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

ORDER

AND NOW, this ____ day of _____ 2016, upon consideration of Plaintiffs' Motion for Class Certification, it is hereby ORDERED that Plaintiffs' Motion is GRANTED. The following Class is certified:

> 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.

It is further ORDERED that Plaintiffs Khadidja Issa; Q.M.H., by and through his parent, Faisa Ahmed Abdalla; Alembe Dunia; Anyemu Dunia; V.N.L., by and through her parent Mar Ki; and Sui Hnem Sung are appointed Class Representatives, and their counsel, the American Civil Liberties Union of Pennsylvania, the Education Law Center, and Pepper Hamilton LLP are appointed Class Counsel. Based upon the evidence offered in support of this Motion, the Court FINDS that:

1. Each of the prerequisites for class certification under Fed. R. Civ. P. 23(a) is satisfied because:

a. The Class is so numerous that joinder would be impracticable;

b. There are questions of law or fact common to all members of the Class;

c. The claims of Khadidja Issa; Q.M.H., by and through his parent, Faisa Ahmed Abdalla; Alembe Dunia; Anyemu Dunia; V.N.L., by and through her parent Mar Ki; and Sui Hnem Sung are typical of the claims and defenses of the Class; and

d. Khadidja Issa; Q.M.H., by and through his parent, Faisa Ahmed Abdalla; Alembe Dunia; Anyemu Dunia; V.N.L., by and through her parent Mar Ki; and Sui Hnem Sung and their counsel will fairly and adequately protect the interests of the Class.

2. Class treatment is appropriate under Fed. R. Civ. P. 23(b)(2) because the District 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.

3. Class Counsel satisfies the requirements of Fed. R. Civ. P. 23(g), considering:

a. The work Class Counsel has done in identifying or investigating potential claims in the action;

b. Class Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in this action;

c. Class Counsel's knowledge of the applicable law; and

d. The resources that Class Counsel will commit to representing the Class.

BY THE COURT.

_____
Hon. Edward G. Smith
United States District Judge

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PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Khadidja Issa; Q.M.H., by and through his parent, Faisa Ahmed Abdalla; Alembe Dunia; Anyemu Dunia; V.N.L., by and through her parent Mar Ki; and Sui Hnem Sung, by their attorneys, hereby move this Court, pursuant to Rules 23(a), (b)(2), and (g) of the Federal Rules of Civil Procedure, for an Order certifying the Class defined below, appointing Plaintiffs as Class Representatives, and appointing Plaintiffs' Counsel, the American Civil Liberties Union of Pennsylvania, the Education Law Center, and Pepper Hamilton LLP, as Class Counsel. In support of this Motion, and as more fully set forth in the accompanying Memorandum of Law, Plaintiffs state as follows:

1. Certification of the following Class is appropriate under Rule 23:

> 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. The proposed Class meets each of the requirements of Rule 23(a). The Class is so numerous that joinder of all members would be impracticable. Adjudication of Class claims will not only involve, but will focus on, common issues of fact and law. The claims of the proposed Class Representatives are typical of the Class, and the proposed Class Representatives will adequately protect the interests of absent Class Members.

3. The proposed Class also satisfies the requirements of Rule 23(b)(2) because 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.

4. Proposed Class Counsel satisfies the requirements of Rule 23(g) and will continue to diligently represent the interests of the Class.

WHEREFORE, Plaintiffs respectfully request that the Court certify the proposed Class, appoint Plaintiffs Khadidja Issa; Q.M.H., by and through his parent, Faisa Ahmed Abdalla; Alembe Dunia; Anyemu Dunia; V.N.L., by and through her parent Mar Ki; and Sui Hnem Sung, as Class Representatives, and appoint the American Civil Liberties Union of Pennsylvania, the Education Law Center, and Pepper Hamilton, LLP as Class Counsel.

Dated: July 19, 2016

Respectfully submitted,

/s/ *Eric Rothschild*

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION FOR CLASS CERTIFICATION

II. INTRODUCTION

Plaintiffs are foreign-born limited English proficient ("LEP") immigrants who, while they were ages 17 to 21, are being unlawfully denied equal educational opportunities by the Defendant School District of Lancaster ("SDOL" or the "District") as a result of Defendant's custom, practice, or policy of denying them enrollment in public high school in violation of state and federal law, or placing them in an inferior alternative school characterized by a highly restrictive and confrontational environment that undermines their ability to learn, rather than the main high school that offers them better access to the language services and programs they need and broader educational opportunities.

By their Motion, Plaintiffs seek certification of a class of all limited English proficient ("LEP") immigrants,[1] who, at any time after August 1, 2013, while aged 17-21, were,

[1] Students who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English are referred to in the law as "LEP students," which stands for limited-English-proficiency students, or as "ELLs," which denotes English

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. Class certification on behalf of this Class of individuals is needed so that the District does not persist in its unlawful practice of denying older refugee and immigrant students the education they are entitled to under state and federal law. Certification of this Class will prevent these issues from being determined in a piecemeal fashion in cases brought by individual students and their families, and eliminates the potential for conflicting results, and will ensure that every harmed Class Member—many of whom have limited resources and lack a sophisticated understanding of the American legal system—can get relief without having to file his or her own lawsuit.

The Class satisfies the requirements of Federal Rule of Civil Procedure 23(a). Class Members are sufficiently numerous that joinder of their claims is impracticable. There are questions of law and fact common to the class, and Plaintiffs' claims are typical of the claims of the Class Members. Plaintiffs will adequately represent claims of the Class. The requirements of Federal Rule 23(b)(2) are satisfied because the District has acted or refused to act on grounds generally applicable to the Class, by denying them access to the regular high school that is best equipped to meet their educational needs.

II. STATEMENT OF FACTS

A. Enrollment of Immigrant Students by SDOL

There are three public high schools in the District. Compl. ¶ 43. Most students over the age of 14 attend the McCaskey High School Campus ("McCaskey"), which is run by the District, and offers the full range of academic and extracurricular opportunities expected of an

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Language Learners, or simply "ELs," English Learners. These terms are used interchangeably in this Motion.

American public high school, with a fairly typical degree of student freedom in movement and expression. *Id.* ¶ 45. McCaskey also includes a one-year transition program called the "International School," designed to address the needs of students who are new to the country or the District and who have limited English proficiency. *Id.* ¶¶ 58-62.

There are two alternative public high schools in the district, Phoenix Academy and Buehrle Academy, both run by the private company Camelot Education. *Id.* ¶¶ 46. Camelot runs two kinds of programs relevant to this lawsuit. "Transitional Programs" are described as "serv[ing] students in need of a temporary placement due to behavioral or disciplinary infractions." *See* Camelot Transitional Schools, *available at* http://cameloteducation.org/transitional-schools-2/ (last visited July 14, 2016). "Accelerated Programs" are described as "offer[ing] students a highly structured, engaging, direct instruction pathway to graduation," and an "opportunity for students from the ages 16-21 who are overage and under-credited to graduate in 2.5 years or less." *See* Camelot Accelerated Schools, *available at http://cameloteducation.org/accelerated-schools* (last visited July 14, 2016). Buehrle is listed among Camelot's Transitional Schools, while Phoenix is listed as both an Accelerated School and a Transitional School. Compl. ¶¶ 47-48. Buehrle Academy operates under Pennsylvania law as an "Alternative Education for Disruptive Youth" ("AEDY") program, which is "designed for seriously and persistently disruptive students." *Id*. ¶ 49.

Phoenix is not an AEDY program like Buehrle, but Camelot runs it like one: students are subjected to pat-down searches, prohibited from bringing books, papers, or other articles to or from school, and are subject to harsh physical interventions. *Id.* ¶¶ 69-79. Phoenix's Student Handbook 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. *Id.* ¶ 77. Only students who are consistently documented "confronting and enforcing the normative culture at Phoenix" can earn the highest behavioral ranking. *Id.*

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

Older immigrant students that are enrolled by SDOL—often only after advocacy by refugee resettlement caseworkers—are typically placed at Phoenix Academy, one of the two privately run, alternative high schools, rather than the regular public high school, McCaskey. *Id.* ¶ 102. Immigrant students placed at Phoenix Academy are not given the option of attending McCaskey. *Id.* ¶ 100. Indeed, Plaintiffs who have expressly requested enrollment in McCaskey have been refused. *Id.* ¶ 101. Documents produced by the District in response to Right to Know Requests filed by Plaintiffs' counsel strongly suggest that it is District policy to place all older refugee students who are not on schedule to graduate by age 18 at Phoenix, regardless of their educational needs. *See* School District of Lancaster 2015 Extended Day Program Abstract at 15, attached as Exhibit 1) ("Phoenix Academy [is] a credit recovery facility for students who, due to

multiple risk factors including refugee status, pregnant and parenting youths, homelessness and other poverty-related issues, may not graduate on time").

Phoenix lacks adequate supports for English Language Learners ("ELLs") and fails to offer a full course curriculum, highly qualified teachers, extra-curricular activities and an equal educational experience, as required by Pennsylvania and federal law. *See* 22 Pa. Code § 12.4; 20 U.S.C. § 1703(f). There is no transitional program for ELLs at Phoenix equivalent to the International School at McCaskey. Compl. ¶ 63. Phoenix provides more limited and less tailored ESL instruction than at McCaskey, and few modifications to instruction and testing in regular education classes. *Id.* ¶ 56. And Phoenix lacks many of the other attributes and opportunities available to students at McCaskey. *Id.* ¶ 55.

B. Plaintiffs and Proposed Class

1. Named Plaintiffs

a. Khadidja Issa

Plaintiff Khadidja Issa is an 18-year-old refugee from Sudan. Compl. ¶ 10. She and her family arrived in the United States in September 2015, and Lutheran Immigration Refugee Services ("LIRS"), a refugee resettlement agency, helped her family resettle in Lancaster, Pennsylvania. *Id*. ¶ 13. Khadidja speaks Fur—an indigenous language of Darfur, Sudan—and Arabic. *Id*. ¶ 14. When she arrived in the United States, she could not speak, read, write, or understand English. *Id.*

The SDOL initially refused to enroll Khadidja in any District school. *Id*. ¶ 15. When she sought enrollment again several months later, the District assigned her to Phoenix. *Id*. She was not offered the option of attending McCaskey. *Id*.

b. Q.M.H., a minor, by and through his mother, Faisa Ahmed Abdalla

Plaintiff Q.M.H. is a seventeen-year-old refugee from Somalia who brings this lawsuit by and through his mother because he is a minor. Compl. ¶ 16. Before coming to the United States, he and his family lived in a refugee camp in Egypt for five years. *Id*. They came to the United States as refugees in September 2015, and LIRS helped them resettle in Lancaster. *Id*. ¶ 18. He and his mother speak and understand only Somali and Arabic. *Id*. ¶ 17. When he arrived in the United States, he could not speak, read, write, or understand English. *Id.*

The SDOL initially refused to enroll Q.M.H. in any District school. *Id*. ¶ 19. After further efforts by his resettlement case worker, the District placed him at Phoenix in January 2016. *Id*. He was not given the option of attending McCaskey. *Id*.

c. Alembe and Anyemu Dunia

Plaintiffs Alembe Dunia and Anyemu Dunia are brothers, aged 20 and 18, respectively. Compl. ¶ 20. They are refugees from the Democratic Republic of Congo who spent 12 years in a refugee camp in Mozambique after fleeing the war in Congo. *Id*. Alembe and Anyemu, along with their mother and siblings, arrived in the United States as refugees in November 2014, and LIRS helped them resettle in Lancaster. *Id*. ¶ 21. They are native Swahili speakers, and also speak Portuguese. *Id*. ¶ 20. When they arrived in the United States, they could not speak, read, write, or understand English. *Id*. ¶ 20.

The SDOL has refused to admit Alembe into any District school. *Id*. ¶ 22. The District placed Anyemu at Phoenix and did not give him the option to attend McCaskey. *Id*.

d. Sui Hnem Sung and V.N.L. by and through her mother, Mar Ki

Plaintiffs Sui Hnem Sung and V.N.L. are sisters, aged 19 and 17, respectively. Compl. ¶ 23. V.N.L brings this lawsuit by and through her mother because she is a minor. *Id*.

The sisters are refugees from Burma and are native Hakha Chin speakers. *Id*. Sui Hnem Sung, V.N.L., along with their mother, and younger brother and sister, arrived in the United States as refugees in November 2015, joining their father who had arrived in 2013. *Id*. ¶ 24. When they arrived in the United States, they could not speak, read, write, or understand English. *Id*. ¶ 23.

The District placed Sui Hnem Sung and V.N.L. at Phoenix and did not give them the option of attending McCaskey. *Id*. ¶ 25.

2. Proposed Class

Plaintiffs are among dozens, and possibly more, of limited English proficient ("LEP") immigrants who, in the past three years, while ages 17 to 21, were excluded from McCaskey—either by being denied enrollment in SDOL entirely or by being required to go to Phoenix Academy rather than McCaskey—and thereby were denied equal educational opportunities in violation of state and federal law. Plaintiffs bring this action on behalf of themselves and all other similarly situated persons pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2). Plaintiffs seek declaratory and injunctive relief on behalf of themselves, and those who currently are, or will in the future be, subject to such unlawful denial of educational opportunities. The Named Plaintiffs bring this action to ensure equal educational opportunities under the Equal Educational Opportunities Act ("EEOA"), 20 U.S.C. § 1703; Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; the Equal Protection and Due Process clauses of the U.S. Constitution, U.S. Const. amend. XIV, § 1; and the Public School Code of 1949, 24 P.S. § 13-1301, *et seq.*

III. ARGUMENT

A. <u>The Standard for Class Certification</u>

1. Rule 23

Federal Rule of Civil Procedure 23 governs class certification. "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). Members of a class seeking certification must demonstrate pursuant to Rule 23(a) that:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). 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). Here, because Plaintiffs satisfy the criteria of Rule 23(a) and 23(b)(2), class certification is warranted.

B. The Proposed Class Meets All of the Requirements of Rule 23(a)

1. The Class Is So Numerous That Joinder Is Impracticable

Rule 23(a)(1) requires that the class be so numerous that joinder of all Class Members would be impracticable. "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."). At a minimum, plaintiffs must "define the class in a way that enables the court to determine whether a particular individual is a class member." *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403 (E.D. Pa. 1995). 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. . . .").

Courts in this Circuit have incorporated the proposition that common-sense assumptions about the number of Class Members can support a finding of numerosity. *Inmates of the Northumberland Cty. Prison v. Reisch*, No. 08-cv-345, 2009 U.S. Dist. LEXIS 126479 (M.D. Pa. Mar. 17, 2009) (citing *Peil v. Speiser*, 97 F.R.D. 657, 658 (E.D. Pa. 1983)) ("Since courts are willing to accept common sense assumptions as to numerosity in securities cases . . . we believe that the relaxed numerosity standard in cases seeking injunctive and declaratory relief would permit us to employ the same common sense assumption in the case at bar."); *see also T.B. v. Sch. Dist. of Philadelphia*, No. 97-5453, 1997 U.S. Dist. LEXIS 19300, at *8 (E.D. Pa. Nov. 21, 1997) ("For a [] class such as the one proposed here, there is no requirement that the class members be identified or counted with exact certainty, and indeed the fact that the membership and size of a class may vary over time enhances the desirability of using a plaintiff class.").

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).

Here, because the Class proposed would include both present and future students, the number of Class Members will invariably increase and their joinder to this litigation is therefore impracticable. *See Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001); *see also Gomez v. Ill. State Bd. of Educ.*, 117 F.R.D. 394, 399 (N.D. Ill. 1987) ("[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.")

Precise records of the number of students fitting the class definition, who have attempted to enroll or are enrolled in SDOL, are in the control of Defendant, which has failed to provide the requested information in response to a Right to Know Request served on it by counsel for Plaintiffs that sought "a record or records that reflect the ages of all students enrolled in ESL programs between the years 2011 to 2016 at (a) Phoenix Academy and (b) the McCaskey Campuses." *See* Right to Know Request No. 9, Pepper Hamilton LLP, to the School District of Lancaster (May 23, 2016) (attached as Exhibit 2).[2] Nevertheless, publicly available information

[2] Defendant purported to provide a spreadsheet responsive to this specific request, but no responsive information was contained in the spreadsheet. An appeal of Defendant's failure to provide responsive information is pending before the Office of Open Records. *See* Appeal of

about the composition of the District provides a basis for the Court to make the common sense assumption that there are sufficient numbers of unidentified, older LEP students (1) currently enrolled at Phoenix Academy, who should be enrolled at McCaskey; (2) who were denied enrollment altogether; or (3) who will be subject to the District's unlawful placement policies in the future, to render the joinder of individual claimants impracticable.

Over the past three years, Lancaster County has helped to resettle 1,630 refugees from Somalia, Burma, Bhutan, and other nations, according to the Pennsylvania Refugee Resettlement Program. Tim Buckwalter, *Lancaster County Ranks 3rd in Pennsylvania for Refugee Resettlement in Past 3 Years*, Lancaster Online, Sept. 16, 2015, *available at* http://lancasteronline.com/news/local/lancaster-county-ranks-rd-in-pennsylvania-for-refugee-resettlement-in/article_22003e76-5bbe-11e5-8c93-0bdbca2e5b6c.html (last visited July 14, 2016). And the number of refugees resettled in Lancaster has increased recently. Dan Nephin, *Reynolds Middle School Refugee Center Getting Ready for Opening*, Lancaster Online, Sept. 21, 2015, *available at* http://lancasteronline.com/news/local/reynolds-middle-school-refugee-center-getting-ready-for-opening/article_52126436-5ca9-11e5-84d0-ff227497033f.html (last visited July 14, 2016) ("Church World Service's Lancaster County chapter expects to resettle 200 refugees this year, 50 more than last year, and Lutheran Refugee Services, which is based here, expects 150, 30 more than last year.").

Seventeen percent of K-12 students in the District—1,872 students—are English language learners. *See* School District of Lancaster Comprehensive Annual Financial Report, June 30, 2015, *available at* http://www.lancaster.k12.pa.us/download/district_documents/financial/2015-

May 23, 2016 Right to Know Law Response, Pepper Hamilton LLP (July 18, 2016) (attached as Exhibit 3).

2016/20151210_comprehensive_annual_fin_report.pdf; School District of Lancaster, Fast Facts, http://www.lancaster.k12.pa.us/download/district_documents/20160520_fast_facts.pdf. That rate is even higher at the high school level. At McCaskey, 19.46% of the school's 2,648 students are English Language Learners—approximately 515 students. *See* Pa. Dep't of Educ., McCaskey Campus School Fast Facts, *available at* www.paschoolperformance.org (using query tool). At Phoenix, 28.17% of the school's 323 students are ELLs—approximately 91 students. *See* Pa. Dep't of Educ., Phoenix Academy Fast Facts, *available at* www.paschoolperformance.org (using query tool). There are 517 refugee students in the District. School District of Lancaster, Fast Facts, http://www.lancaster.k12.pa.us/download/district_documents/20160520_fast_facts.pdf. As of 2014, there were 20 known refugee students enrolled at Phoenix Academy. *See* ACF Performance Progress Report to the Administration for Children and Families, U.S. Department of Health and Human Services (Reporting Period: Aug. 15, 2013 – Feb. 15, 2014) (attached as Exhibit 4).

When considering the number of known refugees and ELLs currently at Phoenix, as well as the additional refugees who were denied enrollment in the District altogether, and non-refugee immigrant ELLs who were denied enrollment or placed at Phoenix, plus all future students fitting the class definition, common sense suggests that the proposed class satisfies the numerosity requirement of Rule 23(a)(1).

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). The obvious and inherent difficulties confronting unsophisticated plaintiffs with limited English proficiency, limited resources, and limited knowledge of the American legal system factor heavily in the assessment of impracticability in this case. 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).

2. Members of the Proposed Class Have Questions of Law and Fact in Common

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. In *Baby Neal*, the court was reviewing the denial of class certification on commonality grounds in a case involving a far-ranging challenge to Pennsylvania's foster care system. The district court had denied class certification because the named plaintiffs all presented individual fact patterns and were affected by a multitude of

different policies. Despite these differences, the Third Circuit held that the plaintiffs presented common questions of law and fact regarding the overall legality of Pennsylvania's foster care system. As the *Baby Neal* Court recognized, "because the requirement may be satisfied by a single common issue, it is easily met." *Id.* "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).

Further, the Third Circuit has held that "Rule 23 does not require that the representative plaintiff have endured precisely the same injuries that have been sustained by the class members, only that the harm complained of be *common* to the class." *Hassine v. Jeffes*, 846 F.2d 169, 177 (3d Cir. 1988) (emphasis in original). As the Third Circuit has recognized with respect to class actions seeking only injunctive or declaratory relief, "because they do not also involve an individualized inquiry for the determination of damage awards, [such actions] by their very nature often present common questions satisfying Rule 23(a)(2)." *Baby Neal*, 43 F.3d at 57.

In factually similar cases, plaintiffs have satisfied the commonality requirement without needing to demonstrate that all plaintiffs are harmed in identical ways. *See Doe v. Los Angeles Unified Sch. Dist.*, 48 F. Supp. 2d 1233, 1242 (C.D. Cal. 1999) (certifying an ELL class challenging a state initiative restricting the use of bilingual education to teach LEP students, brought under common claims of Title VI of the Civil Rights Act of 1964 and § 1703(f) of the EEOA and noting that when "class members share a general, common violation . . . a court may employ a liberal definition of commonality"); *Gomez*, 117 F.R.D. 394 (certifying class of all Spanish-speaking children who have been, are, or will be enrolled in Illinois public schools, and

who have been, should have been, or should be assessed as limited English proficient); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503 (D. Colo. 1983) (finding commonality on the issue of whether the school district had denied the class equal protection of the laws, and whether defendant had failed to follow requirements of Title VI of the Civil Rights Act of 1964 and § 1703(f) of the EEOA); *c.f., also P.V. v. Sch. Dist. of Philadelphia*, 289 F.R.D. 227 (E.D. Pa. 2013) (certifying class of plaintiffs alleging that the Pennsylvania Department of Education violated the Individuals with Disabilities Education Act ("IDEA") by failing to tailor educational placements to the child's individual needs).

In this case, the claims brought by Plaintiffs implicate several questions of law and fact common to the proposed Class. All Plaintiffs, along with the proposed Class, are LEP immigrants who in the past three years and continuing to the present were, while ages 17-21, excluded from McCaskey—either as a result of being refused enrollment altogether, or by involuntary placement at Phoenix. Documents produced by the District in response to Right to Know Requests suggest that the District has a common policy of excluding older LEP immigrants from McCaskey. *See e.g.*, SDOL Refugee Student Initiative Abstract at 14 (attached as Exhibit 5) ("Older refugee students (19+) will be enrolled in Phoenix Academy, a small learning environment for students with specific needs related to credit recovery."). Each member of the proposed Class raises the same basic questions of law: whether the District's refusal to enroll older LEP immigrant students in the regular high school in the District, which is better equipped to address their language needs, is a violation of the Equal Protection Clause of the U.S. Constitution, Title VI, the Equal Educational Opportunities Act, and Pennsylvania law. The Class is defined by the common experience of having been denied this educational opportunity, either by being refused enrollment in the District entirely, or being admitted only to

Phoenix. The rights of the Named Plaintiffs and the proposed Class Members to relief turn on this Court's determination of these statutory and constitutional provisions.

3. The Claims of the Named Plaintiffs Are Typical of Those of the Class

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.").

The basic issue concerning typicality is whether all class members would benefit in some way from a favorable judgment. *See Eisen v. Carlisle & Jacqueline*, 391 F.2d 555, 559 (2d Cir. 1968), *aff'd in part*, 417 U.S. 156 (1974). It is indisputable that a favorable judgment in this action would grant the Named Plaintiffs and the potential Class Members the type of relief from which they would all benefit: namely, the opportunity to attend the school that better meets

the educational and language needs of ELLs who are new to the country, and affords them equal access to educational opportunities. Plaintiffs' request for declaratory and injunctive relief would benefit all Class Members, and there is no danger that the Named Plaintiffs would seek or be afforded relief prejudicial to unnamed Class Members. For these reasons, the typicality requirement of Rule 23(a)(3) is satisfied.

4. The Named Plaintiffs Will Protect the Interests of the Class

The final requirement of Rule 23(a) is that the named class representatives must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). "Adequacy of representation assures that the named plaintiffs' claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class." *Baby Neal*, 43 F.3d at 55. To satisfy this requirement, the proponent of certification must show: (1) that no conflicts of interest exist between the proposed class representative and the proposed class; and (2) that counsel is qualified to represent the class. *See In re Prudential*, 148 F.3d at 312-313; *see also Hassine*, 846 F.2d at 179. In addition, Rule 23(g) outlines the factors that a court must consider in appointing class counsel, including "the work counsel has done in identifying or investigating" the claims, "counsel's experience in handling class actions," "counsel's knowledge of the applicable law," and "the resources that counsel will commit" in its representation. Fed. R. Civ. P. 23(g)(1)(A).

These standards are met in the instant case. Plaintiffs have no interests antagonistic to those of any other members of the putative class. Antagonism between named plaintiffs and the other class members may arise when a unique defense is asserted against the named plaintiff or against the other class members or when a named plaintiff's situation is unique. *Lerch v. Citizen's First Bancorp, Inc*., 144 F.R.D. 247, 251 (D.N.J. 1992) (citing *Zenith Labs., Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir. 1976)). No such circumstances

are present here. To the contrary, the interests of the Named Plaintiffs coincide with those of the class. The declaratory and injunctive relief requested by Plaintiffs will benefit all Class Members.

Finally, Plaintiffs' counsel—attorneys from the Education Law Center ("ELC"), the American Civil Liberties Union of Pennsylvania ("ACLU-PA"), and the law firm of Pepper Hamilton LLP ("Pepper") — have the expertise, experience, and resources to vigorously pursue the interests of the Class. The ELC's lawyers have vast experience dealing with education issues, including in class action litigation. The ACLU-PA has litigated many federal cases, including class actions, to protect the civil rights of individuals. Pepper is a national law firm with 13 offices located throughout the United States. Pepper is highly experienced in handling complex litigation and class actions. Moreover, the ELC, ACLU-PA, and Pepper have already invested significant time and resources on this matter. The legal team has interviewed clients and other witnesses, gathered and reviewed publicly available documents, and developed pleadings and motion papers.

For all of these reasons, the requirements of Rule 23(a)(4) and (g) are satisfied.

C. The Proposed Class Meets the Requirements of Rule 23(b)(2)

"In addition to satisfying the requirements of Rule 23(a), a putative class must also comply with one of the parts of subsection (b)." *Baby Neal*, 43 F.3d at 55-56. Plaintiffs here seek class certification pursuant to Rule 23(b)(2), which provides that a class action is appropriate when "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). This requirement has been interpreted by the Third Circuit to mean that "the interests of class members are so like those of the individual representatives that injustice will not result from their being bound by

such judgment in the subsequent application of principles of *res judicata*." *Hassine*, 846 F.2d at 179.

As the Third Circuit has explained, this requirement is "almost automatically satisfied" in actions primarily seeking injunctive or declaratory relief. *See Baby Neal*, 43 F.3d at 58; *Weiss v. York Hosp.*, 745 F.2d 786, 811 (3d Cir. 1984). "In fact, the [Rule 23(b)(2)] provision was designed specifically for civil rights cases seeking declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons." *Baby Neal*, 43 F.3d at 58-59 (internal citations omitted); *Hassine*, 846 F.2d at 179 ("[W]hen a suit seeks to define the relationship between the defendant(s) and the world at large, as in this case, (b)(2) certification is appropriate.") (internal citations omitted)). "What is important is that the relief sought by the named plaintiffs should benefit the entire class." *Baby Neal*, 43 F.3d at 59.

The Named Plaintiffs challenge a policy and practice by Defendant that is generally applicable to the Class as a whole. That policy operates to exclude Class Members from being educated at their main local high school, by either excluding them from the school system altogether, or funneling them into a school that is defined by a restrictive and confrontational atmosphere that undermines their ability to learn, and deprives them of the educational programs—including adequate language support—that they need in order to learn. Each Class Member will benefit from the relief sought in this suit. Plaintiffs' class-wide claim for injunctive and declaratory relief thus fits squarely within the requirements of Rule 23(b)(2).

IV. CONCLUSION

For all of the foregoing reasons, the Court should grant Plaintiffs' Motion and certify the proposed Class for purposes of Plaintiffs' claims for declaratory and injunctive relief.

Dated: July 19, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 19, 2016, I caused a copy of the foregoing Motion for Class Certification and Memorandum of Law in Support to be served upon the individuals below via electronic and first class mail:

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