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

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

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR EMERGENCY MOTION FOR PROVISIONAL CLASS CERTIFICATION AND ENTRY OF PRELIMINARY INJUNCTION PROTECTING SIMILARLY-SITUATED STUDENTS

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I. INTRODUCTION

On September 7, 2016, Dr. Arthur Abrom, Acting Director of Student Services for the School District of Lancaster ("SDOL" or "District"), sent an email to Church World Service ("CWS"), making plain the District's intentions not to apply the reasoning in this Court's August 26, 2016 opinion and injunction order in determining the placement of newly arriving immigrant English Language Learners ("ELLs"), ECF No. 36:

> "At this point, transfers are being offered to students who were at Phoenix at the time of the [court] order. With all other students, we are proceeding status quo until our appeal is heard."

Ex. 5 at 2-3.[1] Since then, the District has refused to transfer at least two recently arrived ELLs from Phoenix to McCaskey who are similarly situated to Named Plaintiffs: an 18-year-old Burmese refugee and a 19-year-old Haitian entrant. Despite this Court's express expectation in its preliminary injunction order that the District would treat similarly-situated students in accordance with the Court's decision, ECF No. 36 n.1, the District has refused.

Plaintiffs return to this Court seeking specific relief for similarly-situated immigrant ELLs who, without this Court's protection, will continue to suffer irreparable harm caused by the District's refusal to honor this Court's August 26, 2016, preliminary injunction ruling. *See* ECF Nos. 35, 36.[2] For the reasons discussed below, Plaintiffs request that this Court

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[1] Exhibit 5 is one of five email threads between CWS and District officials. Attached as Exhibit 3 is a declaration from CWS Lancaster Director, Sheila Mastropietro, authenticating the five exhibits.

[2] Defendant filed a motion to stay the injunction with the Third Circuit on September 13, but no stay order has yet been entered. Until and unless the Court of Appeals enters such an order, this Court can and should grant additional relief to prevent irreparable harm to Class Members. It is well established that "an interlocutory injunction appeal . . . does not defeat the power of the trial court to proceed further with the case." 16 Charles Alan Wright et al., *Federal Practice & Procedure* § 3921.2; *see also Nwaubani v. Grossman*, 806 F.3d 677, 679 n.5 (1st Cir. 2015) ("As a general matter, an 'interlocutory injunction appeal under § 1292(a)(1) does not defeat the power of the trial court to proceed further with the case.'") (*citing id.*); *Brennan v. William Paterson Coll.*, 492 Fed. App'x 256, 263 n.7 (3d Cir. 2012) (observing that although an

modify its August 26 Order[3] to (1) expressly enjoin the District from continuing its illegal enrollment and placement practices; (2) provisionally certify the class proposed in Plaintiffs' motion for class certification, ECF No. 2; (3) expressly extend the injunction order to Class Members; (4) authorize Plaintiffs to serve additional discovery requests aimed at identifying Class Members and determining their enrollment status; and (5) order Defendant to respond to Plaintiffs' discovery requests.

II. THIS COURT'S AUGUST 26 PRELIMINARY INJUNCTION MEMORANDUM AND ORDER INCLUDED A CLEAR EXPLANATION OF THE APPLICABLE LAW AND EXPECTATION AND ENCOURAGEMENT THAT THE DISTRICT APPLY THAT LAW TO STUDENTS WHO ARE SIMILARLY SITUATED TO PLAINTIFFS.

On August 26, 2016, this Court granted in part Plaintiffs' motion for preliminary injunction, holding that "Plaintiffs have been or are being denied a meaningful education through denial or delays in enrollment and by placement at a school (Phoenix Academy) that fails to overcome their language barriers in violation of the EEOA." ECF No. 35 at 13. The Court determined that "plaintiffs' motion presents straightforward legal issues that were ultimately easy to resolve. As to those issues, the law is clear: eligible students must be timely enrolled, and efforts to overcome language barriers must be sound and effective." *Id*. at 14. On the latter point, the Court held that "the ESL program at Phoenix does not sufficiently overcome the plaintiffs' language barriers, which violates the EEOA." *Id.* at 8.

The Court elected to defer ordering specific "interim relief for [] [Plaintiffs'] proposed class," reasoning that "any such relief is best addressed as the case progresses to avoid

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appeal usually deprives the district court of jurisdiction to proceed, an interlocutory appeal of a preliminary injunction order under 28 U.S.C. § 1292(a)(1) "is an exception to that norm.") (*citing In re Mann*, 311 F.3d 788, 793 (7th Cir. 2002)).

[3] In the alternative, instead of modifying the August 26 preliminary injunction order, the Court could enter a separate order provisionally certifying the class, authorizing additional class discovery, and preliminarily enjoining Defendant from continuing its illegal practices with respect to Class members.

any unintended harm to unnamed class members." *Id*. at 6 n.3. The Court nonetheless included an expectation that Defendant, "going forward, [] will comply with the legal requirements for enrollment imposed by Pennsylvania Law." *Id*. at 9. And in the preliminary injunction Order, the Court noted that its legal reasoning "would likely apply" to similarly-situated students and that "prior to the court's determination on the motion for class certification, the parties are *encouraged* to fairly apply that reasoning to those individuals." ECF No. 36, n.1 (emphasis added).

III. THE DISTRICT HAS REFUSED TO COMPLY WITH THE LAW BY ENSURING THAT SIMILARLY-SITUATED STUDENTS ARE ENROLLED PROMPTLY AND PLACED IN AN APPROPRIATE EDUCATIONAL PROGRAM WHERE THEY CAN OVERCOME LANGUAGE BARRIERS.

Plaintiffs' counsel first contacted Attorney O'Donnell shortly after the Court issued its preliminary injunction memorandum and order on Friday, August 26, to ensure that similarly-situated class members would receive the benefit of the Court's legal ruling and analysis through prompt enrollment and access to McCaskey. Although Attorney O'Donnell stated during those discussions that the District intended to apply the Court's reasoning to similarly-situated students, as we apprised the Court during the telephone conference on September 7, Plaintiffs' counsel was unable to learn which groups of students the District considered "similarly situated" or how the District was identifying those students.

At the Court's suggestion, on September 6, Plaintiffs served a short, informal discovery request on Attorney O'Donnell seeking that information. Ex. 1. The District did not respond to most of the discovery requests and produced only: (1) a spreadsheet listing the names, enrollment dates, and current school placement (but no contact information) of twelve Phoenix students (four of whom were Named Plaintiffs Khadidja Issa, Qasin Hassan, Van Ni Iang, and Sui Hnem Sung), and (2) letters addressed to "Dear Refugee Parent" reportedly hand-

delivered to four students listed on the spreadsheet apprising those students' families of the option to transfer to McCaskey, but warning them that choosing to transfer "may or may not" affect their child's ability to graduate.[4] A copy of Attorney O'Donnell's September 7 email and the five included documents is attached as Ex. 2, with the students' names redacted and replaced with initials. The spreadsheet indicates that the District did not successfully notify two of the students whom it considers "similarly situated" to Plaintiffs of their right to transfer to McCaskey. Ex. 2 at 2. The notice delivered to parents of four students did not describe the Court's ruling with respect to the inadequacy of the English language program at Phoenix or even mention ESL or the benefits of attending McCaskey. Ex. 10. Notably, the District declined to respond to Plaintiffs' request for any explanation of the District's criteria for selecting "similarly situated" Phoenix students who would be notified of the option to transfer to McCaskey. It is not clear how the spreadsheet provided to counsel was compiled or filtered, but as discussed below it has become clear that the District's identification of similarly-situated students was incomplete.

In light of the District's refusal to respond to Plaintiffs' discovery requests, the very small number of students identified by the District as "similarly situated" in a school that is 28% ELLs, and the concerns raised by the District's notice mischaracterizing the risks of transferring to McCaskey and omitting mention of any of the benefits, Plaintiffs' counsel wrote to the Court on September 7 to request a status conference in order to discuss a proposed plan for ensuring that students similarly situated to the Named Plaintiffs would be treated in accordance with the law. At this point, in light of subsequently obtained evidence of the District's refusal to

[4] Although the District did not provide Plaintiffs' counsel with the English language version of this letter, Plaintiffs' attorneys were able to understand the Spanish language version of the letter, and have had it translated into English for the benefit of the Court. *See* Ex. 9 (Declaration of translator Elizabeth Schultz). An English translation is attached as Exhibit 10.

apply the injunction to newly arrived older, under-credited ELLs, as detailed below, Plaintiffs believe it is appropriate for the Court to grant immediate relief to protect the legal rights of putative class members while litigation proceeds.

IV. THE DISTRICT HAS REFUSED AND WILL CONTINUE TO REFUSE TO APPLY THE COURT'S INJUNCTION ORDER TO SIMILARLY-SITUATED STUDENTS.

It is now clear that the District has not honored, and has no intention of honoring, the Court's legal reasoning with respect to all similarly-situated students. Notably, the District has outright refused to transfer two recently arrived ELLs from Phoenix to McCaskey because they are older, under-credited students. Other cases involve the District's refusal to transfer a recently arrived refugee from the Democratic Republic of Congo until pressured by Church World Service to reverse the stance, and a fifteen-year-old refugee who was forced to wait sixteen days after enrollment to start school, and then only because of CWS's advocacy.

A. E.S., a 19-year-old Refugee from Democratic Republic of Congo[5]

On September 7, 2016, Dr. Abrom made clear in an email to CWS Lancaster Director, Sheila Mastropietro, the District's narrow view of the applicability of the Court's August 26 opinion and order to students other than the Named Plaintiffs. In addressing CWS's plea that a recently arrived nineteen-year-old female refugee from the Democratic Republic of Congo, E.S., be allowed to attend McCaskey, Dr. Abrom wrote:

> At this point, transfers are being offered to students who were at Phoenix at the time of the [court] order. With all other students, we are proceeding status quo until our appeal is heard.

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[5] E.S. is a pseudonym being used to protect the class member's identity, and other putative class members discussed herein are being identified similarly. Some press accounts of the case have generated hostile and even threatening comments on the Internet directed at the immigrant students involved in the case, and absent a compelling reason to disclose additional students' names, Plaintiffs' counsel will not be identifying them at this time. Plaintiffs' counsel expects that the District can identify the student based on the initials, but, if not, Plaintiffs' counsel will disclose, confidentially, to District officials the students' names.

Ex. 5 at 2-3. The District's handling of E.S.'s enrollment – including several months of delay in enrolling the student after CWS submitted all documentation last April, refusal to start her education during that school year, and ultimately, assignment to Phoenix because she is older and under-credited – parallels exactly the experiences of Named Plaintiffs.

CWS began trying to enroll several of the family's children shortly after the family arrived in Lancaster this past April. Ex. 5 at 8-13; Ex. 5 at 3. CWS submitted immunization records for E.S. and her younger siblings to SDOL enrollment personnel on Tuesday, May 17. Ex. 4 at 13. When SDOL did not respond, the case manager sent an email on Thursday morning, May 19, to inquire. Ex. 4 at 12. Late on Friday afternoon, May 20, the SDOL employee responded that all enrollment forms have been completed, except for E.S.'s younger brother, who allegedly is missing one immunization. *Id.* The SDOL employee also stated that she "will be talking to [her] boss about all others and see of [sic] their start date and then get back to you." *Id.* On Monday, May 23, the SDOL employee advised the CWS case manager that the two younger siblings (in middle or elementary school) could start the next day and wait for an orientation appointment, respectively. Ex. 4 at 11. With respect to E.S. and her younger brother, the employee wrote, "The other 10th grade students, I am still waiting to hear from Mr. Blackman to see what their decision is. It might be best for them to start next year, but we will see." *Id.* A week later, on Tuesday May 31, the case manager sent another email to SDOL inquiring about the status of the two tenth graders' assignment because he had not heard anything. Ex. 4 at 9. On June 1, SDOL advised the CWS case manager that "[a]t this time students will not be assigned to any school" and that they will need to meet with Mr. Blackman, which might not be until August. Ex. 4 at 8. One month later, on June 30, the case manager sent an email asking about assignment for E.S. *Id.* A July 5 email reply from the SDOL employee

stated that "[a]t this time we have not heard of any scheduled meetings with Mr. Blackman. Sorry ☹." Ex. 4 at 7-8 (emoticon in original). That same day, the CWS case manager sent an email to SDOL ESL Director Amber Hilt explaining the situation and asking, "Can you please help me with this." Ex. 4 at 5. Hilt replied the next day that a counselor "will reach out before school starts." *Id.* On July 14, an SDOL counselor wrote the CWS case manager to say that he saw no evidence the student had been enrolled. Ex. 4 at 4. CWS wrote back that, indeed, E.S. and the other student are enrolled and awaiting a meeting with Mr. Blackman. Ex. 4 at 3-4. A July 21 email from Phoenix Director, Megan Misnik, included an email from Mr. Blackman showing that he had assigned E.S. to ninth grade at Phoenix, and indicated that the Phoenix orientation would be held on August 25. Ex. 4 at 3. The District assigned E.S.'s younger brother to the International School at McCaskey, but E.S., born on August 1, 1997 and now 19 years old, was assigned to Phoenix. *Id.*

After this Court's August 26 Order, CWS asked the District on behalf of E.S. and her family for a transfer to McCaskey so that E.S. could attend the International School. Ex. 5 at 3. This request ultimately elicited the email from Dr. Abrom that "transfers are being offered to students who were at Phoenix at the time of the order." Ex. 5 at 2-3. However, E.S. *was* enrolled at Phoenix at the time the Order was issued. CWS's persistence finally resulted in Dr. Abrom opening the door to E.S. transferring to McCaskey, which he communicated by email to CWS on Thursday, September 8 stating that, "I have directed Mr. Blackman and Ms. Hilt to reach out to this student and offer them the opportunity to transfer to McCaskey, if they so wish." Ex. 5 at 2. The next afternoon, Friday, September 9, having heard nothing from Mr. Blackman or Ms. Hilt and E.S. having missed another day of school, CWS again wrote to Dr.

Abrom to ask whether E.S. and family should show up at McCaskey on Monday morning, September 12. *Id.* Dr. Abrom rejected the proposal, writing that,

> As stated below, we will be reaching out to the family, as there is a required meeting to review the potential positive and/or negative ramifications of the decision to transfer, paperwork to sign, and a student schedule must be developed before anyone is allowed to attend. So no, the family should not come to Campus at 7:40 on Monday. They should wait for contact from the district as to when the appointment is, the time, and place etc.

Ex. 5 at 1. SDOL eventually met with E.S. and she began at McCaskey on September 12, two weeks after classes began.

Without CWS's persistent advocacy, E.S. would not have been transferred from Phoenix to McCaskey. Even under Dr. Abrom's own characterization of SDOL's post-court-order policy, E.S. should have been automatically offered transfer to McCaskey because she was a "student[] who [was] at Phoenix at the time of the order." Although E.S. had not actually attended a class at Phoenix – she was scheduled to attend the first day of classes at Phoenix four days after the court's order – Mr. Blackman had already assigned her there in late July, and District records reflected that she was "enrolled."

Importantly, E.S. does not appear on the SDOL spreadsheet allegedly listing all Phoenix students whom the District considered "similarly situated" that Attorney O'Donnell produced to Plaintiffs' counsel on Wednesday, September 7. Ex. 2 at 2.

B. K.D.W, 18-year-old Burmese Refugee

Although the District eventually reconsidered its refusal to enroll E.S. at McCaskey, the District has outright refused another recent refugee's request to transfer from Phoenix to McCaskey's International School. Ex. 6. K.D.W. is an 18-year-old Burmese female refugee who arrived with her family in Lancaster in late May, 2016. Ex. 6 at 2. CWS helped her complete enrollment at the SDOL office on August 1, at which time the enrollment office

advised her that she would be placed at McCaskey with her 16-year-old sister. *Id.* When the sisters arrived at McCaskey on the first day of school, August 29, SDOL officials refused to admit K.D.W. *Id.* It is unclear to Plaintiffs' counsel at this time whether District officials turned K.D.W. away at the door or removed her from the building once she was inside, whether they actually transported her back to Phoenix that day so she could attend school, or whether they made any attempt to employ an interpreter so that she could understand what was happening to her. Regardless, when the CWS case worker inquired with the District, she was told that K.D.W. "has been redirected to Phoenix." *Id.* This entire sequence of events occurred after the Court's August 26 order.

After Dr. Abrom exercised discretion on September 8 to allow E.S. to transfer to McCaskey, CWS petitioned Dr. Abrom later that same day to make similar allowance for K.D.W. *Id.* On September 9, Dr. Abrom sent an email to CWS refusing to allow K.D.W. to attend McCaskey. Ex. 6 at 1. He wrote:

> In speaking with Mr. Blackman, this student was dropped off at McCaskey the first two days of school without completing all steps of the enrollment process. Communication occurred with the family through language line, telling her she needed to attend Phoenix. She has been attending Phoenix since. She was assigned to Phoenix since she will be 19 on January 1st and has zero credits. If and when she obtains enough credits to return to McCaskey, she will be afforded that opportunity. Thanks for checking.

Id.

K.D.W.'s case makes clear that Dr. Abrom's ultimate willingness to admit E.S. to McCaskey was an exceptional accommodation afforded only to a few students enrolled at Phoenix on the date of the Court's injunction order (and only after exceptional and sustained advocacy by CWS), and that the District is generally unwilling to follow this Court's interpretation of the law with respect to other similarly-situated students. Indeed, Dr. Abrom's

September 8 statement makes plain that only those students actually "at Phoenix at the time of the [court] order" are being allowed to leave Phoenix for McCaskey, and the evidence with respect to E.S. makes clear that even those students who were enrolled at Phoenix on the date of the Court's injunction order encounter unwarranted delays and resistance.

Furthermore, as is the case with E.S., despite the fact that K.D.W. has been enrolled since August 1, she does not appear on the spreadsheet Attorney O'Donnell shared on September 7 with Plaintiffs' counsel. Ex. 2 at 2.

C. H.E., 19-year-old Haitian Entrant

H.E. is a third example of the District's refusal to admit an older immigrant ELL into McCaskey. Ex. 7. H.E. is a 19-year-old Haitian female who came to the U.S. in October 2015. Ex. 7 at 3. She attended a nearby school district for two months, but had to leave for family reasons. *Id.* She moved to Lancaster in July where she lives with another Haitian family who has a teenage child that attends McCaskey.[6] *Id.* Although English is not her native language, the District did not give H.E. a language test upon enrollment and never scheduled her to meet with Mr. Blackman. The District assigned her to Phoenix and placed her in twelfth grade. *Id.* As a twelfth grader, she only needs one year of schooling to graduate, which she plainly could accomplish at McCaskey, especially since she has two remaining years of public-school eligibility. H.E. reportedly has been harassed by other students at Phoenix since her arrival and she wishes to transfer to McCaskey.

On Monday, September 12, CWS asked Dr. Abrom to transfer H.E. from Phoenix to McCaskey. Ex. 7 at 2-3. On September 13, Dr. Abrom refused to allow H.E. to transfer

[6] H.E.'s immigration status is unclear. It is believed that she is a "Haitian entrant," *see* N.T. Aug. 16, 2016, 9:44 AM-12:16 PM, 58:23-60:14 (Mastropietro describing Cuban and Haitian entrants), but Plaintiffs' counsel have been unable to verify her status. In any event, so long as she is an immigrant ELL, she falls within the scope of Plaintiffs' proposed class.

because he did not believe she could not earn enough credits at McCaskey before she turns twenty-one:

> According to enrollment, she came to us with zero credits, even though she may have said she completed 11th grade in Haiti. Warwick also did not give her credits for the time she spent there. Therefore, she was assigned to Phoenix as this provides her the only possible chance to accumulate the 24 credits she needs for graduation before turning 21, as she only has this year and next year as eligible years for public education. Two years at McCaskey would only give her the potential to accumulate 14 credits.

Ex. 7 at 1.

After this Court's August 26 order, H.E. did not receive any type of notice offering her an opportunity to attend McCaskey. And, as with E.S. and K.D.W., H.E. does not appear on the District's spreadsheet of similarly-situated students.

D. S.A.D., 15-year-old Refugee from Democratic Republic of Congo

Beyond the District's refusal to admit foreign-born ELLs to McCaskey's International School, enrollment *delays* for this group of students also still persist. *See* Ex. 8. S.A.D. is a fifteen-year-old refugee from Democratic Republic of Congo, with a birthdate of January 1, 2001. Ex. 8 at 2. CWS enrolled S.A.D. and her siblings on August 24 and submitted all enrollment documentation, including proof of immunizations, to the District's enrollment office on August 29, 2016, the first day of classes. *Id.* While S.A.D.'s younger siblings all began middle school on that day, S.A.D. did not receive a school assignment or any information about where and when to attend school. *Id.* CWS had called and left several voice messages with the District trying to get S.A.D.'s school assignment, but none of the messages were returned. *Id.* Classes began on August 29. Having heard nothing from the District, CWS emailed Dr. Abrom on September 7 to say that S.A.D. "is still waiting for her school placement." *Id.* Dr. Abrom subsequently responded that the student would be starting at McCaskey on

September 9, sixteen days after enrollment, and ten days after the beginning of the school year. Ex. 8 at 1. The fact that S.A.D.'s enrollment was only delayed by sixteen days (in contrast to even longer delays experienced by immigrant ELLs such as the Named Plaintiffs and E.S.) was only because of a CWS case manager's persistence. S.A.D.'s name also is not included on the spreadsheet of similarly-situated students shared by Attorney O'Donnell.

V. THE DISTRICT'S REFUSAL TO HONOR THE COURT'S INJUNCTION RULING AND INSTEAD PROCEED WITH BUSINESS AS USUAL LEAVES SIMILARLY-SITUATED STUDENTS EXPOSED TO IRREPARABLE HARM.

This Court's conclusion that the denial of a free public education causes irreparable harm to the Named Plaintiffs, ECF No. 35 at 13-14, applies equally to similarly-situated students, including E.S., K.D.W., H.E., and S.A.D. *See* N.T. 61:19-64:13 (testimony of Sheila Mastropietro, describing population of school-age refugee and other immigrant children). There is no dispute that the Named Plaintiffs are not the only newly arrived, entering-level ELLs with limited or interrupted schooling. Lancaster continues to receive young immigrants who have fled volatility and violence around the world. The number of these students is unlikely to abate soon because, sadly, the number of refugee and migrant children is growing.[7] The United

[7] A recent report discusses the growing number of refugee and migrant children. *See* United Nations Children's Fund (UNICEF), *Uprooted: the Growing Crisis for Refugee and Migrant Children*, at 2 (September 2016), http://www.unicef.org.uk/Documents/Media/UPROOTED%20Report.pdf:

> Around the world, nearly 50 million children have migrated across borders or been forcibly displaced – and this is a conservative estimate. More than half of these girls and boys fled violence and insecurity – 28 million in total. These children may be refugees, internally displaced or migrants, but first and foremost, they are children: no matter where they come from, whoever they are, and without exception. Children do not bear any responsibility for the bombs and bullets, the gang violence, persecution, the shriveled crops and low family wages driving them from their homes. They are, however, always the first to be affected by war, conflict, climate change and poverty. Children in these contexts are among the most vulnerable people on earth and this vulnerability is only getting worse. The number of child refugees under the United Nations High Commissioner for

States will continue to relocate a share of those refugees to this country, with some of them settling in Lancaster. N.T. Aug. 16, 2016, 9:44 AM – 12:16 PM, 67:5-69:12 (Mastropietro describing trends in immigration to Lancaster). The harm to the newly arrived students caused by the District's recalcitrance will be no less serious or irreparable than it was for the Named Plaintiffs; the denial of a meaningful education during the few remaining years these students have to acquire English and learn the basic skills and content knowledge they need to be successful in life is significant. Besides E.S., K.D.W., H.E., and S.A.D., there may be other Lancaster students, including non-refugee students, already in the District who fall within the proposed class, and their identity and that of all future arrivals is unknown and unknowable to Plaintiffs' counsel at this time. What is knowable is that these young people are equally deserving of the law's protection, which only this Court can ensure.

None of the four students discussed above – E.S., K.D.W., H.E., and S.A.D. – is listed on the spreadsheet produced by the District. Ex. 2 at 2. To the extent that the District considers other *refugee* students at Phoenix to be similarly situated (which seems to be reflected by the letters the District sent out to four families regarding this Court's order, which were addressed to "Dear *Refugee* Parent" (*see* Ex. 10, translated notice to parent of A.C.), the spreadsheet is incomplete. While H.E.'s immigration status is unclear, E.S., K.D.W. and S.A.D. are all here under international refugee status. Regardless of why the District's list does not include them, it is clear that the District will not voluntarily inform eligible students or share with Plaintiffs' counsel reliable and complete information regarding the identity and status of

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Refugees' (UNHCR) mandate has more than doubled in just 10 years – this shocking statistic is simply unacceptable.

similarly-situated students or even explain what factors the District relied on in constructing this spreadsheet.

While Plaintiffs' counsel has obtained some information relating to the enrollment and school placement of specific ELLs (like the four students discussed above) through outreach to CWS, counsel has no way of reliably identifying or reaching out to other similarly-situated students, including immigrants not served by CWS, who are less likely to learn about the case, contact counsel themselves, or have an advocate to navigate the system. Many of these students have parents who are limited English proficient and unfamiliar with U.S. schools and the U.S. legal system.

It is now also clear that the District and its officials are not, and will not be, honoring the Court's expectation or heeding its encouragement with respect either to prompt enrollment or assignment to McCaskey's International Program. In other words, with respect to putative Class Members, it will be business as usual in the District, with refugee students subjected to enrollment delays, discouragement, or outright denial, and the doors of McCaskey's International School will continue to be closed to newly arrived older immigrant ELLs who could greatly benefit from the program. Without a court order expressly extending the injunction to ensure the timely enrollment of these students and the opportunity for older immigrant ELLs to be educated at McCaskey and participate in the International School, similarly-situated Class Members will continue to be irreparably harmed. This is precisely the type of case where courts have held that class certification is most useful and important. *See infra* § VI.

VI. THIS COURT CAN AND SHOULD CERTIFY THE REQUESTED CLASS, EVEN IF ONLY PROVISIONALLY, AND EXTEND THE INJUNCTION TO PREVENT IRREPARABLE HARM TO CLASS MEMBERS.

In light of the District's refusal to heed the Court's encouragement to follow the law, as articulated by this Court, with respect to all similarly-situated students, and the

irreparable harm that will be inflicted on those students, Plaintiffs renew their request that this Court certify the proposed class (and extend the injunction to class members), at least on a conditional or provisional basis until after Plaintiffs receive full discovery on the putative class. *See*, *e.g.*, *Lloyd v. City of Philadelphia*, 121 F.R.D. 246, 252 (E.D. Pa. 1988) (provisionally certifying the class and authorizing further discovery and briefing on numerosity). Plaintiffs' Motion for Class Certification proposed 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.

ECF No. 2 at 1.

During trial, the main concern raised by the Court over certification appeared to be numerosity, but the raw number of class members is merely one way of measuring the impracticability of joining all members of the class.[8] Indeed, the Third Circuit issued a precedential decision on September 13 providing guidance on the numerosity factor and how to determine whether joinder is impracticable. *In Re: Modafinil Antitrust Litig.*, No. 15-3475, 2016 WL 4757793, at *1 (3d Cir. Sept. 13, 2016).

The Court declined to set a "floor at which a putative class will fail to satisfy the numerosity requirement," *id*. at *8, but suggested that classes of "fewer than 20 members will likely not be certified *absent other indications of impracticability of joinder*[.]" *Id*. at *7 (citing

[8] Defendant misreads the law to claim that classes may not be certified with fewer than 40 members. ECF No. 25-2 at 9 (Defendant's Memorandum of Law in Support of its Response in Opposition to Plaintiffs' Motion for Class Certification). Defendant incorrectly cites *Serventi v. Bucks Technical High School*, 225 F.R.D. 159 (E.D. Pa. 2004), for the proposition that a minimum of 40 persons is required to establish numerosity in this Circuit. *Id.* In fact, the *Serventi* Court observed that "[t]he Third Circuit has held that 'no minimum number of plaintiffs is required to maintain a suit as a class action[.]" *Id*. at 164-65 (emphasis added) (quoting *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001)).

5 William B. Rubenstein, *Newberg on Class Actions* § 3:12 (emphasis added)). Ultimately, the Court held that Rule 23 calls for "an inherently fact-based analysis that requires a district court judge to 'take into account the context of the particular case,' thereby providing district courts considerable discretion in making numerosity determinations." *Id*. The Court listed the following "non-exhaustive list" of six relevant factors that are appropriate for district court judges to consider when determining whether joinder would be impracticable: (1) judicial economy; (2) the claimants' ability and motivation to litigate as joined plaintiffs; (3) the financial resources of class members; (4) the geographic dispersion of class members; (5) the ability to identify future claimants; and (6) whether the claims are for injunctive relief or for damages. *Id*. at *10. These considerations reflect prior case law regarding certification of injunction-only (b)(2) classes, and provide a guide to analyzing the propriety of certifying classes comprising fewer than 20 members.

In this case, the class size is presently unknown, largely due to Defendant's refusal to divulge relevant information. Defendant's attempt, in its brief in opposition to Plaintiff's motion for class certification, to characterize the class as consisting of only 17 LEP immigrant students at Phoenix, citing only unidentified "case evidence," ECF No. 25-2 at 9, is unsupported by any evidence of record. Indeed, the evidence suggests Defendant's estimate understates the actual number of similarly-situated students at Phoenix. The District's contention does not line up with the record evidence regarding the number of entering-level ELLs at Phoenix. According to the most recently available data reported to the Pennsylvania Department of Education, 28.17% of the 323 students at Phoenix —a total of 91 students—are ELLs. Pl.'s Trial Ex. 94 at 1. And Phoenix's head ESL teacher testified at trial that two out of three of the ESL classes she taught were for ELLs at the "Entering" and "Emerging" levels, and

that not all of these beginner-level students were "refugees" – these classes included other types of immigrants who also had limited or interrupted formal schooling. N.T. Aug. 22, 2016, 4:13 PM – 5:45 PM, 44:19-45:6, 51:6-18 (Mary Ann Ortiz testifying).

The Defendant's suggested figure also does not include students who were denied enrollment altogether, like Alembe Dunia. It also does not include future class members, who will continue seeking to enroll in District schools. Finally, the figure does not include the four students discussed above who fit the class definition, but appear not to have been counted by the District since they do not appear on the spreadsheet of all students whom the District considers similarly situated. Consequently, the District has offered no sound factual basis for its contention that there are only 17 Class Members. Indeed, simply adding the four students discussed above raises the total above 20, making it a "midsized class." *See In Re: Modafinil Antitrust Litig.*, 2016 WL 4757793, at *7.

Even if the class size were below 20, courts have certified 23(b)(2) injunction-only classes of fewer than 20 people in light of other factors making joinder impracticable. *See, e.g., Jackson*, 240 F.R.D. at 147 (concluding that a putative class of 16 prisoners who had been sentenced to death was sufficiently numerous); *Grant*, 131 F.R.D. at 446 (noting that a court "may certify a class even if it is composed of as few as 14 members"); *Manning v. Princeton Consumer Discount Co.*, 390 F. Supp. 320, 324 (E.D. Pa. 1975) (certifying a class of 15 car purchasers challenging financing conditions), *aff'd*, 533 F.2d 102 (3d Cir. 1976). Courts, including the Third Circuit, have been clear that the numerosity requirement is relaxed where the relief sought is *only injunctive and declaratory*:

> In most cases where a plaintiff seeks injunctive relief against discriminatory practices by a defendant, the defendant will not be prejudiced if the plaintiff proceeds on a class action basis, as opposed to an individual basis, because the requested relief

> generally will benefit not only the claimant but all other persons subject to the practice under attack.

Weiss v. York Hosp., 745 F.2d 786, 808 (3d Cir. 1984) (citation omitted). *Accord Inmates of Northumberland Cty. Prison v. Reish*, No. 08-CV-345, 2009 WL 8670860, at *14 (M.D. Pa. Mar. 17, 2009) (applying "relaxed numerosity standard" in case seeking injunctive and declaratory relief challenging prison conditions where precise number of class members was neither alleged nor clearly ascertainable); *Jackson v. Danberg*, 240 F.R.D. 145, 147 (D. Del. 2007); *Grant v. Sullivan*, 131 F.R.D. 436, 446 (E.D. Pa. 1990).

Certifying a (b)(2) class, even if the number of members is small, is important precisely to protect the similarly-situated individuals not before the court: "A judicial determination that a particular practice infringes upon protected rights and is therefore invalid will prevent its application by the defendant against many persons not before the court." *Weiss*, 745 F.2d at 808. Protecting unnamed class members, ensuring consistent application of the law, and promoting judicial economy are all interests that warrant relaxation of a "rigorous application of the numerosity requirement." *Id.*; *see also Jackson*, 240 F.R.D. at 147-48 (citing importance of promoting "consistent adjudications" and "conserv[ing] scarce judicial resources").

Jackson is a good example of a case for just declaratory and injunctive relief in which the court certified a class of less than 20 members in order to protect similarly-situated individuals not directly before the court. The case involved a single plaintiff who brought a challenge under the Eighth Amendment's cruel-and-unusual-punishment clause to Delaware's use of lethal injection to execute convicted capital defendants. 240 F.R.D. at 146. He sought class certification on behalf of present and future capital defendants. The court concluded that:

> the putative class of 16 members is sufficient, especially considering that, as long as the death penalty is a viable sanction,

> the class possesses the potential to increase at random. To that end, although the identity of the members of the putative class may change, the defining characteristics and the parameters of the class will remain the same.

Id. at 147. The court certified the class over the state's argument that joinder of all class members or proceeding by individual actions was possible with such a small number of people, especially since all capital inmates had appointed counsel. The court reasoned that class treatment was important to promote "consistent adjudications" and was the "most prudent course to conserve scarce judicial resources." *Id*. at 148.

In another injunction-only case, the district court certified a class of immigrant detainees with between 10 and 17 members who alleged they were being illegally detained by the federal government. *Kazarov v. Achim*, No. 02 C 5097, 2003 WL 22956006, at *4 (N.D. Ill. Dec. 12, 2003). The court held that certification of such a small class was appropriate because of the fact that the action sought only "declaratory and injunctive relief," the likelihood of "future impacts" on "unascertainable individuals," the administrative difficulties of identifying all actual members, the fact that "the class may grow and change as more individuals are detained," and the fact that "potential class members are immigrants, incarcerated, likely indigent, and many do not speak English, thus hindering their ability to join this lawsuit." *Id.* This case presents the same compelling reasons discussed in *Kazarov* and *Jackson* to certify the class.

Five of the six *Modafinil* Court's factors support certification of the proposed class. 2016 WL 4757793, at *10. Class treatment will promote consistent application of the law and judicial economy. Otherwise, aggrieved students will need to bring separate actions. Class members have limited ability to litigate as joined plaintiffs and their financial resources are extremely limited. Claimants are individuals who do not speak English and in some cases are illiterate, are unfamiliar with American culture and the American legal system, and are indigent.

There is no ability to identify future claimants, as they have not yet arrived from overseas. And the claims are purely for declaratory and injunctive relief. The only one of the six factors that is not directly relevant to the need for certification in this case is geographic dispersion. On balance, the numerosity factor is satisfied comfortably, regardless whether the actual number is over or above 20, and with unknown future members it will undoubtedly grow to more than 20. As demonstrated by the four young people discussed above, class certification is necessary to protect them and the as-yet-unknown Class Members who will be subject to the Defendant's enrollment delays and relegation to Phoenix, both of which this Court has already determined to be illegal.

Defendant's other objections to class certification based on commonality and typicality, ECF No. 25-2 at 9-14, also are without merit. Defendant acknowledges that the commonality requirement is satisfied so long as "Plaintiffs share at least one question of fact or law with the grievances of prospective class members." ECF No. 25-2 at 9. Defendant mischaracterizes Plaintiffs' claims, both legally and factually, *id.* at 9-13, but those disputes have now been subject to the crucible of trial and resolved by this Court's August 26 memorandum and order. This Court's preliminary injunction decision makes clear that enrollment delays and denials, including denials of enrollment to students who are unlikely to graduate, violate state law, ECF No. 35 at 8-9, and that placement of recently arrived immigrant ELLs at Phoenix violates the EEOA, *id.* at 10-12. All Class Members, regardless whether the District denies them enrollment altogether or funnels them to Phoenix, will be denied the educational experience at McCaskey, making this an important and material fact common to all Named Plaintiffs and Class Members. A legal point common to all Class Members is the Court's determination that the District's placement of class members at Phoenix constitutes a failure to take appropriate

action to overcome language barriers that violates the EEOA. The commonality requirement is thus easily satisfied.

The District is also incorrect in asserting that the Plaintiffs' claims are not typical of those of the Class. ECF No. 25-2 at 13. The District claims that Plaintiffs have not demonstrated that it discriminates based on national origin, but Plaintiffs' Title VI and Equal Protection claims have not yet been litigated or decided. It is clear however, that the Plaintiffs' claims arising out of the District's refusal to enroll newly arrived immigrant ELLs in McCaskey are typical of Class Members' claims.

Rule 23(b)(2) was designed precisely for institutional reform cases, like this one. The Third Circuit has explained why the Rule 23(a) and (b)(2) factors are more easily met in such injunction-only cases challenging government practices and policies. In *Baby Neal*, the Third Circuit held that the district court abused its discretion by denying class certification in a case involving a far more complicated set of legal violations arising out of dysfunction in Philadelphia's foster care system with myriad different transgressions. *Baby Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994). In reversing the district court's refusal to certify the class of foster children, the Court wrote that:

> Indeed, the violations alleged here are precisely the kinds targeted by Rule 23(b)(2). The writers of Rule 23 intended that subsection (b)(2) foster institutional reform by facilitating suits that challenge widespread rights violations of people who are individually unable to vindicate their own rights.

Baby Neal, 43 F.3d at 64 (*citing* Rules Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. 102 (1966); 1 Newberg & Conte, § 4.11 at 4-39). Here, as in *Baby Neal*, the "fact that the plaintiffs in this case seek only injunctive and declaratory relief, not individual damages, further enhances the appropriateness of class treatment. Clearly, this action aims to define the relationship of the defendants to the universe of children

with whose care the defendants are charged." *Id*. And, as in *Baby Neal*, "all of the class members will benefit from relief which forces the defendant to provide, in the manner required by law, the services to which class members either are currently or at some future point will become entitled." *Id.*

This Court has already made a "judicial determination that a particular practice infringes upon protected rights and is therefore invalid[.]" *Weiss*, 745 F.2d at 808. Certifying a class and extending the Court's prior ruling to apply to Class Members will prevent additional enrollment delays and refusals to admit students to McCaskey's International School. The class definition can be modified at any point until entry of a final judgment if the District comes forward with evidence of unexpected consequences or unintended harm arising from class certification.[9] Absent class treatment, however, students like E.S., K.D.W., H.E. and S.A.D. – young people "[n]ow in America, all earnestly seek[ing] to learn English, advance their education, and contribute to society," ECF No. 35 at 2 – will suffer irreparable harm by being deprived of their right to an education under federal and state law. This harm is not speculative. The potential for harm, and balance of harms, is just as real as it was for Khadidja, Qasin, Van Ni, Sui Hnem, Alembe, and Anyemu.

VII. CONCLUSION

On August 26, this Court wrote that "the law is clear: eligible students must be timely enrolled, and effort to overcome language barriers must be sound and effective." ECF

[9] The *Baby Neal* court emphasized the authority, discretion, and flexibility that inheres in the district court to modify the injunction if unanticipated problems arise, and even to decertify the class if need be: "To the extent that some of the claims raised by the plaintiffs truly do require the court to engage in individualized determinations, the court retains the discretion to decertify or modify the class so that the class action encompasses only the issues that are truly common to the class." 43 F.3d at 63 (citing Fed. R. Civ. P. 23(c)(4)). *See also R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 179-80 (D.D.C. 2015) (discussing "provisional class certification" for immigrant detainees in the context of a preliminary injunction).

No. 35 at 14. However, the District has taken an unduly narrow reading of this Court's ruling, and has declared its intent to admit to McCaskey only those who were physically present at Phoenix on the date of the Court's order. Plaintiffs now respectfully request that the Court clarify, and if necessary extend, the injunction order to (1) expressly enjoin the District from continuing its illegal enrollment delays and placement of new immigrant ELLs at Phoenix; (2) provisionally certify the class proposed in Plaintiffs' motion for class certification, ECF No. 2; (3) expressly extend the modified injunction order to Class Members; (4) authorize Plaintiffs to serve additional discovery requests aimed at identifying Class Members and determining their enrollment status; and (5) order Defendant to respond to Plaintiffs' discovery requests.

Dated: September 16, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 16, 2016, I filed the foregoing Memorandum of Law in Support of Emergency Motion for Provisional Class Certification and Entry of Preliminary Injunction Protecting Similarly-Situated Students electronically via ECF and served same via ECF on:

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