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,

Plaintiffs,

vs.

THE SCHOOL BOARD OF COLLIER COUNTY, FLORIDA and KAMELA PATTON, Superintendent of Collier County

been repeatedly upheld.

whether there is a more plausible explanation for the defendant's conduct than the one offered by the plaintiff. *Id.* at 1950-51. These same pleading standards now apply in cases involving qualified immunity and are essentially the old "heightened pleading" standard under a new name. *Randall v. Scott,* 610 F.3d 701, 716 (11th Cir. 2010).

Argument and Authorities

General Legal Principals Applicable to All Counts

Plaintiffs have not stated a claim under any count, because they were not otherwise qualified to attend regular high school in Florida.

The State of Florida provides free public schools by its Constitution and an extensive statutory scheme. Those statutes include requirements graduation from middle school and advancement to high school. Neither Florida's Constitution, nor its general law, grants or requires free public education to children over the age of 16.[5] *L.P.M., et al. v. School Board of Seminole County,* 753 S.2d 130 (Fla. 5th DCA 2000). Local school boards, under their home rule powers, may regulate anything not pre-

These broad home-rule powers are also reiterated in section 1001.32, Florida Statute (2015). It says:

> In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards shall operate, control, and supervise all free public schools in their respective districts and may exercise any power *except as expressly prohibited* by the State Constitution or general law. (Emphasis added.)

Therefore, school boards enjoy a broad grant of home-rule powers subject only to express prohibitions in general law. *McCalister v. Sch. Bd. of Bay County*, 971 So. 2d 1020, 1023 n.1 (Fla. 1st DCA 2008). The Florida Attorney General has repeatedly stated that "it has been the position of this office that (section 1001.32(2), Florida Statutes) conferred on school boards a variant of 'home-rule power,' and that a district school board may exercise any power for school purposes in the operation, control, and supervision of the free public schools in its district except

(Fla. 2d DCA 1982) (“An ‘express' reference is one which is distinctly stated and not left to

though they were not qualified for high school by age and academic achievement, i.e. reasons other than their national origin or language deficiencies.

U.S. 433, 440-41 (2009). Therefore, even assuming the allegations of the Complaint are true, the School Board was free to "funnel" what it considers to be adult students with language deficiencies to adult English language education programs.

Plaintiffs also seem to be alleging that the EEOA requires that Plaintiffs to be given the opportunity to make up for academic content they allegedly are missing because they are receiving adult English language instruction.[14] Plaintiffs may be relying on the Dear Colleague Letter as foundational for their pleading.[15] But that position was explicitly rejected by *Flores v. Huppenthal*, 789 F3d 994 (9th Cir. 2015), after guidance from the Supreme Court.

To ensure the 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. Dear Colleague Letter, p. 19.	…Plaintiffs' chief complaint is that the four year model is defective (i.e. does not constitute "appropriate action" under the EEOA because, "[t]he state does not provide ELL students with an opportunity to recover academic content that they missed … as a result of ELD." But the EEOA imposes no such requirement on the school district; it requires only that a State " 'take appropriate action to overcome language barriers without specifying particular actions a State may take…" *Flores v. Huppenthal*, 789 F3d 994 (9th Cir. 2015) (quoting *Horne v, Flores*, 557 U.S. 433, 440-41 (2009)).

Plaintiffs' claims about whether the School Board's instruction of Plaintiffs in its adult

courts the authority to judge whether a State or school district is providing 'appropriate' instruction in other subjects. That remains the province of the States and the local schools." *Horne v. Flores*, 557 U.S. 433, 470 (2009). Whether the School District is providing appropriate extracurricular programs is even more outside the province of the EEOA.[16]

Therefore, Plaintiffs EEOA claim should be dismissed.

COUNT II: Title VI

Plaintiffs Title VI claim should be dismissed for reasons similar to those for dismissing their EEOA claim. As noted above, the crux of the Complaint is that certain persons unqualified for high school by age and academic achievement should have been admitted to regular high school and should not have been sent to adult English language education programs. However, ability grouping based on educational achievement, such as has been alleged here, has been upheld repeatedly by the Eleventh Circuit. *Holton v. City of Thomasville School Dist.*, 490 F.3d 1257 (2007).

Plaintiffs must plead intentional discriminatory national origin treatment under Title VI, because there is no private right of action for disparate impact. *Alexander v. Sandoval,* 532 U.S. 275 (2001). Intentional discrimination of based on national origin can be shown in only two ways: (1) either with direct evidence, or (2) by circumstantial evidence.[17]

Plaintiffs have alleged no direct evidence of national origin discrimination.

Plaintiffs have also not pled the element of a prima-facie case of circumstantial evidence. Under the *McDonnell Douglas* framework, the plaintiff has the initial burden of establishing a

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The claims concerning extracurricular activities are therefore without merit. Compl. at ¶ 41.

While the Eleventh Circuit does not appear to have formally adopted the framework in Title VI cases. Nevertheless, the similarities with Title VII, make review of Title VII appropriate for comparative analysis.

prima-facie case of unlawful discriminatory motive by a preponderance of the evidence. *McDonnell Douglas*, 411 U.S. at 802; *Rioux v. City of Atlanta*, 520 F.3d 1269, 1275 (11th Cir. 2008); *Damon v. Fleming Supermarkets of Florida, Inc*., 196 F.3d 1354, 1358 (11th Cir. 1999). Discrimination is about actual knowledge, and real intent, not constructive knowledge and assumed intent. *Silvera v. Orange Cnty. Sch. Bd*., 244 F.3d 1253, 1262 (11th Cir. 2001).

If the plaintiff establishes a prima-

above, Plaintiffs have not alleged that they were qualified by age or academic achievement to attend regular high school. Nor have Plaintiffs even generally alleged that any similarly unqualified person was admitted to regular high school. "Different treatment of dissimilarly situated persons does not violate the Equal Protection Clause." *Strickland v. Alderman*, 74 F.3d 260, 265 (11th Cir. 1996) (quotation marks omitted); *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 794 (8th Cir. 2010) (saying "the students were unable to identify any 'comparator'—a person not a member of the same allegedly protected class—who was treated more favorably than the plaintiffs").

Additionally, the Eleventh Circuit has repeatedly upheld the kind of ability grouping of which Plaintiff's complain. In fact, under *Holton*, a school district may "implement ability grouping programs 'in spite of any segregative effect they may have.'" 490 F.3d at 1260.

Finally, to the extent the Plaintiffs are alleging that they were discriminated against under Title VI due to their language deficiencies,[18] language and national origin are not interchangeable. *Mumid v. Abraham Lincoln High School*, 618 F.3d 789 (8th Cir.2010). Language is not an immutable characteristic and, by itself, does not identify members of a suspect class. See *Soberal–Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir.1983); *Olagues v. Russoniello*, 770 F.2d 791 (9th Cir.1985) (same); see also *Mumid*, 618 F.3d at 789 (policy that treats students with limited English proficiency differently than other students does not facially discriminate based on national origin in Civil Rights action); see, e.g., *Santiago-Lebron v. Florida Parole Com'm*, 767 F. Supp. 2d 1340, 1349 (S.D. Fla. 2011).

Therefore, Plaintiff's Title VI claim should be dismissed.

Plaintiffs have incorporated all of the general allegations into each Count.

COUNT III: 14th Amendment (Equal Protection)

Plaintiffs have not stated a claim under the Equal Protection Clause for the same reasons that they have not stated a claim under Title VI. They have not alleged facts of either direct or circumstantial discrimination based on national origin.

When suing an individual, section 1983 has two elements: First, a deprivation of a federal right. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Second, the right was deprived under color of state law. *Id.* When suing a municipal entity, dep(ui) 0.2 5 cm BT 50 d24 12(d cm BT50 e) 17 564467cn

First, for the reasons stated in the Title VI analysis above, Plaintiffs have failed to allege facts of national origin discrimination. Even assuming that they had alleged such facts, they have only alleged that some unnamed school official did the discriminating, and that is insufficient with respect to the claims against either Patton or the School Board.

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entitlement" to education and the "dimensions" of that right are determined by State law. *Id*. The Due Process clause protects the grant of this property right by the state only in so far as the State has granted a property right. *Id*

Additional Reasons for Dismissal of Patton

To receive qualified immunity, a defendant must first establish that he "acted within the

a. Injury in fact

WHEREFORE, Defendants THE SCHOOL BOARD OF COLLIER COUNTY, FLORIDA and KAMELA PATTON, respectfully move this Court dismiss the Complaint and all its claims against them with prejudice, and grant such other relief as is just and proper.

Respectfully submitted,

ROETZEL & ANDRESS, LPA

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July 2016 this document was electronically filed with the Clerk of Court by using the CM/ECF system.

By: /s/ *James D. Fox*