learning community of their choice, based on their personal interest. Key features of the international school include, close communication with families, access to appropriate translation services, and assistance in connecting to community resources. Eligibility for this program is determined through screening conducted at the enrollment center in collaboration with the facilitator of the international school.

Ex. 8 at 1; N.T. Aug. 18, 2016; 9:42 AM-2:11 PM, 143:20-144:11 (Marshall testifying).

369. The school as described by the District "conforms exactly" to what is known as a newcomer program and ensures Entering level students receive "intensive English and content material from day one, but with language incorporated into the content." N.T.

- Aug. 18, 2016, 9:42 AM-2:11 PM at 145:1-4 (Marshall testifying). A newcomer school is “intended for English learners, immigrants, refugees of whatever age at the secondary level.” *Id.* at 145:12-14. While the program focuses on Entering level students, it can include a student at the Emergent level if the student has gaps in schooling or low literacy and therefore needs a newcomer program. *Id.* at 145:18-21. It focuses on a small group of students that work together as a learning community. *Id.* at 145:4-7.
370. Hilt agrees that the International School is good at progressing SLIFEs and that the International school is a great example of the District adopting nationally recognized best practices to educate ELLs. N.T. Aug. 19, 2016, 9:32 AM-12:19 PM, 102:1-7 (Hilt testifying).
371. Beginning/entering ELLs at McCaskey have two 48-minute periods of ESL per day. Ex. 21 at 11 (McCaskey High School Campus 2015/2016 Curriculum Guide) (students “take two courses of ESL (English as a Second Language) at one of two proficiency levels, determined by the International School Staff.” (parenthetical in original)).
372. Importantly, the McCaskey International School offers sheltered instruction in core classes for beginning/entering ELLs for their content classes. Ex. 21 at 11 (McCaskey High School Campus 2015/2016 Curriculum Guide) (“Students attend mathematics, science, social studies and technology classes (sheltered content)...”).
373. Pull-out is an inappropriate model for SLIFE because “SLIFE need an entire day of instruction [that is] tailored to them.” N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 163:10-13 (Marshall testifying). There is “no reason” to pull out SLIFE from the classroom, because SLIFE should always be in a classroom that is “appropriate for them.” *Id.* at 163:12-17. The only time it is appropriate to pull out a SLIFE is when the district is “low incident,” meaning there are very few, perhaps only one, SLIFE. *Id.* at 18-25.
374. The sheltered instruction model used at McCaskey gives Entering Level newly arrived immigrant students instruction in the content areas in a program where the content and methodology are adapted by a teacher who knows how to teach both language as well as content. The teacher is trained to provide language instruction while teaching concepts in an integrated manner. *Id.* at 140:5-17. Teachers must teach cognitive development level concepts but with very low level English. “It takes skill to do this.” *Id.* at 147:2-4.
375. The International School is beneficial because it is a cohort model whereby students form a learning community and stay with each other all day. A “big benefit” of this is that teachers share students and compare notes and collaborate and can teach subjects thematically. *Id.* at 149:12-150:5. The cohort model enables students to access the curriculum more readily. *Id.* at 150:12-14. Based on a review of the ESL instructional services matrix, it is apparent that “McCaskey identifies [SLIFEs] and creates a section” just for that population of students. *Id.* at 162:20-22. McCaskey has two rosters of SLIFE, which permits small group instruction. *Id.* at 163:2-5.
376. In addition, SLIFE belong in a program that is specifically designed for them because “they are a particular type of student getting used to school and the way . . . school [is

- done] in this county.” *Id.* at 165:12-16. Other ELLs, even entering or beginning level ELLs, do not need the programming specifically designed for this type of student. *Id.* at 165:15-17. Phoenix does not provide a separate section for “limited formally schooled students” or SLIFE. *Id.* at 164:8-15.
377. In addition to sheltered instruction in core subjects, the International School also focuses on “teaching cultural values and norms while fostering an environment of tolerance and diversity.” Ex. 21 at 11 (McCaskey High School Campus 2015/2016 Curriculum Guide). A strong emphasis on culture and teaching students about school are both beneficial to newcomers. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM at 146:1-6 (Marshall testifying).
378. The International School model at McCaskey would be beneficial for all Plaintiffs, even for a student like Alembe Dunia, who although too old to accrue enough credits to earn a high school diploma, being SLIFE, could benefit from a one-year program designed specifically for SLIFE that provides a “window into math, science, social studies,” as well as intensive English language instruction. *Id.* at 167:2-16.
379. Several of the Named Plaintiffs’ younger siblings or friends attend McCaskey and have been more successful learning English and advancing their education than their Phoenix-student siblings who have been in school the same amount of time.
380. For example, Van Ni and Sui Hnem’s younger brother has just finished tenth grade at McCaskey in the International School, where he receives more ESL and brings books and homework home to work on, and he has been able to learn much more English than his sisters. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 80:3-5; 85:9-21, 93:18-20 (Van Ni testifying); N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 101:22-102:1 (Sui Hnem testifying).
381. Khadidja’s sister, Nouracham, has learned better English at McCaskey, where she can bring work home, than Khadidja has at Phoenix. N.T. Aug. 16, 2016, 1:29 PM-5:27 PM, 17:19-18:2 (Khadidja testifying). *See also* N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 59:22-60:3 (Anyemu testifying “I think McCaskey would be better for me because the school is big and they have more teachers and they don’t go fast like at Phoenix, so McCaskey they go slow they make sure [to cover] the material before they move on, but that wasn’t the case at Phoenix[.]”).

**XI. SDOL Was on Notice About Illegal Treatment of Immigrant ELLs and Did Not Act to Remedy the Problems.**

382. Refugee resettlement caseworkers have complained to District officials about delays and denials in enrollment of older immigrant and refugee students since 2010. N.T. Aug. 16, 2016, 9:44 AM–12:16 PM, 69:23-73:5 (Mastropietro testifying). In 2013, the District was sued in Lancaster County Court of Common Pleas for refusing to enroll a 19-year-old Nepali immigrant student, and was forced to enroll him. N.T. Aug. 22, 2016 4:13 PM-5:45 PM, 27:8-24 (Abrom testifying). The problems re-emerged in 2015, N.T. Aug. 16, 2016, 9:44 AM–12:16 PM, 78:1-81:16 (Mastropietro testifying), and have persisted.

383. Between November 2015 and March 2016, CWS and LRS brought to the attention of Jack Blackman and Amber Hilt, who often enlisted Arthur Abrom, enrollment problems involving six different refugee students, including that of Plaintiffs Van Ni, Sui Hnem, Khadidja and Qasim. (Tim Purcell notifying Amber Hilt by email that Qasin was denied enrollment); N.T. Aug, 17, 2016, 9:32 AM-12:43 PM, 39:1-4 (Chesson testifying that a conference call was held with LRS staff and Amber Hilt and Jack Blackman on January 4, 2016 regarding Qasin's enrollment issues); *Id.* at 62:4-24, 84:25-85:1 (Chesson testifying regarding meeting between LRS staff Madav Sharma, Willis Orlando and Elise Chesson and District officials Dr. Abrom, Amber Hilt, and Jack Blackman on February 11, 2016 to discuss concerns about delays and denials of enrollment, including case of Khadidja Issa).
384. The circumstances around Khadidja's enrollment screamed out that there was a problem with SDOL's process with educating immigrant and refugee students that enrolled to attend school. Khadidja had been recorded enrolled by SDOL as of November 18, 2015, triggering the flow of state and federal funds. Ex. 15 at LSD21 (listing "District Enrollment Date" as 11/18/15). Nevertheless, Khadidja had not been allowed to attend school as of January 21, 2016 when her caseworker Bilal AlTemimi brought the issue to SDOL's attention. Ex. 83 (Emails between Bilal and Hilt, Bilal reporting Khadidja not attending school). Despite a lengthy email exchange between Bilal and Amber Hilt that Mr. Blackman was copied on, Mr. Blackman purports to have ignored the entire email which claimed – *correctly* – that Khadidja was being refused entry to school. N.T. August 22, 2016, 9:27 AM – 12:34 PM, 27:2-28:1 (Blackman testifying that he did not read three email exchanges he was copied on about Khadidja enrollment). He ignored the actual substance of the email even when it was further elevated as an issue because he sent an inadvertent reply to Bilal that began, "[t]his guy is nuts," and participated in a meeting, with his supervisor Dr. Abrom, about the exchange. N.T. Aug. 22, 2016, 9:27 AM – 12:34 PM, 41:2-16, 42:12-43:16 (Blackman testifying); Ex. 16 (Email Jan. 21, 2016 Blackman to Bilal). No investigation or corrective action about the enrollment/placement process occurred as a result of the email exchange or the meeting. N.T. Aug. 22, 2016, 9:27 AM – 12:34 PM, 44:23-45:12;48:4-13 (Blackman testifying).
385. A more organized effort to fix the enrollment problems and address perceived deficiencies in the education being provided by Phoenix began in January and February of this year, when new LRS caseworker Elise Chesson took over Qasin and Khadidja's cases. Ms. Chesson learned from her LRS colleagues that they too experienced problems with student enrollments. N.T. Aug, 17, 2016, 9:32 AM-12:43 PM, 43:17-44:10. She researched the law by looking at the Pennsylvania Department of Education, the U.S. Department of Education, and the Education Law Center websites. *Id.* at 44:11-45:12. She also accompanied Khadidja to her orientation at Phoenix on February 17, where she witnessed the stringent security measures and learned that education for ELLs seemed deficient. Finally, she brought her concerns to Sheila Mastropietro at Church World

- Services. Ex. 55 (emails between Ms. Chesson and Ms. Mastropietro). Ms. Mastropietro, who has been involved in refugee resettlement work for nearly thirty years, prodded SDOL officials into a meeting. N.T. Aug. 16, 2016, 9:44 AM–12:16 PM, 84:19-85:5 (Mastropietro testifying).
386. On March 17, 2016, Superintendent Rau and Dr. Abrom met with Ms. Chesson, Ms. Mastropietro and her associate, Valentina Ross. N.T. Aug. 16, 2016, AM,PM,9:44 AM–12:16 PM, 84:19-85:15, 87:7-21 (Mastropietro testifying) The resettlement workers raised concerns about how Phoenix operated and served ELLs, including insufficient ESL services compared with the International School, the punitive and restrictive atmosphere at Phoenix, enrollment problems, and why overage refugees were being sent to Phoenix. *Id.* at 87:7-21. Dr. Rau refused to discuss the plight of the individual students raised by Ms. Chesson, but promised to investigate the allegations and meet again after school ended. *Id.* at 88:23-89:12 (Mastropietro testifying); N.T. Aug. 19, 2016, 1:29 PM, 454:4-45:8 (Rau testifying); Rau Dep. 106:9-107:2.
387. In early April, Ms. Chesson met with Hilt, Blackman and Heisey to address Qasin’s problems with student-on-student bullying and the lack of sufficient academic supports at Phoenix. *See* Ex. 57 at 468 (Chesson emails to Dr. Abrom raising concerns regarding bullying of Qasin); N.T. Aug. 17, 2016, 9:32 AM-12:43 PM, 104:6 (Chesson testifying about April 7 meeting). Dr. Abrom cavalierly and insensitively dismissed Qasin’s bullying allegations, saying that “the events that [Qasin] described, even if they occurred, were not severe, persistent or pervasive”; that “Qasin has provided no verifiable and/or credible information to substantiate the bullying”: and that “Qasin’s statement that he feels unsafe at Phoenix Academy is neither credible nor reasonable.” Ex. 58 at ISSA 473 (April 15, 2016, email from Abrom to Chesson).
388. On April 26, the ACLU of Pennsylvania sent a letter addressed to Dr. Rau, Dr. Abrom and Principal Heisey detailing enrollment, academic support and bullying problems experienced by Qasin Hassan at Phoenix, and requested that the District transfer him to McCaskey. Ex. 26 (ACLU letter). The District never responded to the letter, and refused to admit Qasin to McCaskey. Abrom Dep. 32:14-19; 35:7-15. Dr. Rau indicated that she recognized that the letter was an indication that legal action may be imminent, but her only response was to give the letter to the District’s solicitor; she took no action to investigate the allegations concerning Qasin. N.T. Aug. 19, 2016, 1:29 p.m. (Rau) 76:1-77:3. In her words, “I’m not involved in that level of the weeds.” *Id.*
389. Dr. Rau, Dr. Abrom and Ms. Hilt met on July 13, 2016, with Ms. Mastropietro and her associate to follow up on the March 17 meeting. Ms. Mastropietro presented concerns about Phoenix Academy’s inadequate ESL, the accelerated curriculum, enrollment delays and denials, pat down searches, restrictive dress code, the no-homework rule, and the issue of why kids are sent to Phoenix and not McCaskey’s International School. N.T. Aug. 16, 2016, 9:44 AM–12:16 PM, (Mastropietro) 95:2-96:12, 98:23-99:22.

390. The only changes identified by Dr. Rau on July 13 in response to all of the concerns raised by CWS and LRS were that Phoenix would no longer demonstrate the seventh level of the Handle With Care restraint system during orientation, and that she recommended to Camelot that refugee students not be patted down in the morning unless they were suspected of possessing contraband and consider allowing students to take home books. N.T. Aug. 16, 2016, 9:44 AM – 12:16 PM (Mastropietro) 99:23-25; N.T. Aug. 19, 2016, 1:29 p.m. (Rau) 107:12-108:14; *Id.* at 109:19-110:13. When Ms. Mastropietro raised concerns about how Phoenix could graduate students so quickly when they still didn't speak English, Rau replied that they receive credit for "seat time," by simply being present in class N.T. Aug. 16, 2016, 9:44 AM. – 12:16 PM (Mastropietro) 103:12-104:1. None of the changes announced by Dr. Rau involved moving the ELLs from Phoenix to McCaskey. N.T. Aug. 19, 2016, 1:29 PM (Rau) 112:4-9.
391. This lawsuit was filed and served on July 19.
392. Despite months of enrollment complaints involving numerous immigrant and refugee students, and concerns raised about the harsh security measures, deficient academic supports for ELLs, and bullying at Phoenix, as of August 19, when Dr. Rau testified in federal court, she had not yet commenced an investigation into how Phoenix operates. N.T. Aug. 19, 2016, 1:29 p.m. 84:16-85:4 (Rau testifying). She was unaware of whether Camelot had ever demonstrated that the accelerated-credit model worked for ELLs or SLIFEs. *Id.* at 93:15-94:5. Despite her lack of knowledge about Phoenix after one year at the District's helm, and the numerous complaints raised about the Phoenix operation, including a federal court class-action civil rights lawsuit, her recent recommendation to the SDOL Board of Directors that they form a committee to study ELL services did not include an examination of Phoenix Academy. *Id.* at 88:12-89:1.
393. Dr. Rau was disappointed when the instant litigation was filed because she believe the refugee agencies "instigated" the lawsuits. N.T. Aug. 19, 2016, 1:29 PM, 47:19-23; 103:7-11 (Rau testifying).
394. Furthermore, despite the history of enrollment problems, neither Dr. Abrom nor Dr. Rau have directed Mr. Blackman to do anything differently in terms of getting immigrant students enrolled in school. N.T. Aug. 22, 2016, 9:27 AM-12:34 PM, 48:14-18 (Blackman testifying). The only change Blackman has made, on his own initiative, is to try to be "more conscious communicating" with Ms. Riddick and the enrollment office. N.T. Aug. 19, 2016, 9:27 AM- 12:34 PM, 44:23-45:12; 48:4-13 (Blackman testifying).
395. The District also has expressed little concern and taken no action about the complaints of bullying. *See* discussion re Qasin, *supra* at ¶ 387. When Anyemu repeatedly reported bullying to Phoenix teachers or staff, he was advised that consistent with the Camelot rules encouraging peer confrontation that he should confront the bullies himself. N.T. Aug. 17, 2016, 2:06 PM-3:56 PM, 43:8-44:6 (Anyemu testifying). He saw no significant

- improvement in classmates' behavior after alerting staff to the bullying problems. *Id.* at 44:6-18.
396. The District's resistance to placing Plaintiffs and Class Members at McCaskey and its International School ignores the immigrant and refugee ELLs' best interests. The District has pointed to an imperative to keep graduation rates high enough not to attract state monitoring. N.T. Aug. 19, 2016, 1:29 p.m. 39:23-40:7 (Rau testifying). Dr. Rau testified she did not want the District to be known as a "dropout factory." *Id.* at 41:8-22. And she has criticized local refugee resettlement agencies for being "very narrow-minded" in thinking about their "small select group" and not about everyone else. *Id.* at 42:18-43:7. When the District makes changes for "one small group of students there's a ripple effect out into the rest of the community of students." *Id.* at 43:8-12. The District does not have a federal-law obligation to help those other non-ELL students overcome language barriers.
397. In response to the Court's question about why the District was opposed to transferring Class Members to McCaskey, Superintendent Rau responded, "I think that our biggest -- one of our biggest concerns is that the School Code gives the authority to the Board of Directors to place students in a school. And there's a real concern of taking away the authority of a School Board in making those decisions." N.T. Aug. 19, 2016, 4:07 p.m. – 4:26 p.m 12:14-13:13 (Rau testifying).

## **XII. Summary of Dr. Helaine Marshall Undisputed Expert Opinions**

398. Dr. Helaine Marshall is an Associate Professor of Education, and the Director of Language Education Programs, at Long Island University. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 58:1-2 (Marshall testifying), Ex. 80 (Marshall CV). Dr. Marshall's educational background and more than thirty years of professional experience are in TESOL, Teaching English to Speakers of Other Languages. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 58:9-59:13 (Marshall testifying) Her sub-specialty is in teaching ESL to SLIFE, Students with Limited Formal Interrupted Education. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 84:6-11 (Marshall testifying). She has published scholarly books and peer-reviewed articles on the subject. Ex. 80 at 2-4. She has also consulted with the states of New York and Massachusetts, and various individual schools and districts, on how to teach ESL for SLIFE. Ex. 80 at 2, 9-10. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 66:22- 69:7 (Marshall testifying)
399. Plaintiffs tendered Dr. Marshall under F.R.E. 702 as an expert in the field of TESOL, ESL programming, and meeting the needs of students with limited or interrupted formal education. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 84:12-16 (Marshall testifying). The Court accepted her as a qualified expert without objection from Defendant. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 95:24-96:5 (Marshall testifying).
400. Dr. Marshall's testimony was un rebutted by any other expert. Indeed, the District did not produce an expert or provide to the Court any peer-reviewed or other studies to support

the proposition that Phoenix program is supported in any way by sound educational theory or deemed a legitimate experimental strategy. Accordingly, Dr. Marshall's expert opinion regarding the Phoenix program was reasonably based on a wide range of the District's own recent documents as well as multiple interviews with Named Plaintiffs, parents, caseworkers and former teacher Ms. Rivera all of which is reflected in *Information Considered for Expert Report by Helaine W. Marshall, Ph.D.* (Ex.82).

401. Dr. Marshall expressly opined that the Phoenix program is not informed by an educational theory recognized as sound by experts in the field or deemed a legitimate experimental strategy. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 120:9-16 (Marshall testifying). Rather, the English immersion ESL model provided to Entering Level students who are SLIFE in an accelerated credit recovery program has been uniformly rejected by the field. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM at 120:11-16 (Marshall testifying). Second, Dr. Marshall concluded that the programs and practices used by Phoenix are not reasonably calculated to implement the proposed educational theory because it is not implemented in a way that makes it likely to succeed. N.T. Aug. 18, 2016, 9:42 AM-2:11 PM at 120:22-25 (Marshall testifying). Third, Dr. Marshall opined that there was no evidence that Phoenix program produces results indicating that the language barriers confronting students are actually being overcome. Instead, based on her analysis of the program and the fact that the students are "still at lower levels of English and the transcripts are telling us they are not understanding what's going on in class," N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 46:2-4 (Marshall testifying). "Phoenix is not overcoming the language barriers for this population." N.T. Aug. 18, 2016, 9:42 AM-2:11 PM, 45:23-24 (Marshall testifying)

## CONCLUSIONS OF LAW

### **I. The Class of 17-21 Year-Old Immigrant and Refugee Children Should Be Certified**

*"I want to make sure changes happen so people who would come after me, refugees come after me they can be in better shape than me."*-*Anyemue Dunia* N.T. Aug. 17, 2016, [2:06 p.m. – 3:56 p.m], [60:9-11]

#### **A. Class Certification Requirements**

1. Plaintiffs seek class certification of the following class:

All limited English proficient ("LEP") immigrants, who, at any time after August 1, 2013, while aged 17-21, were, are, or will be in the future, excluded from Defendant School District of Lancaster's main high school, McCaskey—either as a result of being refused enrollment altogether, or through involuntary placement at Phoenix.

2. "To obtain class action certification, plaintiffs must establish that all four requisites of Rule 23(a) and at least one part of Rule 23(b) are met." *Baby Neal v. Casey*, 43

F.3d 48, 55 (3d Cir. 1994); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

3. Members of a class seeking certification must demonstrate pursuant to Rule 23(a) that:

- a. the class is so numerous that joinder of all members is impracticable;
- b. there are questions of law or fact common to the class;
- c. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- d. the representative parties will fairly and adequately protect the interests of the class.

4. Under Rule 23(b)(2), members of a putative class must further show that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]” Fed. R. Civ. P. 23(b)(2).

#### **B. Numerosity**

5. “The numerosity prerequisite is satisfied as long as the class representatives can show impracticability of joinder, even if the exact size of the class is unknown.” *Santiago v. City of Philadelphia*, 72 F.R.D. 619, 624 (E.D. Pa. 1980), *see also In re K-Dur Antitrust Litig.*, No. 01-1652, 2008 U.S. Dist. LEXIS 118396, at \*3 (D.N.J. Apr. 14, 2008), at \*3 (“No threshold number is required to satisfy the numerosity requirement, and the most important factor is whether joinder of all parties would be impracticable for any reason.”); No minimum number of plaintiffs is required to maintain a suit as a class action . . . .” *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001)).

6. The numerosity requirement is relaxed where injunctive and declaratory relief is sought. *See Weiss v. York Hospital*, 745 F.2d 786, 808 (3d Cir. 1984) (declining to apply a strict application of the numerosity requirement after concluding “that the interests of the plaintiff class and the interests of the defendants will not be affected significantly by permitting [Representative Plaintiff] Weiss to maintain this class action. . . .”).

7. Populations under 20 can satisfy the numerosity requirement of Rule 23(a). *See, e.g., Jackson v. Danberg*, 240 F.R.D. 145, 147 (D. Del. 2007) (concluding that a putative class of 16 prisoners who had been sentenced to death was sufficiently numerous); *Grant v. Sullivan*, 131 F.R.D. 436, 446 (M.D. Pa. 1990) (noting that a court “may certify a class even if it is composed of as few as 14 members”); *see also Manning v. Princeton Consumer Discount Co.*, 390 F. Supp. 320, 324 (E.D. Pa. 1975) (certifying a class of 15 persons who purchased cars at Springfield Dodge between June 1973 and June 1974 with similar financing conditions), *aff’d*, 533 F.2d 102 (3d Cir. 1976); *see also Kazarov v. Achim*, No. 02 C 5097, 2003

U.S. Dist. LEXIS 22407, at \*4 (N.D. Ill. Dec. 12, 2003) (certifying class of 10-17 immigrants who were likely indigent and unable to speak English).

8. SDOL has represented that there are at least 18 refugee students enrolled at Phoenix Academy. **[Def.'s Resp. to Class Cert. Mot., ¶ 2 (ECF No. 25)]** This alone is sufficient to justify class certification under the circumstances of this case.

9. The proposed class also includes non-refugee immigrants who attend Phoenix Academy, or will be placed there in future. **[FOF ¶ 38]**

10. The class also includes immigrant and refugee children who were denied enrollment by SDOL, in the same way that Alembe, Khadidja and Qasim were, and never had that illegal denial rectified. SDOL does not maintain records of enrollment refusals **[FOF ¶ 87]**, but the Court can infer additional enrollment refusals requiring a remedy from the enrollment practices demonstrated at the hearing.

11. “[N]umerosity is met where, as here, the class includes individuals who will become members *in the future*. As members *in futuro*, they are necessarily unidentifiable, and therefore joinder is clearly impracticable.” *Gomez v. Ill. State Bd. of Educ.*, 117 F.R.D. 394, 399 (N.D. Ill. 1987); *see also Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001). This Court must ensure that future members of the class begin their education promptly after they enroll, and in the school that can overcome their language barriers, so that their limited time in the school system provides them the maximum benefit to which they are entitled under law.

12. In addition to class size, other factors relevant to evaluating the impracticability of joinder include “judicial economy, the geographic diversity of class members, the financial resources of class members, the relative ease or difficulty in identifying members of the class for joinder, and the ability of class members to institute individual lawsuits.” *Anderson v. Dep’t of Public Welfare*, 1 F. Supp. 2d 456, 461 (E.D. Pa. 1998).

13. In this case, joinder is highly impracticable. Because of their limited English proficiency, limited resources, and limited knowledge of the American legal system it is highly unlikely that Class Members in this matter would be able to bring individual cases to assert their rights. *See Ray M. v. Bd. of Educ.*, 884 F. Supp. 696, 705 (E.D.N.Y. 1995) (finding sufficient numerosity because joinder of individuals was impracticable for plaintiff preschool children denied special education services who lacked the capacity to bring legal action on their own, had few financial resources, limited proficiency in English, and no facility with American legal system); *see also Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009, 1013 (W.D. Mich. 1987) (finding impracticability because class of migrant labor workers lacked formal education, facility with English language, and knowledge of legal system); *see also Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991) (finding joinder impracticable in action brought for injunctive and declaratory relief challenging Medicaid policy because class consisted of poor and elderly or disabled people who could not bring individual lawsuits without great hardship).

### C. Commonality

14. The commonality requirement of Rule 23(a)(2) is satisfied if the named plaintiffs “share at least one question of fact or law with the grievances of the prospective class.” *Baby Neal*, 43 F.3d at 56; *see also Stewart*, 275 F.3d at 227. Common questions “need only exist, not predominate.” *Baby Neal*, 43 F. 3d at 60. “[B]ecause the requirement may be satisfied by a single common issue, it is easily met.” *Id.*

15. “A finding of commonality does not require that all class members share identical claims, and indeed factual differences among the claims of the putative class members do not defeat certification.” *In re Prudential Ins. Co. America Sales Practice Lit. Agent Actions*, 148 F.3d 283, 310 (3d Cir. 1998).

16. There are numerous questions of law and fact common to the class. All members of the class are entitled to enrollment up through the age of 21, regardless of credit status, and promptly within 5 days after enrollment, both which were regularly violated, and appear not to have even been understood by SDOL until this lawsuit was filed. [FOF ¶ 47]; 24 Pa. Cons. Stat. Ann. § 13-1301; 22 Pa. Code § 11.11(b).

17. All members of the class have been, and will continue to be subject to SDOL’s rigid practice of sending all older refugee and immigrant children to Phoenix if they are undercredited, without regard to language and academic proficiency, and without regard to whether the educational model for educating new immigrant and refugee children used at Phoenix is adequate to overcome language barriers that impede equal participation by its students in instructional programs. [FOF ¶ 94 *et seq.* ].

### D. Typicality

18. Rule 23(a)’s typicality requirement asks “whether the named plaintiffs’ claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class.” *Baby Neal*, 43 F.3d at 55. Factual differences do not defeat typicality “if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the absent class members, and if it is based on the same legal theory.” *Stewart*, 275 F.3d at 227-28; *see also Hassine*, 846 F.2d at 177-78 (stating that like commonality, the typicality requirement “mandates only that complainants’ claims be common, and not in conflict.”). As the Third Circuit has noted: “even relatively pronounced factual differences will generally not preclude a finding of typicality where there is strong similarity of legal theories.” *Baby Neal*, 43 F.3d at 58. “Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice.” *Id.*; *see also Kerrigan v. Phila. Bd. of Election*, 248 F.R.D. 470, 476 (E.D. Pa. 2008) (quoting *New Directions Treatment Servs v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007)) (“Conflicts of interest are rare in Rule 23(b)(2) class actions seeking only declaratory and injunctive relief.”).

19. Named Plaintiffs are typical of the class in that all of them are being denied timely enrollment in the SDOL school delivering English language services adequate for them to overcome language barriers, because of delayed or denied enrollment or because of

automatic placement at Phoenix because due to credit status, regardless of language proficiency or educational needs.

**E. Adequacy**

20. SDOL does not dispute that Plaintiffs and their attorneys are adequate representatives for the Class. *See* Defendant’s Response to Plaintiffs’ Motion for Class Action Certification [**Def.’s Resp. to Class Cert. Mot. ¶ 4 (ECF No. 25)**]

**F. 23(b)(2) Requirements**

21. Under Rule 23(b)(2), members of a putative class must further show that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]” Fed. R. Civ. P. 23(b)(2).

22. There is no dispute that SDOL has acted on grounds that apply generally to the class, namely that it refuses to enroll any members of the class at McCaskey based on their credit status, without regard to English proficiency or other educational needs.

**G. Class Action Conclusion**

23. The class proposed by Plaintiffs meets all requirements of Rule 23(a) and (b)(2), and is thus ordered certified.

**II. Plaintiffs Have Satisfied the Requirements for this Court to Issue a Preliminary Injunction**

24. This Court must weigh four factors to determine whether to issue a preliminary injunction: (a) the likelihood that the moving party will succeed on the merits; (b) the extent to which the moving party will suffer irreparable harm without injunctive relief; (c) the extent to which the non-moving party will suffer irreparable harm if the injunction is issued; and (d) the public interest. *Liberty Lincoln-Mercury Inc. v. Ford Motor Co.*, 562 F.3d 553, 556 (3d Cir. 2009); *McNeil Nutritionals LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 356-57 (3d Cir. 2007).<sup>9</sup>

**B. Plaintiffs have demonstrated likelihood of success on the merits of its EEOA claim.**

25. The EEOA provides that “[n]o State shall deny equal educational opportunity to an individual on account of his race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in instructional programs.” 20 U.S.C. § 1703(f).

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<sup>9</sup> Plaintiffs are not seeking a ruling on their Equal Protection claims in this Preliminary Injunction proceeding, but preserve those claims for the Court’s consideration of its request for Permanent Injunction.

26. To prevail under the EEOA, a plaintiff need not prove that the district intentionally denied educational opportunity on account of national origin. *C.G. v. Pa. Dep't of Educ.*, 888 F. Supp. 2d 534, 574-76 (M.D. Pa. 2012). To state a claim for national origin discrimination under Section 1703(f), plaintiffs need only allege facts showing: “(1) language barriers; (2) defendant’s failure to take appropriate action to overcome these barriers; and (3) a resulting impediment to students’ equal participation in instructional programs.” *Id.* at 575.

27. There is no dispute that all Plaintiffs have language barriers. [Ans. ¶ 1-2]

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

29. Pursuant to *Castaneda*, a reviewing court must determine: (1) whether a school system is pursuing a program “informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy”; (2) whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school; and (3) whether the program, once employed for a sufficient time period to give the plan a legitimate trial, produces “results indicating that the language barriers confronting students are actually being overcome.” *Castaneda*, 648 F.2d at 1009-10. The test is conjunctive. All three requirements must be fulfilled for SDOL to comply with EEOA.

30. SDOL is familiar with the *Castaneda* factors, and recognizes that SDOL ESL program for Plaintiffs must satisfy them.

31. Delays or refusals to allow students to go to school as required by State law is by definition a denial of equal educational opportunity. The illegal delays that were experienced by immigrant and refugee students after the students were officially reported enrolled to State and Federal governments was a standard practice of the School District. [FOF-¶ 43] There is no evidence this practice was inflicted on non-refugee/immigrant students enrolling at SDOL. The District also refused to allow certain refugee students to attend school based on snap judgments that their intentions about attending school were insincere, despite the completion of the enrollment process, and advocacy by case workers and statements by parents.

32. SDOL has also violated all three *Castaneda* criteria in its education of Plaintiffs at Phoenix.

### **Castaneda Factor 1: Sound Educational Theory**

33. The accelerated program used at Phoenix is not an educational theory for overcoming language barriers recognized as sound by experts in the field. Plaintiffs’ Expert, Dr. Marshall, testified that the “accelerated recovery program is totally inappropriate for this population.” [FOF ¶ 245-246] There is “absolutely no contrary research.” [FOF ¶ 249] Dr. Marshall testified, and nobody disputed, that students with entering level proficiency needed their first education in an American school to be slowed down, not sped up – a runaway before

takeoff. [FOF ¶ 38, 247] This need is particularly profound for SLIFE students. [FOF ¶ 246-249] No expert disputed this opinion.

34. The educational theory that is recognized as appropriate for students at entering level English proficiency, particularly SLIFE students, is employed at the International School at McCaskey: 2-3 hours of ELL each day, and sheltered instruction of students at the same level in all content classes. [FOF ¶ 256, 371-78 ] Ms. Hilt recognized that “this is actually a great example of the District adopting best practice recognized nationally for how to educate ELLs.” [FOF ¶ 370].

35. In addition to being accelerated, Phoenix’s program lacks the attributes agreed by Dr. Marshall and Ms. Hilt to be best practices for educating new ELLs, including 2-3 hours of ESL and sheltered instruction in content classes with same English proficiency level. [FOF ¶ 254-258 ]

36. Students at Phoenix are also handicapped by not being given homework as is done at McCaskey. [FOF ¶ 321] The patronizing suggestion by Phoenix Executive Director Megan Misnik that ELLs at Phoenix weren’t given homework because they would be frustrated by taking home work that “they’re not going to be able to feasibly do on their own” [FOF ¶ 318] is entirely undermined by the fact that homework is regularly given to younger ELLs at McCaskey. Plaintiffs with siblings at McCaskey see their younger siblings racing ahead in their English language acquisition. [FOF ¶ 379 ]

37. SDOL purports to be satisfying its requirement to provide 2-3 hours of ESL to Entering level students at Phoenix by treating its Communications Arts class as ESL. [FOF ¶ 364] This practice violates the Pennsylvania Department of Education’s interpretation of what state law requires for teaching ESL. [FOF ¶ 267]. SDOL is accelerating Plaintiffs through school by providing them with less ESL than this standard requires, which experts recognize as necessary to overcome language barriers.

### **Castenada Factor 2: Effective Implementation**

38. The program used at Phoenix for new ELLs is not reasonably calculated to effectively implement the educational theory adopted by the school. The structured immersion model that places students at different levels of English proficiency, including native speakers, is not a sound educational theory for beginning ELLs. [FOF ¶ 270] It is also not being implemented consistently or effectively.

39. The strategies for applying structured immersion – for those students with more advanced English proficiency who might benefit – include differentiated instruction, push-in, pull-out, and co-teaching. Dr. Marshall gave undisputed testimony that any differentiated instruction provided at Phoenix *could not* be effective given the range of English language proficiency levels in content classes, and former Phoenix teachers Rivera and Ortiz gave undisputed testimony that it *was not* effective. [FOF ¶ 271] The students testimony that they did not understand most of what was taught to them in content classes is consistent with this testimony. [FOF ¶ 243, 357, 363-367]

40. The other strategies for applying structured immersion were not formalized, *i.e.*, they were applied inconsistently as limited resources permitted, not regularly as part of any coordinated plan so that students could count on their application to advance their comprehension of core content. [FOF ¶ 282-286]

### **Castenada Factor 3: Results**

41. SDOL has no “results indicating that the language barriers confronting students are actually being overcome.” ESL Coordinator Amber Hilt acknowledged that “there is no data at this level that would allow us to determine whether the educational program, the ESL delivered to these students in with the Phoenix accelerated model is working or not.” N.T. 8.19.16 PM, 10:7-10:19 (Hilt testimony). SDOL has elected to not disaggregate its Phoenix ACCESS data to make this assessment, keeping the effectiveness of the program completely hidden from itself as well as the Court. [FOF ¶ 333] Through her own extensive efforts, Dr. Marshall was able to discern from limited data provided by SDOL that Phoenix’s performance on literacy measures– the core measure of “overcoming language barriers” – was far worse than McCaskey’s. [FOF ¶ 349-350]

42. The only “assessment” described at the Preliminary Injunction Hearing was an Internal Survey document filled out by the Phoenix ESL teacher, Maryann Ortiz. [FOF 329, 340-345¶] This review was never entered into evidence by SDOL to show its program was working, and there was no suggestion by Ms. Ortiz or any other witness that this Review constituted a quantitative assessment of progress at Phoenix that would show its accelerated program was actually resulting in students overcoming language barriers.

43. Plaintiffs have demonstrated that the District has not met a single one of the three *Castaneda* factors and, thus, that Plaintiffs are likely to succeed on the merits of its EEOA claim.

### **C. SDOL is Deliberately Indifferent to Immigrant and Refugee Children In All Aspects of Their Delivery of Educational Services, In Violation of Title VI**

44. Title VI states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d; *see also* 34 C.F.R. § 100.3(b)(1)(i)-(vi) (describing specific discriminatory actions prohibited under Title VI).<sup>10</sup> Title VI prohibits intentional discrimination, which the Third Circuit has held may be demonstrated through proof of “deliberate indifference.” *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 272-73 (3d Cir. 2014). A plaintiff can establish deliberate indifference by proving that a school district: (1) had actual knowledge of the alleged misconduct; (2) had the power to correct it; and (3) failed to do so. *Id.* at 273 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645-49 (1999) (articulating a deliberate indifference standard in the Title IX context)). Thus, school systems can be found liable under Title VI for discrimination against ELLs not only by their actions but by inaction.

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<sup>10</sup> There is no question that the District is a recipient of federal funding and subject to Title VI’s anti-discrimination mandate.

45. Deliberate indifference pervades every aspect of SDOL's interactions with Plaintiffs and the proposed Class, from enrollment through graduation. This indifference extends from undisputed violations of law, to elevation of District priorities over the educational needs and rights of students, to uninformed assumptions about Plaintiffs' goals, to casual disregard for serious problems and issues brought to SDOL's attention. It is only through the efforts of refugee resettlement agencies and this lawsuit that *any* of the serious violations of Plaintiffs' legal rights have been addressed; many of these problems remain unresolved and susceptible to repetition.

46. Deliberate indifference towards older refugee and immigrant children begins as soon as they arrive seeking enrollment. Even though Pennsylvania law requires students to start school five days after submission of four required enrollment documents, and even though SDOL's assignment of an enrollment date triggers the delivery of funds from the Commonwealth of Pennsylvania and the U.S. government, SDOL adopted the regular practice of requiring refugees to wait for weeks until they meet with Mr. Blackman whereby they were assigned to a school. There is no evidence that non-immigrant and refugee students were forced to wait for weeks to start school after their official enrollment date. Some students simply were not enrolled at all, again in violation of State law, at least until their caseworkers intervened on their behalf.

47. SDOL has been deliberately indifferent to its own illegal conduct. As one prominent example, it was brought to SDOL's attention on January 21, 2016 that Khadidja Issa had not started school, despite having completed the enrollment process in mid-November 2015. [FOF ¶ 54] Mr. Blackman ignored the emails directly relating to his denial of this student's enrollment, other than to direct an angry missive purportedly about Miss Hilt that began: "This guy is nuts." [FOF ¶ 384] Even though this email thread became the source of embarrassment for SDOL as a result of its inadvertent transmittal to the initiator of the email thread, caseworker Bilal Altememi, resulting in an in-person meeting, the actual subject of Bilal's email -- the denial of education to a student for months after she properly enrolled -- was completely disregarded by Blackman and his colleagues. Mr. Blackman testified that no investigation or action to address this situation were initiated by himself or his supervisor Dr. Abrom. [FOF ¶ 384] At trial, Dr. Abrom and other witnesses attempted to rationalize away this violation of Khadidja's education rights by speculating that there were immunization issues. There is no evidence in the record that there were open immunization issues when SDOL reported Khadidja enrolled to the Commonwealth and U.S. governments; indeed, SDOL would not have made those reports if Khadidja had not completed all paperwork required for enrollment. [FOF ¶ 42-43]

48. An investigation of SDOL's practices when enrolling and placing older immigrant and refugee students would have revealed that similar denials and delays were inflicted on most of the other Plaintiffs. It might also have revealed similar treatment of other immigrant and refugee students who have been denied entry to SDOL schools, or had their start delayed. To date, no such investigation has occurred.

49. Deliberate indifference in the enrollment and placement process is also demonstrated by the snap judgment that Mr. Blackman made about Qasin Hassan. Even though Qasin manifested his intent to go to school *by enrolling*, Mr. Blackman decided he could unilaterally override that intention and deny Qasin the free public education that he was entitled

to because he stood silently apart during the short meeting between Mr. Blackman, Ms. Hilt and Qasin's family. [FOF ¶ 85] (At trial there was a suggestion that Qasin expressed a desire to work, not go to school – which could not have occurred if he was silent. In all likelihood, that desire to work was not expressed until after his miserable experience at Phoenix, as testified about by Ms. Ortiz). [FOF ¶ 164]

50. Despite the serious violations brought to SDOL's attention by the refugee agencies on March 17, by the ACLU's letter of April 26, and again through this lawsuit filed on July 19, it does not appear that any rigorous investigation of past misconduct has been undertaken, or any clear policies developed to protect students from future violations. The most that has been suggested is that Mr. Blackman is endeavoring to "communicate better" with SDOL staff involved with enrollment. [FOF ¶ 394]

51. For those older immigrant and refugee students that SDOL allows in school, SDOL is indifferent to whether they get the meaningful education required by EEOA, or whether they graduate college or career *ready* – the goal for other students enrolled in SDOL. [FOF ¶ 105-115]

52. SDOL is bound by the requirements of *Castenada*, and SDOL knows that. Nevertheless, Phoenix was permitted by SDOL to use an educational theory for ELLs that does not satisfy EEOA requirements [FOF ¶ 329], and which SDOL *knew* was different than the best practices used by SDOL at McCaskey. [FOF ¶ 254-289; 368-371]

53. SDOL actually authorized Phoenix to provide less ESL instruction than required by the State, by counting its Communications Arts class as ESL instruction.

54. Phoenix was also demonstrated to be inferior to McCaskey by every criteria that can be described and measured, other than pace of credit acquisition:

- Qualified teachers [FOF ¶ 176]
- Course offerings [FOF ¶ 167-168]
- Extracurricular activities [FOF 169-171]
- School Performance [FOF ¶ 176]

55. SDOL has also allowed Phoenix to use intrusive search practices, peer confrontation and aggressive behavior management practices on its students that are not used at McCaskey. [FOF ¶ 136-141; 148-161]. SDOL is so deferential to the private company running this public school that its Superintendent had no idea that it used intrusive searches until a year into her tenure, when the practice was confirmed during a July meeting with staff from Church World Services. [FOF ¶ 141]

56. Despite the fact that the refugee agencies brought this and many other serious problems, including violations of law, to SDOL's attention over the past year, they are considered "instigators" by SDOL. [FOF ¶ 393].

57. SDOL has knowingly deprived older immigrant and refugee children of these educational rights and benefits for the sole purpose of faster credit acquisition towards graduation. Graduation is *one* important objective for students at SDOL, but appears to be the sole objective that SDOL is pursuing.

58. The accelerated program that Phoenix delivers is provided as an option to students who come through McCaskey for pursuing their graduation. [FOF ¶ 97] Immigrant and refugee children are not provided that option. [FOF ¶ 98-100] There is no evidence in the record that the accelerated program was designed with ELLs in mind, including SLIFEs. Providing the same “benefit” to students differently situated as a result of national origin in terms of their academic needs and rights is as discriminatory as treating identically situated students differently on that basis.

59. Equal treatment of immigrant and refugee students, including Plaintiffs, would require that they also get the chance to start at McCaskey so they could begin their education with the runway that the International School provides, and then assess whether to bridge from McCaskey to Phoenix based on their English proficiency, other academic development, and goals about finishing high school and moving on to other education or work. SDOL allows non-immigrant and refugee students who have come through their school system, and their families, to make this kind of choice about how to best pursue their academic goals.

60. Instead, SDOL consigns older immigrant and refugee students to Phoenix until their fast-tracked graduation, rather than allowing them to bridge from McCaskey, as other students do. [FOF ¶ 98-99] The only rationale for this practice presented at trial appears to be concerns about maturity differences between these students, and the student body at McCaskey. This is not a legal reason to compromise students’ educations, and indeed must be managed by other school districts that do not have an accelerated school in which to quarantine older students.

61. SDOL has made no plans to evaluate the education at Phoenix, as it has for McCaskey, to assess whether it is actually meeting Plaintiffs’ language acquisition and other educational needs. [FOF ¶ 390]. Superintendent Rau strongly suggested that she is more interested in shuttering the International School, a program endorsed by her own ESL Coordinator Ms. Hilt as the best practice for new ELLs, in favor of immersing them with English language speakers, an approach that neither Ms. Hilt, nor national experts recommend. *Id.*

**D. Plaintiffs Have Demonstrated Likelihood of Success on the Merits of Their Procedural Due Process Claim**

62. The Fourteenth Amendment provides that “no person shall be deprived of life, liberty, or property without due process of law.” U. S. Const. amend. XIV.

63. The Supreme Court has established a two-part test to determine whether a person has been denied of life, liberty, or property without due process of law. The first step is to determine whether there is a protected liberty or a property interest that has been interfered with by the government. If so, the second step is to determine whether the procedures that attend the deprivation are constitutionally sufficient. *Kentucky Dep’t of Corrections v. Thompson*, 490

U.S. 454, 460 (1989) (citations omitted); *accord Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

64. Property interests are “created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (citations omitted).

65. The right to a free public education is clear under Pennsylvania law. Every child who has not graduated from high school has a right to attend the public schools in her district until the end of the school year in which she turns 21. 24 Pa. Cons. Stat. Ann. § 13-1301. A child who turns 21 during the school term and who has not graduated from high school has the right to continue to attend the public schools in his district free of charge until the end of the school term. See 22 Pa. Code § 12.1(a).

66. Pennsylvania regulations expressly require that a “school district or charter school shall normally enroll a child the next business day, but no later than 5 business days of application.” 22 Pa. Code § 11.11(b).

67. Pennsylvania law creates a protected property interest in attending public school. *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 149 (3d Cir. 2005); *Bell v. Pennsbury Sch. Dist.*, Civ. No. 09-5967, 2011 WL 292241 at \*6 (E.D. Pa. Jan. 31, 2011). That is because the right to a free public education is clearly established in Pennsylvania law. 24 P.S. § 13-1301; *see also* 22 Pa. Code § 12.8(a) (2005) (“[E]ducation is a statutory right, and students must be afforded all appropriate elements of due process if they are to be excluded from school.”). Accordingly, a student’s legitimate entitlement to a free public education cannot be taken away without procedural due process.

68. Once a protected liberty or property interest has been identified, the focus shifts to the quality and timing of the process due before the government may deny an individual her protected property interest. *Goss v. Lopez*, 419 U.S. 565, 573 (1975); *Shuman*, 422 F.3d at 149. The test for determining what process is due, first enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), requires this Court to balance three factors: (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* at 334-35; *accord E.B. v. Verniero*, 119 F.3d 1077, 1106 (3d Cir. 1997).

69. The *Goss* Court established the minimum process required for brief (*i.e.*, ten days or less) exclusions from school: [I]n connection with a suspension of 10 days or less . . . the student [must] be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. . . . The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school. *Shuman*, 422 F.3d at 149-50 (quoting *Goss*, 419 U.S. at 581). *Goss* noted that “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.” *Id.* at 584.

*Goss*, thus, establishes “the minimum requirements” for exclusions from school. *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 927 (6th Cir. 1988) (emphasis in original).

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

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

72. SDOL’s failure to provide students denied enrollment in McCaskey with any notice of reason for denial, with documents translated into their native language, or an interpreter to assist them violates Plaintiffs’ right to procedural due process. Without any due process, the risk that the District’s decisions will be arbitrary or discriminatory is high.

73. In light of the undisputed testimony establishing the absence of any type of notification of a denial of enrollment and the acknowledged failure of the school district to afford any student the opportunity to challenge the denial of enrollment through the enrollment complaint system maintained by the Pennsylvania Department of Education, Plaintiffs have established their likelihood of success on the merits of the procedural due process claim.

**E. Plaintiffs Have Demonstrated Likelihood of Success on the Merits of Their State Law Claims**

74. Education is a fundamental right under the Pennsylvania Constitution and the Pennsylvania Public School Code of 1949. *See* Pa. Const. Art. III, § 14; *Sch. Dist. of Wilksburg v. Wilksburg Educ. Ass’n*, 667 A.2d 5, 9 (Pa. 1995) (interpreting Article III, Section 14 of the Pennsylvania Constitution to make public education a fundamental right in the Commonwealth).

75. The right of older immigrant students to be educated in the district where they live is clear and unequivocal. In Pennsylvania, every child who has not graduated from high school has a right to attend the public schools in her district until the end of the school year

in which she turns 21. 24 Pa. Stat. § 13-1301 (“Every child, being a resident of any school district, between the ages of six (6) and twenty-one (21) years, may attend the public schools in his district, subject to the provisions of this act.”); 22 Pa. Code § 11.12 (describing school age); *see also* 22 Pa. Code § 12.1(a) (“All persons residing in this Commonwealth between the ages of 6 and 21 years are entitled to a free and full education in the Commonwealth’s public schools.”).

76. The right to a free public education extends equally to immigrant students who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English.

77. Pennsylvania regulations require that a “school district or charter school shall normally enroll a child the next business day, but no later than 5 business days of application.” 22 Pa. Code § 11.11(b).

78. Pennsylvania regulations also explicitly state that a “child’s right to be admitted to school may not be conditioned on the child’s immigration status . . . [and, thus, a] school may not inquire regarding the immigration status of a student as part of the admission process.” 22 Pa. Code § 11.11(d).

79. The School District of Lancaster has a pattern or practice of denying or delaying enrollment for immigrant LEP youth that are 17-21 years old. [FOF ¶ 41 *et seq.* ]

80. The District illegally denies enrollment to older immigrant students under the age of 21 if District officials believe they would not graduate by the year in which they turn 21.

81. Plaintiff Alembe Dunia had just turned 19 when he sought to enroll in the SDOL. However, District officials refused to admit Alembe because of his limited prior schooling and age, and the District’s determination that he could not graduate high school by age 21.

82. It took Plaintiff Qasin Hassan several months of trying to enroll in school before he was finally placed at Phoenix on January 20, 2016. [FOF ¶ 55]

83. Khadidja’s enrollment documents were submitted in November 2015 and she met with Mr. Blackman during that same month, but she did not start school until February 2016.

84. Plaintiff Sui Hnem sought to enroll in the District in November 2015 but did not start school until February 2016, several months after her sister began at Phoenix.

85. Plaintiff Van Ni submitted required documents to the District on November 18, 2015 but did not actually started at Phoenix on December 22, 2015.

86. The District requires older immigrant youth to wait for a meeting with Mr. Blackman. [FOF ¶ 46, 48] Appointments with Mr. Blackman can be delayed or unavailable for weeks or months. [FOF ¶ 46, 49, 51-56] In addition, once Mr. Blackman unilaterally determines

placement for a student to Phoenix, the student must also wait for an orientation before beginning classes. [FOF ¶ 50]

87. The District's actions of denying these student enrollment violate state law which requires the SDOL to enroll all students within 5 days of presentation of requisite enrollment documents: proof of age, residency, immunization records and an Act 26 Statement. 22 Pa. Code § 11.11(b). For these students, who have a time-sensitive limited window when they are eligible to attend school, every day of lost instruction time and English language learning matters

88. In light of the evidence of record demonstrating the District's pattern and practice of denying enrollment to older immigrant students Plaintiffs have demonstrated a likelihood of success on the merits of its state law claim.

#### **F. Plaintiffs Will Suffer Irreparable Harm If An Injunction is Not Issued**

89. Irreparable harm is shown where the movant suffers "potential harm which cannot be redressed by a legal or an equitable remedy following trial." *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994); *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1146 (3d Cir. 1982); "Compensation in money can never atone for deprivation of a meaningful education in an appropriate manner at the appropriate time." *John T. ex rel. Paul T. v. Commonwealth*, Civ. No. 98-5781, 2000 WL 558582, at \*8 (E.D. Pa. May 8, 2000).

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

91. Plaintiffs have been or are being denied a meaningful education through denial or delays in enrollment, and by placement at a school that violates the EEOA by failing to overcome their language barriers.

#### **G. The Balance of Equities Weighs in Favor of Granting the Injunction**

92. Placing Plaintiffs at McCaskey, simply could not result in "greater harm" to the District that outweighs the indisputable, serious, and ongoing harm to Plaintiffs of being excluded from equal educational opportunities. *See Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 167 (3d Cir. 1999) (explaining that the relevant question is not whether the defendant

“would suffer some harm” but which of the two potential harms is greater). In balancing those potential harms, the court should be “unwilling to gamble with a child’s education.” *New Jersey v. New York*, 872 F. Supp. 2d 204, 215 (E.D.N.Y. 2011).

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

94. The District has *no* interest in continuing practices that violate the Constitution and federal and state law. *See Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. Sch. Dist.*, 233 F. Supp. 2d 647, 667-68 (D.N.J. 2002), *aff’d on appeal by Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Tp. School Dist.*, 386 F.3d 514 (3d Cir. 2004) (citing *American Civil Liberties Union v. Reno*, 217 F.3d 162, 180-81 (3d Cir. 2000)). “Providing statutorily [and constitutionally] granted services to a child does not harm the school district; doing so is its function under state and federal law.” *See John T.*, 2000 WL 558582, at \*8.

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

96. Furthermore, the District already has in place the International School, a program that can satisfy its legal duties to Plaintiffs. To its credit, the District knows what to do for refugee and immigrant children – all that is required is that it do it for all of them.

#### **H. An Injunction Is In the Public Interest**

97. The Third Circuit has stated that, “[a]s a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.” *American Tel. and Tel. Co. v. Winback and Conserve, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994); *L.R.*, 2010 WL 1433146, at \*5. Moreover, the public interest generally favors constitutional protection even in the face of otherwise important interests. *Child Evangelism Fellowship*, 233 F. Supp. 2d at 667-68.

98. It is “undeniably in the public interest for providers of public education to comply with the requirements [of federal education law].” *L.J.*, 2007 WL 3252240, at \*9; *see*

*also Reach Acad. for Boys & Girls, Inc. v. Del. Dep't of Educ.*, 46 F. Supp. 3d 455, 475-76 (D. Del. 2014); *John T.*, 2000 WL 558582, at \*8; *Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418, 424-25 (E.D. Pa. 1982).

99. The public interest clearly weighs in favor of granting a preliminary injunction to ensure Plaintiffs' immediate enrollment in McCaskey and access to the meaningful education to which they are legally entitled.

### **REQUESTED RELIEF**

Plaintiffs respectfully request that this Court grant their Motion for Preliminary Injunction and, specifically, order the following relief:

1. Plaintiffs' Motion for Class Certification is hereby granted and this Court provisionally certifies a class consisting of the following individuals ("Class Members"):

All limited English proficient ("LEP") immigrants, who, at any time after August 1, 2013, while aged 17-21, were, are, or will be in the future, excluded from Defendant School District of Lancaster's main high school, McCaskey—either as a result of being refused enrollment altogether, or through involuntary placement at Phoenix.

2. Defendant shall forthwith transfer Plaintiffs Khadidja Issa, Qasin Hassan, Sui Hnem Sung and Van Ni Iang to the International School at McCaskey, in time for them to begin school on Monday, August 29, 2016.

3. Defendant shall take all reasonable and necessary steps to welcome the four above-mentioned Plaintiffs to McCaskey and to orient them appropriately to their new school, including providing for an escort to assist them the first week of school.

4. Defendant shall enroll all four students in the International School at McCaskey and assess the four Plaintiffs' language and core content proficiencies the first week of school and place them in appropriate ESL and core content classes at McCaskey.

5. Plaintiff Anyemu Dunia will be given one week from this date to make a decision about whether he wants to enroll at McCaskey. If he chooses to enroll in McCaskey, the parties are directed, in the first instance, to attempt to work out an appropriate grade placement and lesson plan. If the parties are unable to agree on his placement and courses, this court shall schedule a conference call with the parties in order to resolve the dispute.

6. Defendant shall provide compensatory education services for Plaintiff Alembe Dunia, and for Plaintiff Anyemu Dunia if he chooses not to attend McCaskey, for a two year period on an hour-for-hour basis based on the denial of educational services by the SDOL for a two year period. These funds, which shall be held in trust by a third party, may be used solely for educational purposes to cover the cost of Plaintiffs' education at Harrisburg Area Community College (HACC) or another program of language instruction or education,

including career technical opportunities, and shall be made available forthwith to allow enrollment in such programs this Fall.

7. Defendant shall forthwith identify all Class Members presently attending Phoenix and within three (3) days of this date provide a confidential list to Plaintiffs' attorneys that includes students' names, addresses, telephone numbers and any other available contact information, native language, present grade level and length of time at Phoenix. Defendant shall provide to Plaintiffs' attorneys, if the request includes a signed authorization by the student or his or her parent/guardian if a minor, the student's academic and other records within twenty-four (24) hours of request.

8. Defendant shall enroll at McCaskey all Class Members who elect to transfer from Phoenix within five (5) days of being notified that the student wishes to transfer. Defendant shall assess each student's language and core content proficiencies within one week of transfer to determine appropriate ESL and core content classes at McCaskey.

9. Defendant shall forthwith cease sending any newly enrolling ELL's to Phoenix Academy. All newly enrolled ELL's shall henceforth only be enrolled in McCaskey's International School, and said enrollment shall comply with Pennsylvania's five-day rule. The school may reassign any students who are not at the entering or emergent language proficiency levels to classes at McCaskey that are outside the International School, if academically appropriate.

10. Defendant shall forthwith cease denying, delaying or discouraging any newly enrolling ELLs, regardless of the student's age so long as the student will be less than twenty-one (21) years of age at any point during the upcoming school year, from enrolling in the SDOL.

11. Defendant shall forthwith provide parents and students with written notice of an enrollment denial in the family's preferred language, with said notice to include (1) the reason(s) for the District's decision to exclude the student from school; and (2) a description of the appeal process available through the Pennsylvania Department of Education to challenge the District's denial of enrollment.<sup>11</sup>

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<sup>11</sup> This procedure is set forth in the [Basic Education Circular on Enrollment of Students issued by the Pennsylvania Department of Education](#) and provides: *When a dispute arises regarding enrollment of a student, the person attempting to enroll the child or the school district may bring the dispute to the attention of the Department's School Services Office. A complaint may be filed by mail, email or by phone with written follow up. After receipt of a complaint, a Department representative will contact the school district, family or other involved parties to determine the facts, whether the child is entitled to enrollment in the district and to try to resolve the problem. These contacts, whenever possible, will occur within five (5) days of receipt of the complaint. If the complaint is not amicably resolved, a written determination will be made and sent to the school district and the individual who filed the complaint. If the school district does not enroll the student within five (5) school days after receiving the written determination, the Department will issue a letter to the school district requesting its position on the situation. The school district will have five (5) school days to respond to the request. If the school district refuses to enroll the student or does not respond, the matter will be forwarded to the Department's Office of Chief Counsel (OCC). The OCC and the Deputy Secretary for Elementary/Secondary Education will determine if the school district's response is valid to deny enrollment. If not, the Deputy Secretary will determine what additional measures may be necessary to assure enrollment. See*

12. Any party may, for good cause shown, petition this Court to modify the terms of this Order.

13. This Order shall remain in effect until further Order of this Court.

Dated: August 25, 2016

Respectfully submitted,

/s/ Eric Rothschild

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<http://www.education.pa.gov/Documents/Codes%20and%20Regulations/Basic%20Education%20Circulars/Purdons%20Statutes/Enrollment%20of%20Students.pdf>

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 25, 2016, a true and correct copy of the foregoing document was served via electronic mail and ECF upon the following:

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