UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT 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; on behalf of themselves and all other similarly situated,
Plaintiff

vs.

No. 2:16-cv-00379-SPC-MRM

THE SCHOOL BOARD OF COLLIER COUNTY, FLORIDA and KAMELA PATTON, Superintendent of Collier County Public Schools, in her official capacity,
Defendants
_____/

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal court. This litigation implicates a matter of critical national importance – the right of English Learner (EL) students to equal access to a high-quality education.

The United States submits this Statement of Interest to assist [illegible] Civil Rights Act of 1964, 42 U.S.C. §§ 2 implementing regulations, *see e.g.* 28 C.F.R. Part 42, 34 C.F.R. P Department of Justice (DOJ) is responsible for enforcing the EE 1709 (authorizing DOJ to bring suit also is r enforcement of Title VI across the federal governmen and Coordination of Nondiscrimination Laws, 45 Fed

Title VI

ages 18-21, after a "sharp increase in the number of unaccompanied minors arriving to the United States from abroad," most of whom were 16 or 17. *Id.* ¶ 41, 102–106 & Ex. 2. Although the Policy does not delineate between currently enrolled and prospective students, Plaintiffs allege that a district employee represented to the Board that the Policy targets "new kids enrolling at our schools." *Id.* ¶ 47.

Plaintiffs further allege that the Board relies on the Policy as part of a larger "practice of denying high school enrollment to recently-arrived, foreign-born ELL students" age 15 and older, in contravention of the Policy's express terms and federal EL requirements, including those in the District's EL Plan. *Id.* ¶¶ 45, 50–64. According to the Amended Complaint, the Board refers some of these students to "noncredit, adult English for Speakers of Other Languages (Adult ESOL) classes that charge a fee" and that offer no opportunity to obtain a standard diploma, learn core subjects, or participate in high school activities. *Id.* ¶¶ 3–4, 51–52, 56-61. Plaintiffs allege that, since 2013, several hundred foreign-born children between the ages of 15 and 18 have been denied enrollment in regular high schools and found their way to these Adult ESOL programs. *Id.* ¶ 53. In contrast, Plaintiffs allege that the Board permits students 15 and older who are not recently arrived, foreign-born ELs to enroll in or continue to attend a regular high school even though they are far behind and not on track to graduate. *Id.* ¶¶ 46–47.

Plaintiffs recount that when they tried to enroll Y.M. (age 15), G.O. (age 16), M.D. (age 16), and T.J.H. (age 17) at Immokalee High School, all four were denied admission, and three

not have enough credits." *Id.* ¶ 80. Board employees did not advise K.V. of any alternate enrollment options. *Id.* They similarly failed to advise N.A. (age 17) of other enrollment options when denying his enrollment at Lely High School for being "too old" and at Golden Gate High School for being "no longer eligible" for a regular diploma or alternative program. *Id.* ¶¶ 87, 89. K.V. and N.A. found Adult ESOL Programs on their own and paid $30 to attend. *Id.* ¶¶ 81, 90.

Plaintiffs allege that the Adult ESOL programs that Plaintiff ELs and hundreds like them were referred to (or located on their own) do not teach math, science, social studies, or the standard curriculum that ELs are entitled to under federal law and the District EL Plan. *Id.* ¶¶ 32, 39, 57, 68, 72, 76, 95. Further, unlike non-ELs and ELs receiving EL services in regular high school, and in contravention of state law and the District EL Plan, ELs in Adult ESOL programs must pay $30 and cannot earn credit toward a standard diploma. *Id.* ¶¶ 40, 58.

The Board moved to dismiss, Defs.' Mot. to Dismiss (MTD) (Doc. 37), erroneously arguing that it satisfies its federal obligations. MTD at 2, 3, 9, 11. The Board repeatedly invokes the February 2013 Policy, but ignores Plaintiffs' allegations that: the Board's actions are not consistent with the Policy; the Policy is intentionally discriminatory and is discriminatorily applied; and the Adult ESOL

U.S.C. § 2000d. Decades of federal case law and guidance interpreting the EEOA and Title VI and its implementing regulations establish both that school districts must make their standard instructional programs accessible to ELs through language assistance programs and that discrimination against limited English proficient (LEP) persons can g

defendant’s failure to take appropriate action to overcome these barriers; and (3) a resulting impediment to students’ equal participation in instructional

may be impaired because of deficits incurred [while] participat[ing] in" the EL program. *Id.* If no such opportunity to recoup academic deficits is provided, the Court explained, "the language barrier, although itself remedied, might, nevertheless, pose a lingering and indirect impediment to [ELs'] equal participation in the regular instructional program." *Id.*

The Departments of Education and Justice summarized these requirements in their joint 2015 Dear Colleague Letter on EL Students and LEP Parents (EL DCL): "To ensure that EL students can catch up in those core areas within a reasonable period of time, such districts must provide compensatory and supplemental services to remedy academic deficits that the student may have developed while focusing on English language acquisition." MTD at 13 (quoting EL DCL at 19).This summary is entirely consistent with § 1703(f) and the binding *Castañeda* standards just described.[5] Ignoring these standards, the Board asks this Court to reject this guidance on the basis of a case that is not binding and completely at odds with these standards. *See infra* discussion of *Flores v. Huppenthal*, 789 F.3d 994 (9th Cir. 2015) at 11-12.

B. The Board Cannot Show Plaintiffs' EEOA Claim Fails As A Matter Of Law

Here, Plaintiffs allege facts sufficient to survive a motion to dismiss under the *Castañeda* standards. In particular, Plaintiffs allege that, contrary to the Board's EEOA duty to offer a sound EL program that enables ELs to attain parity of participation in the standard instructional program, the Board denied Plaintiff ELs access to its free EL program and standard instructional program altogether by refusing to enroll them in regular high schools. Am. Compl. ¶¶ 67–89. More specifically, as to ELs ages 15 and 16, Plaintiffs allege that the Board denied them

[5] *Castañeda*'s interpretation of § 1703(f) controls here, but even if it did not, this guidance regarding the EEOA, Title VI, and its implementing regulations is entitled to substantial deference because DOJ and ED are the agencies tasked with enforcing the EEOA, Title VI, and their implementing regulations. *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 843–44 (1984) (where a statute that an agency administers is silent with respect to a specific issue, the question is whether the agency's interpretation is "j -0.001 Tc 0.0Bctrv.

enrollment in the regular high school program in contravention of the Board's own Policy. As to K.V. (16), Plaintiffs allege that the Board assumed her inability to timely graduate based on her limited English and did not offer her any enrollment option. *Id.* ¶ 80. Even when the Board referred some Plaintiff ELs to Adult ESOL programs, these

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context, makes clear that the "latitude" afforded to schools applies only to the type of EL program and techniques offered – for example, bilingual education – and must be exercised in "good faith" to ensure ELs' meaningful participation in the standard instructional program. *Castañeda*, 648 F.2d at 1009;[7]

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because of deficits incurred during participation in an agency's [EL] program." *Id.* at 1011. Here, Plaintiffs allege that Adult ESOL programs do not even teach other areas and provide no access to the standard program. Further, *Huppenthal* addressed only whether the district court abused its discretion under Federal Rule 60(b)(5) in granting Arizona's request for relief from a decades-old judgment for alleged violations of the EEOA based on changed circumstances. *See id.* at 997–998, 1001–1008. The post-trial, fact-intensive analysis in *Huppenthal* under Rule 60(b)(5) does not support dismissal under Rule 12(b)(6) of Plaintiffs' EEOA claim here, especially where Plaintiffs allege that the Board has denied them any semblance of a high school education.[8]

Lastly, the Board's argument that the EEOA allows it to "legally send" Plaintiff ELs to Adult ESOL programs misreads this same "latitude" quote as well as federal guidance. MTD at 11-12 & n.22. Consistent with § 1703(f) and *Castañeda*'s standards, federal guidance advises districts to "place EL students in age-appropriate grade levels so that they can have meaningful access to their grade-appropriate curricula and an equal opportunity to graduate" and cautions districts against placing older ELs who are below grade level in age-inappropriate programs that do not teach core content courses that earn credit toward graduation. EL DCL at 18 & n.50. Neither this guidance nor § 1703(f) allows the Board to exclude ELs from regular high schools and offer only fee-based Adult ESOL programs with no core content instruction. Further, placing 15- to 17-year old ELs in regular high schools is more age-appropriate than placing them with "adults, some of whom are older than the students' parents or grandparents." Am Compl. ¶ 62.

[8] The Board faults PlCID 41 [illegible] are [illegible]

II. Title VI Prohibits The Board From Engaging in National Origin Discrimination

A. Intentional Discrimination Under Title VI

establishing intent under *Arlington Heights*, "the plaintiff need provide very little such evidence ... to raise a genuine issue of fact ...; any indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a fact-finder." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013) (citations omitted).

In arguing that Plaintiffs fail to state a Title VI claim of national origin discrimination, the Board urges application of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which provides a test for employment discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e–2000e-17. *See* MTD at 14-16. While the *McDonnell Douglas* framework is one way of demonstrating intentional discrimination based on national origin, it is not the appropriate framework to prove intentional discrimination under Title VI in this case. The totality of the relevant facts can show that national origin discrimination was the motivation behind a facially neutral law. *See Washington v. Davis,* 426 U.S. 229, 242 (1976); *Arlington Heights*, 429 U.S. at 264-68; *cf. Reynolds v. Barrett*, 685 F.3d 193, 202 (2d Cir. 2012) (*McDonnell Douglas* framework is generally more appropriate for individual claims). Given the neutral policy and facts alleged here, the *Arlington Heights* framework is more appropriate. *See Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993) (applying *Arlington Heights* in Title VI intent case); *Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999).

In determining whether a neutral policy is intentionally discriminatory, a court must also evaluate whether it is applied in a discriminatory way, as Plaintiff ELs have alleged. *See Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

B. The Board Cannot Establish That Plaintiffs' Title VI Claim Of Intentional National Origin Discrimination Fails As A Matter Of Law

Under the *Arlington Heights* framework, Plaintiffs adequately allege facts sufficient to state a plausible Title VI claim, and the inapposite cases the Board cites do not defeat this claim.

1. Plaintiffs State a Title VI Claim of Intentional Discrimination

Plaintiffs' allegations include precisely the types of facts that courts regularly examine under *Arlington Heights* when evaluating intentional discrimination claims. Plaintiffs, for example, point to the discriminatory impact of the Board's policy, which provides an "important starting point" in the intent analysis. *Arlington Heights*, 429 U.S. at 266 (citing *Davis*, 426 U.S. at 229). They allege that several hundred foreign-born children between the ages of 15 and 18 have found their way to Adult ESOL programs after being denied access to the Board's regular high school program, including a free education, core content, credits toward a school diploma, academic enrichment, sports, and extracurricular activities; and that the Board is aware of this fact. Am. Compl. ¶¶ 4, 53–54, 61, 135. More specifically, Plaintiffs allege that in the 2015-2016 school year alone, at least 369 foreign-born students under the age of 18 were attending the Adult ESOL programs instead of Collier's regular high school. *Id.* ¶ 106.

and fails to keep records of attempts to enroll these EL children in regular high schools. *Id.* ¶¶ 47–48; *see Utica*, 2016 WL 1555399 at *10 (that district employees did not keep

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discriminatory animus, or the *McDonnell Douglas* framework. *Id.* at 794–95. These approaches are not required to prove intentional discrimination under Title VI. Indeed, the court in *Mumid* did not even consider the settled *Arlington Heights* framework applicable here. [12]

3. The Board's Reliance on *Holton* Is Misplaced

Lastly, the Board argues that "the State's academic prerequisites for high school matriculation and adult education provide the kind of ability grouping that has been repeatedly upheld." MTD at 3 (citing *Holton v. City of Thomasville Sch. Dist.*, 490 F.3d 1257 (11th Cir. 2007)); *see also* MTD at 8–9 n.20, 11, 14, 16, 19. This line of Title VI cases, which rely on *McNeal v. Tate Cty. Sch. Dist.*, 508 F.2d 1017 (5th Cir. 1975), has no place here. [13]

By contrast, the Plaintiffs here allege the Board has a policy of intentionally excluding recent immigrant ELs from its regular high schools altogether and funneling them to non-credit, Adult ESOL programs in violation of Title VI and the EEOA. *Holton* is not an EEOA or EL case, and in the few desegregation cases where EEOA or Title VI claims by ELs have arisen,

courts carefully isolated the claims, citing *McNeal* solely with respect to *classroom* segregation, and applying *Castañeda*'s three-part test to assess the adequacy of the EL program. *See, e.g.*, *Castañeda*, 648 F.2d at 995–99; *Morales v. Shannon*, 516 F.2d 411, 413 (5th Cir. 1975).[14] None of the cases contemplated complete exclusion of ELs from regular high school programs.

Further, even if Holton were apposite, it would not foreclose Plaintiffs' Title VI claim, which alleges that the Board is intentionally segregating recently-arrived ELs out of a desire to exclude them from the district's regular high school programs. Am. Compl. ¶¶ 4, 46–50, 67, 70–71, 74, 80, 86–87, 94. As the Eleventh Circuit made clear in its first *Holton* opinion: "'[S]chool systems are free to employ ability grouping, even when such a policy has a segregative effect, *so long, of course, as such a practice is genuinely motivated by educational concerns and not discriminatory motives.*'" 425 F.3d 1325, 1347 (11th Cir. 2005) (quoting *Castañeda*, 648 F.2d at 996–97) (emphasis in original). The *Holton* court went on to say that the proper resolution of such a case turns on a careful assessment of the facts. *Id*. at 1348.

CONCLUSION

The Board's motion to dismiss Plaintiffs' EEOA and Title VI claims should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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