UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

LESLY METHELUS, on behalf of Y.M., a minor; ROSALBA ORTIZ, on behalf of G.O., a minor; ZOILA LORENZO, on behalf of M.D., a minor; MARIE ANGE JOSEPH, on behalf of K.V., a minor; EMILE ANTOINE, on behalf of N.A., a minor; LUCENIE HILAIRE DUROSIER, on behalf of T.J.H., a minor; MARTA ALONSO, as next friend on behalf of I.A.; WAYBERT NICOLAS, on behalf of themselves and all others similarly situated,	)	Civil Case No. 2:16-cv-00379-SPC-MRM
Plaintiffs,	)	
v.	)	
THE SCHOOL BOARD OF COLLIER COUNTY, FLORIDA, and KAMELA PATTON, Superintendent of Collier County Public Schools, in her official capacity,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW

With eight weeks until the start of the school year in Collier County, Plaintiffs seek preliminary relief allowing English Language Learner (ELL) children to attend public high school. Plaintiffs Marta Alonzo, Emile Antoine, and Lucenie Hilaire move this Court for a preliminary injunction on behalf of three ELL children (I.A., N.A., and T.J.H., "Plaintiff Children") who were excluded from public school and unlawfully denied equal access to educational opportunities as a result of the policy and practice of Defendants, the School Board of Collier County and Superintendent Kamela Patton (Defendants). Plaintiffs move for

a preliminary injunction under the Equal Educational Opportunities Act (EEOA), 20 U.S.C. § 1703(f), and the Florida Educational Equity Act (FEEA), Fla. Stat. § 1000.05(2), and seek an order directing Defendants to: 1) enroll Plaintiff Children and permit them to attend regular public school beginning August 16, 2017; 2) assess Plaintiff Children's language proficiency and allow them to access the benefits of the Defendants' ELL Plan; 3) provide services to compensate for the educational opportunities that Plaintiff Children were denied; and 4) cease excluding recently-arrived, foreign-born ELLs aged fifteen and older from public school.

FACTUAL BACKGROUND

I. Plaintiff Children Were Denied Enrollment in School.

Plaintiff Children are recently-arrived, foreign-born ELL students who were denied enrollment in Collier County Public Schools ("CCPS"). I.A., who is from Guatemala, arrived in Naples in January 2017, soon after her seventeenth birthday. Ex. 1 (I.A. Decl.) ¶¶ 4, 7. She aspires to be a nurse. *Id.* ¶¶ 6, 7, 32. I.A. finished the year of school called "*tercero básico*" in Guatemala, which she understands to be equivalent to ninth grade in the United States. *Id.* ¶ 7. N.A., who is from Haiti, arrived in Collier County in February 2016 at age seventeen. Ex. 2 (N.A. Decl.) ¶¶ 4, 10. N.A. wants to study computer science and aspires to work with computers or electronics. *Id*. ¶ 6. He was enrolled in what is called the "*9em*" grade in Haiti. *Id.* ¶ 9. When he left Haiti, he was on track to finish that grade in a couple of months and to graduate from high school in three years. *Id.* T.J.H. is also from Haiti. Ex. 3 (T.J.H. Decl.) ¶ 4. He hopes to learn many languages and to work for the U.S. Department of State as a diplomat. *Id.* ¶¶ 7, 46. T.J.H. was in the "*rheto*" year of school in Haiti, which was his second

to last year of secondary school. *Id.* ¶ 5. After arriving in the United States at age seventeen, T.J.H. moved to Georgia, where he was placed in the tenth grade. *Id.* ¶ 9. He attended school there from January to April 2016, and moved to Immokalee in May 2016. *Id.* ¶ 9.

Plaintiff Children attempted to enroll in Defendants' public schools in either the 2015-16 (N.A. and T.J.H.) or 2016-17 (I.A.) school year. Ex. 2 ¶ 10; Ex. 3 ¶ 10; Ex. 1 ¶ 10. Each Plaintiff Child went at age seventeen with a parent or family member to attempt to enroll in school, and each was denied enrollment. Ex. 1 ¶¶ 10-17; Ex. 2 ¶¶ 10-15, Ex. 3 ¶¶ 10-14. School officials gave various reasons for the denial, including: age, lack of English proficiency, insufficient academic credits, and/or lack of high school qualifications. Ex. 1 ¶ 17; Ex. 2 ¶¶ 11, 13-14; Ex. 3 ¶ 14. None of Plaintiff Children was provided a "Home Language Survey"—the tool used to determine whether newly-enrolling students should be classified as ELLs. Ex. 1 ¶ 18; Ex. 2 ¶ 16; Ex. 3 ¶ 15; Ex. 4 (Dr. R. Burns Decl.) ¶ 9. None was assessed for English language proficiency or academic achievement before being denied enrollment. Ex. 1 ¶ 18; Ex. 2 ¶ 16, Ex. 3 ¶ 15. No Plaintiff Child filed any document declaring intent to terminate school enrollment. Ex. 1 ¶ 19; Ex. 2 ¶ 18; Ex. 3 ¶ 15. Defendants did not document the denial of enrollment of Plaintiff Children or of any other recently-arrived, foreign-born ELL students ages fifteen and older. *See* Ex. 5 (Defs.' Am. Resp. to Pls.' First Req. for Prod.), No. 9 (conceding that Defendants do not track enrollment denials).

II. Plaintiffs Enrolled in Adult English for Speakers of Other Languages (ESOL) Programs After Defendants Denied Them Public School Enrollment.

Plaintiff Children I.A. and N.A. were denied enrollment outright and not directed to any educational program. Ex. 1 ¶ 21; Ex. 2 ¶ 20. Family or friends told them about the Adult

English for Speakers of Other Languages ("Adult ESOL") program at Lorenzo Walker Technical College ("Lorenzo Walker"). Ex. 1 ¶ 21; Ex. 2 ¶ 20. School officials directed T.J.H. to Adult ESOL at Immokalee Technical Center ("iTech"). Ex. 3 ¶¶ 14, 16. Lorenzo Walker and iTech are operated by Defendants, but are not part of the regular primary and secondary public school system. *See* CCPS, Adult and Community Education, http://www.collieradulted.com/. During the 2015-2016 school year, the 2016 summer session, and the first semester of the 2016-2017 school year, Defendants charged (and Plaintiffs paid) a $30.00 fee for each semester of attendance in Adult ESOL. Ex. 2 ¶¶ 20, 36; Ex. 3 ¶¶ 19, 34. Defendants do not charge a fee for attendance at regular primary and secondary schools. Fla. Const. Art. IX, § 1.

Plaintiff Children and other students enrolled in Adult ESOL cannot earn credits toward a high school diploma. Ex. 1 ¶ 39; Ex. 2 ¶ 32; Ex. 3 ¶ 31; Ex. 5 (Defs.' Am. Resp. to Pls.' First Req. for Prod.), No. 35 (confirming that Adult ESOL classes do not provide credits toward a high school diploma because "[t]his is not the purpose of Adult ESOL."). Defendants' Adult ESOL programs do not offer curricular content meeting the "Florida Standards," which specify the core content knowledge and skills that K-12 public school students are expected to acquire and require instruction in science, math, social studies, and visual and performing arts, among other subjects. *See* Fla. Stat. § 1003.41(1)-(2); Fla. Admin. Code R. 6A-1.09401; *contra* Ex. 1 ¶¶ 27-30, 32; Ex. 2 ¶¶ 20, 23, 25, 26, 30; Ex. 3 ¶¶ 23-24, 26, 30, 31, 37. Plaintiff Children are not assigned homework in Adult ESOL. Ex. 1 ¶ 31; Ex. 2 ¶ 31. They spend hours each day on the computer. Ex. 1 ¶ 27; Ex. 2 ¶¶ 23, 26, 27; Ex. 3 ¶¶ 23, 28. While N.A. and T.J.H. are now able to take practice tests for the General Educational

Development (GED) exam, they do not receive live instruction in subjects on that exam. Ex. 2 ¶ 27; Ex. 3 ¶ 28. Moreover, the GED is not equivalent to a high school diploma. Ex. 4 (Burns Decl.) ¶ 26.

Defendants' Adult ESOL programs isolate Plaintiff Children from same-age peers who are not recently-arrived ELL immigrant children. Ex. 1 ¶ 25; Ex. 2 ¶¶ 24, 28, Ex. 3 ¶ 21; Ex. 4 ¶ 52; Ex. 6 (CCPS Adult Education Contract and Goals) (noting that "encroachment on any high or middle school facilities is grounds for dismissal"). Plaintiff Children have no access to extracurricular activities that are generally available in public schools. Ex. 1 ¶¶ 35, 36; Ex. 2 ¶ 35; Ex. 3 ¶ 39. Instead, Plaintiff Children attend school with adult students, some of whom are older than their parents or grandparents. Ex. 1 ¶ 24, Ex. 2 ¶ 25, Ex. 3 ¶ 19. Plaintiff Children do not have an opportunity to interact with native speakers of English in Adult ESOL, other than the instructors. *See* Ex. 1 ¶¶ 29, 42; Ex. 2 ¶¶ 24, 28; Ex. 3 ¶¶ 21, 25.

III. Defendants' Policy and Practice Excludes Hundreds of Recently-Arrived, Foreign-Born ELL Children from Public School.

Defendants excluded Plaintiff Children from regular public schools pursuant to a policy and practice of denying enrollment to foreign-born ELL children recently arrived in the United States. Defendants justify the decision to exclude Plaintiff Children based in part on a School Board policy titled "Maximum Age for Participation in the Regular High School Program." Defs.' Mot. to Dismiss (ECF No. 37) at 8. That policy provides, in relevant part:

> In order to provide reasonable consistency of maturity levels among students in the regular high school program, no person shall be permitted to attend the regular high school program after attaining the age of nineteen (19). Those who attain the age of nineteen (19) during a school year may complete that school year. Persons who are seventeen (17) years old or older and who, by earning eight (8) credits per academic year, cannot meet graduation requirements, including grade point average (GPA), prior to the end of the

> school year during which they attain the age of nineteen (19), shall not be permitted to attend the regular high school program beyond the end of the academic year in which they attain the age of seventeen (17). Such persons shall be afforded an opportunity to pursue a high school diploma through the Adult High School or General Educational Development (GED) programs of the District.

Collier County School Board Policy 5112.01. (ECF No. 76) at 81-82. Defendants amended the policy in February 2013 to lower the maximum age for high school participation from twenty-one to nineteen, and to reduce from nineteen to seventeen the age at which students lose eligibility to participate in the "regular high school program" if they are deemed not to be on track for graduation. *Id.* The amended policy took effect at the start of the 2013-2014 school year. *Id.* Despite the policy's reference to an "Adult High School," no such program exists in CCPS. *See* Ex. 5 (Defs.' Am. Resp. to Pls.' First Req. for Prod.), No. 27.

For at least the past five years, Defendants have routinely denied enrollment to recently-arrived, foreign-born ELLs. Michael Scanlan, who previously worked for Catholic Charities in Collier County, commonly encountered sixteen and seventeen year old foreign-born ELL children who were denied enrollment in CCPS high schools without any assessment of their English proficiency or academic level. Ex. 7 (M. Scanlan Decl.) ¶¶ 9-11, 28. Scanlan personally advocated for a seventeen year-old Cuban child who was denied enrollment at Palmetto Ridge High School, including meeting with Superintendent Kamela Patton and other district officials on February 5, 2013. *Id.* ¶¶ 12-17; Attachment A at 3465. The administrators told the Catholic Charities staff that A.P. could not enroll in school for three reasons: (1) he had a gap in his education, (2) he had low English language skills, and (3) he was seventeen years old. *Id.* ¶ 18. Superintendent Patton said that the district's policy

would not permit students under such circumstances to enroll in school. *Id.*[1] Seven days after this meeting, the School Board amended Policy 5112.01 to lower the maximum high school attendance age. ECF No. 76 at 81-82 (showing policy was revised on February 12, 2013).

Defendants' own data confirms the exclusion of large numbers of foreign-born ELLs from public schools, particularly after the amendment of Policy 5112.01. The number of foreign-born children ages fifteen to seventeen who were enrolled in Adult ESOL, GED Preparation or Adult Basic Education more than tripled from 100 children in 2012 (before Policy 5112.01 was amended) to 334 in 2013 (after the policy was amended). Ex. 8 (Decl. of L. Whitlow), Attachment A. These numbers continued to climb in 2014-2015 (517 children) and 2015-2016 (597 children). *Id.* Other data produced by the Defendants is consistent with this trend. The number of children ages fifteen to seventeen who enrolled in Adult ESOL after attending a non-U.S. school increased dramatically from 125 in the 2013–2014 school year to 346 in the 2015–2016 school year. *Id*. Attachment B. These numbers make clear that the experiences of Plaintiff Children are not anomalies: the District routinely denies immigrant children enrollment in public school, leaving them with no option but to attend adult education classes.

[1] Emails produced by Defendants confirm an extensive correspondence between School Board officials and Catholic Charities about the student, as well as the District's refusal to enroll him. Ex. 8, Attachment A.

LEGAL BACKGROUND

I. The Florida Constitution Mandates a Free Public School Education for All Children.

In its Opinion and Order denying Defendants' motion to dismiss, this Court described Florida's legal framework relating to public school education. *Methelus v. Sch. Bd. of Collier Cty., Florida*, No. 216CV379FTM38MRM, 2017 WL 1037867, at *3 (M.D. Fla. Mar. 17, 2017). As the Court explained, "[t]he Florida Constitution guarantees a free public school education to all children residing within its borders." *Id.* (citing Fla. Const. art. IX, § 1(a)). The constitution states that "[t]he education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children in the State." Fla. Const. art. IX, § 1(a); *see also Scavella v. Sch. Bd. of Dade Cty.*, 363 So. 2d 1095, 1098 (Fla. 1978) ("The clear implication is that all Florida residents have the right to attend this public school system for free.").

School attendance is compulsory for children between the ages of six and fifteen. Fla. Stat. § 1003.21(1)(a)(1). A student may drop out at age sixteen, but only if he "files a formal declaration of intent to terminate school enrollment with the district school board." *Id.* § 1003.21(1)(a)(2)(c). Therefore, all students who have reached age sixteen and have not yet graduated are required by Florida law to remain in school unless and until they file a formal declaration of intent to terminate enrollment. *See id.*

II. The Right to Attend Florida Public Schools Does Not End at Sixteen and Is Guaranteed to ELLs.

The Court previously found that "Florida guarantees free public education beyond age sixteen." *Methelus*, 2017 WL 1037867, at *5. Florida law does not specify a maximum

public school attendance age. All Plaintiff Children were under eighteen when they were initially denied enrollment. Plaintiff I.A. is currently seventeen and has an unambiguous state constitutional right to attend public school. Plaintiffs N.A. and T.J.H. are currently eighteen, which is the age of majority in Florida. *See* Fla. Stat. § 743.07(1). Under the circumstances of this case, N.A. and T.J.H. are nonetheless entitled to injunctive relief to be enrolled in school.

N.A. and T.J.H. each lost more than an entire school year due to Defendants' unlawful denial of enrollment. Data that Defendants produced in the course of discovery indicate that students aged eighteen and older are commonly enrolled in public school. *See* Ex. 8, Attachments C, D. Defendants' own ELL plan even contemplates the enrollment of immigrant students up to age 21. *See* Ex. 10 (CCPS ELL Plan 2016-19) at CCPS-3789 (identifying "immigrant students" as those between the ages of 3 and 21, born outside of the U.S., who have spent three years or less in U.S. schools). That N.A. and T.J.H. reached the age of majority during the period in which they were unlawfully excluded from public school does not deprive them of the right to enroll now—when nothing in state law or district policy automatically cuts off that right at age eighteen.

In addition, the history of the Florida Constitution indicates that the entitlement to education applies to all children up to and including age 21. The 1868 Florida Constitution, which established the state's "paramount duty" to provide education for "all children," also created a "Common School Fund" to finance that education, and required the Common School Fund to be distributed among the counties "in proportion to the number of children residing therein between the ages of four and twenty-one years." Fla. Const. art. VIII, §§ 1, 4, 7 (1868). The 1868 Florida Constitution therefore contemplated that the "children" entitled to

a public education included children through age 21. Although the language regarding distribution of the Common School Fund has since been removed from the Florida Constitution, that constitution retains language establishing the state's "paramount duty" to provide for the education of "all children" in the state. Fla. Const. art. XI §1. The Florida Supreme Court has noted that the "paramount duty" language—which was removed from the Constitution in 1885 before being reinstated in 1998—"represents a return to the 1868 Constitution." *See Bush v. Holmes*, 919 So. 2d 392, 404 (Fla. 2006) (quoting William A. Buzzett and Deborah K. Kearney, *Commentary*, art. IX, § 1). Florida's current constitution therefore incorporates the definition of "children" contemplated by the drafters of the 1868 constitution, who understood "children" to include all persons up to and including age 21.[2]

Florida law also guarantees free public education to all students regardless of their national origin and expressly prohibits discrimination by school districts against national origin minorities. Fla. Stat. § 1000.05. Each school board must implement procedures regarding limited English proficient students that include, *inter alia*: identifying ELL students through assessment; providing ELL students with ESOL instruction in English and ESOL instruction or home language instruction in reading, math, science, social studies, and computer literacy; providing qualified teachers; and providing equal access to other programs for ELL students. Fla. Stat. § 1003.56(3). These requirements are incorporated into the Defendants' ELL plan, which they are required to submit to the Florida Department of

[2] The Court need not determine a maximum age for public school attendance in Florida to provide injunctive relief to N.A. and T.J.H.

Education for review and approval. *Id* § 1003.56(3)(a); Ex. 9 at CCPS 3861-64, 3868-70; Ex. 10 at CCPS 3788-91, 3796-98.

ARGUMENT

Plaintiffs merit a preliminary injunction because: (1) there is a substantial likelihood of success on the merits of their claims; (2) Plaintiffs will suffer irreparable injury unless the injunction issues; (3) the threatened injury to Plaintiffs outweighs whatever damage the proposed injunction may cause Defendants; and (4) an injunction would not be adverse to the public interest. *Hispanic Interest Coal. of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1242 (11th Cir. 2012).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Defendants' Policy and Practice Violates the EEOA.

Plaintiffs are likely to succeed on the merits of their claim that Defendants' denial of regular public school enrollment to recently-arrived, foreign-born ELL students violates the EEOA.[3] Under the EEOA, "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. §1703(f). "[S]chools are not free to ignore the need of limited English speaking children for language

[3] Plaintiffs bring two separate EEOA claims, one under 20 U.S.C. § 1703(f) and another under § 1703(a). Plaintiffs seek a preliminary injunction only on the § 1703(f) claim.

assistance to enable them to participate in the instructional program of the district." *Castañeda v. Pickard*, 648 F.2d 989, 1008 (5th Cir. 1981).[4]

This Court has previously found that "[a]n individual alleging a § 1703(f) violation must satisfy four elements: (1) defendant is an educational agency; (2) plaintiff faces language barriers that impede his equal participation in defendant's instructional programs; (3) defendant failed to take appropriate action to overcome those barriers; and (4) plaintiff was denied equal educational opportunity on account of his national origin. *Methelus*, 2017 WL 1037867, at *7 (citing *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 132 (3d Cir. 2017)). A violation of § 1703(f) does not require an intent to discriminate. *Castañeda*, 648 F.2d at 1008. Nor does § 1703(f) require proof of discrimination of any kind, including disparate impact discrimination. *Issa*, 847 F.3d at 139. The first and second elements of the § 1703(f) test are clearly met here: it is undisputed that the School Board is an educational agency, and the record establishes that Plaintiffs are all ELL students who face language barriers impeding their equal participation in the District's instructional programs. *See* Defs.' Ans. (ECF No. 80) ¶ 141; Ex. 1 ¶ 4; Ex. 2 ¶ 4; Ex. 3 ¶ 4. [5]

[4] *Castañeda* is binding on courts in the Eleventh Circuit as Fifth Circuit precedent rendered before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[5] *Castañeda* does not discuss element (4), which was added by the Third Circuit in *Issa*. For this element to be met, "the denial of the equal educational opportunity—in § 1703(f)'s case, the language barrier that is not being overcome—must stem from race, color, sex, or national origin, rather than from, for example, a cognitive disability covered by a different remedial scheme, like the Individuals with Disabilities Education Act." 847 F.3d at 140. Here, like in *Issa*, "the record fully supports that the plaintiffs' language barriers, and hence their lost educational opportunities, stem from their national origins." *Id.*

As for the third element, the Fifth Circuit in *Castañeda* devised a three-pronged framework to determine whether school districts have taken "appropriate action" to overcome language barriers impeding ELL students' equal access to the instructional program. 648 F.2d at 1009–10. However, the Court need not analyze the three-pronged *Castañeda* framework because Defendants have not taken the minimum steps to comply with the EEOA. In *Castañeda,* the defendant school district enrolled the plaintiff children in regular public schools, and the plaintiffs challenged the adequacy of those schools' programs. The *Castañeda* analysis assumes that ELL students will be permitted to enroll, and addresses whether the school's ELL programs are sufficient under the EEOA.

Here, Defendants excluded Plaintiff Children from any regular public school education, causing them instead to attend a non-diploma-granting program for which they had to pay. As the Court noted in denying Defendants' motion to dismiss the EEOA claim, "this case attacks a frontline inquiry—whether Plaintiff Children were denied access to free public education available to other non-ELL children." *Methelus*, 2017 WL 1037867, at *8. Defendants turned Plaintiff Children away at the schoolhouse door and made no provision for them to ever re-enter public school. Defendants failed to take any action—much less appropriate action—to overcome the language barriers that prevent Plaintiff Children from participating equally in the District's instructional programs. *See, e.g., Gomez v. Ill State Bd. of Educ.*, 811 F.2d 1030, 1043 (7th Cir. 1987) ("Although the meaning of 'appropriate action' may not be immediately apparent without reference to the facts of the individual case, it must mean something more than 'no action.'").

Defendants also fail the three-part *Castañeda* analysis. Under *Castañeda*, a court first "must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based." 648 F.2d at 1009. The Court ascertains whether "a school system is [pursuing] a program informed by an educational theory recognized as sound by some experts in the field, or, at least, deemed a legitimate experimental strategy." *Id.* Next, the court determines "whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school." *Id.* at 1010. Third, if a district's program, despite being based on a sound educational theory and implemented effectively, "fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome," it may "no longer constitute appropriate action." *Id.* The prongs are assessed sequentially, and if a school district fails any one of these prongs, it violates § 1703(f). *See Issa*, 847 F.3d at 134 n.7. Defendants here fail under all three prongs.

1. Denial of Enrollment, or Referral of Plaintiffs to Adult ESOL Is Unsupported by Any Sound Educational Theory.

No sound educational theory could support the denial of enrollment of Plaintiff Children in school. The District did not refer I.A. and N.A. to any alternative program, and it referred T.J.H. only to Adult ESOL. Providing no education is per se not a sound educational theory. And the violation is not cured by referral of ELL children to Adult ESOL: such programs do not constitute "appropriate action" under the EEOA. Plaintiffs' expert, Dr. Rebecca Burns, confirms that no sound educational theory could support the use of adult education programs to educate Plaintiff Children. Ex. 4 ¶¶ 6, 69. Nor could such a practice be

considered a reasonable experimental strategy under any recognized theory of education or second language acquisition. *Id.* ¶ 6.

First, Adult ESOL is an unsound method for educating Plaintiff Children and similarly situated ELLs because it does not teach core subjects or allow students to obtain a high school diploma. To comply with the EEOA, a school district must not only remedy language barriers, but also provide ELLs meaningful access to the same academic curriculum as their English-speaking peers. *Castañeda*, 648 F.2d at 1011 (school districts must design programs "reasonably calculated to enable [ELLs] *to attain parity of participation* in the standard instructional program within a reasonable length of time after they enter the school system.") (emphasis added). Defendants' own ELL plan, which is designed to implement the EEOA, confirms that ELL students should receive equal access to the regular public school curriculum and should be assessed based on their understanding of academic content. Ex. 9 at CCPS 3869 ("ELL students receive *equal access to the regular curriculum*" and "ELLs have *equal access to grade level curriculum* that is comparable in scope and sequence to that provided to mainstream students.") (emphasis added); Ex. 10 at CCPS 3797 (same).

Referring Plaintiff Children and similarly-situated ELLs to Adult ESOL contravenes these mandates. Adult ESOL programs are not "public school" (*i.e.* part of Florida's uniform "K-12" school system). Rather, Adult ESOL is a noncredit English language program "designed to improve the employability of the state's workforce." Fla. Stat. § 1004.02(2). As explained *supra* (pp. 4-5), students in Adult ESOL, including Plaintiff Children, are not taught curricular content tailored to the Florida Standards, and they cannot earn a regular

high school diploma. The most that they can aspire to is a GED certificate.[6] Adult ESOL students are not assessed by the District in academic content, as no such instruction is offered. The District's practice of referring ELLs to Adult ESOL contravenes the EEOA and is unsupported by any sound educational theory or reasonable experimental strategy.

In addition to its failure to teach core academic classes, Adult ESOL is not based on any sound educational theory of language acquisition for ELL children. Ex. 4 (Burns Decl.) ¶¶ 27-58. Adult ESOL departs dramatically from the program set forth in Defendants' ELL Plan. First, the English language instruction in Adult ESOL is inferior to English language development programs available in District public schools. Adult ESOL is designed to "improve the employability of the state's workforce," not to help students develop the comprehensive, academic English taught in the regular public schools. Fla. Stat. § 1004.02(2); Ex. 4 (Burns Decl.) ¶¶ 32, 37, 40, 41, 45-48. Consistent with that limited purpose, Adult ESOL students are not assessed for academic English language proficiency, as Defendants' ELL plan requires for students in public school. Ex. 4 (Burns Decl.) ¶¶ 10, 37, 45-46; Ex. 9 at CCPS 3871-72; Ex. 10 at CCPS 3800-01, 3809-10. As explained *supra*

[6] Defendants claim that the GED is the equivalent of a high school diploma. *See* Defs.' Mot. to Dismiss (ECF No. 37) at 7 n.5. Although a Florida statute provides that all equivalency diplomas "shall have equal status with other high school diplomas for all state purposes, including admission to any state university or Florida College System institution," Fla. Stat. § 1003.435(6), that does not end the inquiry. Studies indicate lower postsecondary attainment and earnings for those with GEDs as opposed to diplomas. Ex. 4 (Burns Decl.) ¶ 26. Colleges may require GED recipients to submit evidence of extensive high school coursework for admission. *See, e.g.* University of South Florida, Office of Admissions, GED Requirements, *available at* http://www.usf.edu/admissions/freshman/special-requirements/ged.aspx; Course Requirements, *available at* http://www.usf.edu/admissions/freshman/app-requirements/course-requirements.aspx (listing admissions requirements, including 18 high school credits in academic subject areas). The GED is not a high school diploma.

(pp. 4-5), Plaintiff Children spend hours each day on the computer. They are wholly segregated from their English-speaking peers and lack the opportunity to interact with native English speakers apart from their instructors. Unlike ESOL teachers in the public schools, Adult ESOL instructors are not required to be certified in an academic subject or to have, or be working toward, an ESOL endorsement,[7] and the District may set any qualifications it wants for these instructors. Fla. Stat. § 1012.39(1)(b); Ex. 4 (Burns Decl.) ¶¶ 34, 54; Ex. 10 at CCPS 3784, 3796-97. Referring children to Adult ESOL is a fundamentally unsound educational practice. If Defendants genuinely believed that exclusion from public school and referral to Adult ESOL were based on a sound educational theory, they would have laid out such procedures in their ELL Plan. They do not. Ex. 4 (Burns Decl.) ¶¶ 13-17; Exs. 9, 10. Defendants' stark departure from their own ELL Plan highlights their noncompliance with the EEOA.

2. Adult ESOL is Not Reasonably Calculated to Overcome Language Barriers to ELLs' Equal Participation.

Defendants also fail *Castañeda*'s second prong. This prong requires a school district to take measures "reasonably calculated to implement effectively" the educational theory that it adopts to overcome language barriers to equal participation in the standard instructional program. *Castañeda*, 648 F.2d at 1010. The school district must "follow through with the practices, resources and personnel necessary to transform the theory into reality." *Id.*

It is unclear what educational theory Defendants pursue by excluding Plaintiff Children from public school. No matter what the theory, Defendants' practices could not be

[7] A teacher who is already certified in another subject can receive an additional specialization in ESOL, called an ESOL endorsement. Fla. Admin. Code R. 6A-4.0244.

"reasonably calculated" to overcome Plaintiff Children's language barriers to equal participation because Plaintiff Children have no way of entering Defendants' regular instructional program. Plaintiff Children's experiences in Adult ESOL highlight the inadequacy of the practices used to implement Defendants' hypothetical educational theory, including: the disproportionate amount of computer time; the basic nature of the English language curriculum; the limited, non-academic vocabulary students learn; the lack of academic content; the lack of any assigned homework; the lack a requirement that teachers have, or be working toward, an ESOL endorsement; and the permanent isolation from native English-speaking peers. *See supra* at pp. 4-5, 16-17; Ex. 4 ¶¶ 43-58.

3. Adult ESOL Fails to Produce Results Indicating Plaintiffs' Language Barriers to Equal Participation Are Being Overcome.

Defendants also violate *Castañeda*'s third prong because the Defendants' practices fail to produce results showing that language barriers impeding ELLs' equal participation in the regular instructional program are being overcome. ELL students "cannot be permitted to incur irreparable academic deficits" in content areas during the period they are learning English. *Castañeda*, 648 F.2d at 1014. "Only by measuring the actual progress of students in these areas during the language remediation program can it be determined that such irremediable deficiencies are not being incurred." *Id.* To that end, *Castañeda* requires that ELL students be tested on their progress in learning curricular content other than English language skills. *Id*.; *see also United States v. Texas*, 601 F.3d 354, 361 (5th Cir. 2010) (analyzing *Castañeda*'s "results prong" with reference to an assessment tool monitoring ELL student performance in five content areas). Defendants' ELL Plan requires such content-based assessment, including measuring ELL students' mastery of "grade level academic

content standards." Ex. 9 at CCPS 3870; Ex. 10 at 3798, 3799 (providing that all public school students, including ELLs, take statewise content area assessments). However, the Adult ESOL program contains no such assessment of student progress in academic content, in violation of *Castaneda*'s third prong. Ex. 3 (T.J.H. Decl.) ¶ 26; Ex. 4 (Burns Decl.) ¶¶ 45-46.

If Defendants' only legal mandate were to monitor ELL students' English language acquisition, they would still fail *Castañeda*'s third prong. The District's assessment of language development in Adult ESOL is far less rigorous than its assessment of language development in public schools, as set forth in its ELL Plan. Defendants evaluate Adult ESOL students' language acquisition through the CASAS test, which measures progress in attaining very basic English, and measures only reading and listening, not speaking or writing. Ex. 3 (T.J.H. Decl.) ¶ 26; Ex. 4 (Burns Decl.) ¶¶ 45-46. In contrast, ELL students in Defendants' public schools are assessed using the WIDA ACCESS for ELLs 2.0 test, which measures speaking and writing, in addition to reading and listening, and tests students' knowledge of language used in an academic setting. Ex. 4 ¶¶ 10, 37; Ex. 10 at CCPS 3800-01. The contrast between these two methods of evaluation reflects the District's lower expectations for students in Adult ESOL than for those in regular public high schools. Because Defendants fail to adequately assess whether the language barriers to equal participation are actually being overcome, Defendants fail *Castañeda*'s third prong.

Failure to meet any one of the three *Castañeda* prongs would violate the EEOA, and Defendants fail all three prongs. Plaintiffs are likely to succeed on the merits of their claim that Defendants' refusal to enroll their children in public school violates the EEOA.

B. Defendants' Policy of Denying Enrollment Violates the FEEA.

Plaintiffs are likely to succeed on their claim that Defendants' denial of public school enrollment to recently-arrived, foreign born ELL students violates the Florida Educational Equity Act (FEEA). The FEEA prohibits discrimination based on national origin against a student in the state system of public education. Fla. Stat. § 1000.05(2)(a) ("No person in this state shall, on the basis of . . . national origin . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any public K-20 educational program or activity, ..."). "Discrimination," prohibited by the FEEA, is defined by state regulations as, *inter alia*: "[t]he application of any policy or procedure, or taking of an admission action, that adversely affects a student, or applicant for admission, belonging to a national origin minority group, unnecessarily based on limited-English-language skills." Fla. Admin. Code r. 6A-19.001(4)(a)(9). The text of the Act confirms that schools may not impose criteria for admission that have a disparate impact based on national origin. *See* Fla. Stat. § 1000.05(2)(b) ("The criteria for admission to a program or course shall not have the effect of restricting access by persons of a particular . . . national origin."). The FEEA provides a private right of action for equitable relief. Fla. Stat. § 1000.05(7).[8]

Defendants violate the FEEA by denying Plaintiff Children and those similarly-situated enrollment in public school based on these children's status as foreign-born ELLs. Defendants cannot separate Plaintiff Children's limited English proficiency from their

[8] Courts in this district have granted preliminary injunctions under the FEEA to remedy inequalities in public education. *See Landow v. Sch. Bd. of Brevard Cty.*, 132 F. Supp. 2d 958, 967 (M.D. Fla. 2000) (preliminary injunction granted under FEEA to remedy disparities between girls' and boys' sports programs); *Daniels v. Sch. Bd. of Brevard Cty.*, 985 F. Supp. 1458, 1462 (M.D. Fla. 1997) (same).

decision to deny public school enrollment. Indeed, Defendants take the position that Plaintiff Childrens' lack of English fluency *supports* their decision to exclude them from public school. *See, e.g.*, Defs.' Counterclaim (ECF No. 80) ¶ 89 ("Because . . . Plaintiffs have been out of school for many years and or are *years behind linguistically* and educationally, placing them in a regular high school . . . would only cause them to fall further behind, set them up for failure, and is not either in their best interests or those of traditional students.") (emphasis added); Defs.' Mot. to Dismiss (ECF No. 37) at 12 (same); Ex. 11 (Letter of J. Fishbane to L. Carmona) "G.O. and M.D., *who did not know English*, would have to successfully complete . . . four years of English; which is *especially problematic since they lacked three years of middle school English*. . . . Your insistence that the District should have nevertheless enrolled them in high school would have set them up for academic failure.") (emphasis added).

As further evidence that the District denies enrollment to children based on English language ability, N.A. was told by school staff that he could not enroll in school because he did not understand English well enough. Ex. 2 ¶ 11. Similarly, Defendants told Catholic Charities that a Cuban child could not enroll in public school due to, *inter alia*, his lack of English skills and gaps in his education. Ex. 7 (Scanlan Decl.) ¶ 18. Denial of public school enrollment due to a lack of English proficiency violates the FEEA.

Defendants also violate the FEEA to the extent that Policy 5112.01—as well as the broader practice barring the enrollment of recently-arrived foreign born adolescent ELLs—disparately impact national origin minorities. *See* Fla. Stat. § 1000.05(2)(b). I.A. and T.J.H. were told by school staff that they were too old to enroll in school in light of the grade in which they would be placed. Ex. 1 ¶ 17; Ex. 3 ¶ 14. N.A. was likewise told by school staff

that his age—together with his status as an ELL—made him ineligible for public school. Ex. 2 ¶ 11. At that time, all three students were seventeen. Ex. 1 at ¶¶ 7, 10; Ex. 2 at ¶¶ 9–11; Ex. 3 at ¶ 10. Recently-arrived immigrant and refugee students—*i.e.*., national origin minorities—often have educational interruptions due to conditions in their home countries or the process of immigrating to the United States. Ex. 7 (Scanlan Decl.) ¶ 19. Application of a maximum age policy to deny these students enrollment has a disparate impact on the basis of national origin and violates the FEEA. Because Plaintiff Children were denied enrollment in high school based on their status as national origin minorities, they are likely to prevail on their FEEA claim.

II. PLAINTIFFS FACE IRREPARABLE INJURY ABSENT AN INJUNCTION

With a new school year scheduled to begin on August 16, 2017,[9] Defendants' refusal to enroll Plaintiffs in public school results in irreparable harm. "An injury is irreparable if it cannot be undone through monetary remedies" or when monetary damages "would be inadequate or difficult to calculate." *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) (citations and quotation marks omitted). Denial of public school enrollment constitutes irreparable harm. *See Hispanic Interest Coal.*, 691 F.3d at 1249 ("interference with the educational rights of undocumented children is not a harm that can be compensated by monetary damages."); *Ray v. Sch. Dist. of DeSoto Cty.*, 666 F. Supp. 1524, 1528, 1535 (M.D. Fla. 1987) (where school district barred HIV-positive children from regular classroom, children suffered irreparable harm "to their mental well-being and educational potential.").

[9] *See* Collier County Public Schools, 2017-18 Academic School Calendar, *available at* http://www.collierschools.com/Page/8387

The Third Circuit recently upheld a district court's finding of irreparable harm where recently-arrived foreign-born ELL students were sent to an alternative, accelerated "credit-recovery" school and excluded from a public high school designed to meet the needs of ELLs. *Issa*, 847 F.3d at 142-43. The *Issa* court stressed that the ELL students were attending an unsound academic program that failed to overcome their language barriers, and noted the narrowing window for public school attendance as ELLs got older. *Id.* Here, Plaintiff Children's loss of opportunity to attend public school with their peers, earn credits toward a high school diploma, and benefit from the ELL Plan available in public school, is irreparable.

Plaintiffs are devastated by their exclusion from public school. Ex. 1 ¶ 40-42; Ex. 2 ¶ 37-38, 40 ("With each day that passes, the difference between high school students and me gets larger . . . At this point, I have missed over a year of school. This has delayed my life, my career and my future. I am working so hard, and I just need access to a real school to give me the chance to achieve my dreams."); Ex. 3 ¶ 42-45 ("The decision to deny me enrollment made me think about how well I had started in school, and all of the work that I did over the years. I want to finish. My life is passing by. . ."). Defendants' refusal to enroll Plaintiffs in regular high school causes damage during a critical time in their young lives.

As the Supreme Court noted in a case arising out of a statute barring public school enrollment by undocumented immigrants, "[t]he harm caused these children by lack of education needs little elucidation. Not only are the children consigned to ignorance and illiteracy; they also are denied the benefits of association in the classroom with students and teachers of diverse backgrounds." *Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1332 (1980); *see also Plyler v. Doe*, 457 U.S. 202, 221

(1982) (noting the "lasting impact of [education's] deprivation on the life of the child"); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (observing that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education"). Plaintiffs suffer irreparable injury by being denied access to public school.[10]

III. THE BALANCE OF EQUITIES STRONGLY FAVORS AN INJUNCTION

The equities tip sharply in favor of a preliminary injunction. As noted above, Plaintiffs have a strong interest in attending school. In contrast, Defendants have no interest in continuing practices that violate the EEOA, the FEEA, and their own ELL plan. *See Issa*, 847 F.3d at 143 ("the School district has 'no interest in continuing practices' that violate § 1703(f) of the EEOA" (quoting *Issa v. Sch. Dist. of Lancaster*, No. CV 16-3881, 2016 WL 4493202, at *8 (E.D. Pa. Aug. 26, 2016)).

IV. A PRELIMINARY INJUNCTION SERVES THE PUBLIC INTEREST

The public is not served by allowing an unlawful policy to remain in effect. *See Louis v. Meissner*, 530 F. Supp. 924, 929 (S.D. Fla. 1981) ("The public's interest is not served by continued acts violative of the law."). To that end, courts have held that the public interest is

[10] Plaintiffs acknowledge that the Eleventh Circuit has held that "delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). In *Wreal*, the moving party had "failed to offer any explanation" for the delay. *Id.* This case is distinguishable. First, Plaintiff I.A. became party with the filing of the Second Amended Complaint on May 3, 2017 (ECF No. 76). Second, Plaintiffs support this motion with evidence that has only come to light through the discovery process. *See, e.g.*, Exs. 5, 6, 8; *contra Wreal*, 840 F.3d at 1248-49. Third, Defendants' motion to dismiss was pending from September 2016 until March 2017, and judicial efficiency may have weighed against adjudicating a preliminary injunction motion where a pending motion to dismiss implicated the same dispositive issues. *See Bagley v. Yale Univ.*, No. 3:13-CV-1890 CSH, 2014 WL 7370021, at *3 (D. Conn. Dec. 29, 2014).

served by enjoining action that violates the EEOA or the FEEA. *See Issa*, 847 F.3d at 143 (it is "'undeniably in the public interest for providers of public education to comply with the requirements' of the EEOA" (quoting *Issa*, 2016 WL 4493202, at *8)); *Daniels*, 985 F. Supp. at 1462 (noting in granting injunction that students, "the school system as a whole, and the public at large, will benefit from a shift to equal treatment").

More generally, protecting children's access to a public education serves the public interest. Recognizing that "education has a fundamental role in maintaining the fabric of our society," the Supreme Court has cautioned that we "cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Plyler*, 457 U.S. at 221; *see also Brown*, 347 U.S. at 493 (emphasizing the "importance of education to our democratic society"); *Ray*, 666 F. Supp. at 1535 (it "is the concern of the public to provide adequate, non-discriminatory education to all children of this state."). The public interest is served by an injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs request a preliminary injunction directing Defendants to: 1) enroll Plaintiff Children and permit them to attend regular public school beginning August 16, 2017; 2) assess Plaintiff Children's language proficiency and allow them to access the benefits of the Defendants' ELL Plan; 3) provide services to compensate for the educational opportunities that Plaintiff Children were denied; and 4) cease excluding recently-arrived, foreign-born ELLs aged fifteen and older from public school.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 21, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will provide service to the following:

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