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.

CASE 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.
_______________________________________/

MOTION TO DISMISS

Defendants, THE SCHOOL BOARD OF COLLIER COUNTY, FLORIDA (the "School Board" or the "School District") and KAMELA PATTON ("Patton"), pursuant to Rule 12(b)(6), respectfully move this Court to Dismiss the Complaint against them, file this combined memorandum of law pursuant to Local Rule 3.10, and say follows:

The Allegations

Plaintiffs are three immigrants who allegedly sought admission to a Collier County regular public high school shortly after arrival in the United States, but were enrolled in an adult education English instruction program. Y.M. was a 16 year-old Hatian with limited English proficiency who had not completed the eighth grade in Hati.[1] G.O. was a 16 year-old Guatemalan with limited English proficiency who had completed sixth grade. M.D. was a 16

[1] Plaintiffs allege that Y.M. sought admission to high school the same week (the exact day is not alleged) he was turning sixteen but before having completed the eighth grade. (Compl. ¶ 46.)

year-old Guatemalan with limited English proficiency who had completed the sixth grade. All three Plaintiffs allegedly sought admission to Immokalee High School. However, none of the Plaintiffs are alleged to have completed Florida's statutory requirements for advancement to high school. All three were allegedly denied admission to high school under School Board Policy 5112.01, because they had "aged out" as they could not complete high school by age 19.

Plaintiffs claim that they were "funneled" into an alternative adult education program where they received English language instruction and could eventually work towards a GED. The GED is recognized under as an appropriate alternative diploma under state law.[2] Plaintiffs allege that Policy 5112.01 discriminates against them based on their national origin and limited English proficiency, in violation of the EEOA, Title VI, the 14th Amendment, and state law.

However, Federal law[3] does not pre-empt the age and academic prerequisites of a State's free public education system as administered by the School Board. See, § 1001.32, Fla. Stat. Neither the Equal Educational Opportunity Act (EEOA), nor Title VI, nor the Constitution proscribes the matriculation policies alleged.[4] Under our system of federalism, such policies are left to the States. *Horne v, Flores*, 557 U.S. 433, 440-41 (2009). The State of Florida has left to local school boards, under their home-rule powers, the determination of the cut-off age, or "age out" limit, for attendance in free public schools. § 1001.32, Fla. Stat. A review of the School Board's "age out" policy, Policy 5112.01, shows that it is a facially neutral age out limitation on attendance at public schools designed to provide "reasonable consistency of maturity levels among students in the regular high school program." Further, the State's academic prerequisites for high school matriculation and adult education provide the kind of ability grouping that has

[2] § 1003.435(6), Fla. Stat. (2015); see fn. 7 *infra*.
[3] There are exceptions to this rule that are not relevant in this case.
[4] Compare the IDEA and its 21 year old mandatory education requirement. 20 U.S.C. § 1400 (a)(1)(A).

been repeatedly upheld. *Holton v. City of Thomasville School Dist.*, 490 F.3d 1257 (2007). Further, Plaintiffs lack standing, as they have no right to attend regular high school and have aged out of the public school system. See, *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 794 (8th Cir. 2010). Finally, Defendants raise certain other defenses, including but not limited to qualified immunity in the case of Defendant Patton, and certain other pleading problems as described more fully below.

<u>Standard of Review</u>

The United States Supreme Court has tightened the pleading requirements of Rule 8, Federal Rule of Civil Procedure. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561 (2007), the Court "retired" the oft-quoted rule that " 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 562-63 (quoting *Conley v. Gibson*, 355 U.S. 41, a45–46 (1957)). In its place, the Court adopted a plausibility standard that requires pleaders to allege sufficient facts of each element to move beyond mere speculation, thereby "nudg[ing] their claims across the line from conceivable to plausible . . . ." *Id.* at 570.

This plausibility standard requires more than labels and conclusions or formulaic recitation of the elements that amount to "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Indeed, allegations that only show the mere possibility of misconduct will not survive a motion to dismiss. *Id.* at 1950. Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. Then after determining whether the factual allegations in the complaint state a plausible claim, the Court must also "draw on its judicial experience and common sense" to consider

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-empted by general law, including when a person has "aged out" of the system of free public schools.

A) Constitutional Grant of Home Rule

School boards in Florida have home-rule powers under the Florida Constitution section 4(b), Art. IX (1968). It says:

> The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs.

B) Statutory Enshrinement of Home Rule

5 With certain exceptions not relevant here.

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 as expressly prohibited by the State Constitution or general law." [6]

Under Florida's Constitutional scheme, the School Board may exercise any power for school purposes, including establishing age out requirements, absent an express prohibition in the Constitution or general law preventing it from providing from doing so. Section 4(b), Art. IX.; § 1001.32, Fla. Stat.. "Express pre-emption requires a specific statement; the pre-emption cannot be made by implication nor by inference." *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006); see also, *Fla. League of Cities, Inc. v. Dep't of Ins. & Treasurer*, 540 So.2d 850, 856 (Fla. 1st DCA 1989) (quoting *Bd. of Trs. v. Dulje*, 453 So.2d 177, 178 (Fla. 2d DCA 1984)); see also *Phantom of Clearwater, Inc*., 894 So.2d at 1018 ("Express preemption ... must be accomplished by clear language stating that intent."); *Edwards v. State*, 422 So.2d 84, 85

[6] Opinion 86-45; See also, Fla. Att'y Gen. Op. 2003-40 (2003) (saying, "[t]his office, on many occasions, has recognized the home rule authority of school boards.").

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

There are no specific Constitutional or Legislative statewide restrictions, prohibitions, or mandates regarding the age out requirements free public schools in Florida, beyond the statutorily required compulsory education requirements.[7] Florida has a compulsory education law for "children" who have not reached the age of 16, and for "students" aged 16 to finish the school term in which they turned 16. See, § 1003.21, Fla. Stat. Those who have reached the age of 16 and have left elementary or secondary school are defined as "adult" students. § 1004.02(5), Fla. Stat.

However, Florida law is silent with respect to whether "children" who have reached the aged of 16 who are not already students are entitled to a free public education. Rather, Florida delegates to local school boards policies regarding "admitting, classifying, promoting, and graduation of students to or from various schools of the district." § 1003.02(1)(a), Fla. Stat. (2015).

Pursuant to its home rule powers, the School Board of Collier County adopted Policy 5112.01, pertaining to the admission to high school of children over the age of 17, who are not already "students." It says, 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

[7] See, § § 1002.20(2)(a) and 1003.21(1), Fla. Stats. (2015).

> 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)[8] programs of the District.
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The Complaint alleges that the School Board as a matter of practice, pursuant to this policy, funnels prospective enrollees who are unable to complete high school by age 19 into adult education programs. [9]

Florida has detailed statutory requirements for graduation from middle school and entrance to high school. § 1003.4156, Fla. Stat. (2015). These requirements include, but are not limited to, demonstrated proficiency in English, Mathematics, Social Studies, and Science. Id. These requirements must be met, "in order for a student to be promoted to high school." Id. Plaintiffs have not alleged that they met any of these requirements.

As alleged, each of the Plaintiffs had either aged out, or not completed the requirements for admission to high school, or both. G.O. and M.D. had allegedly only completed 6th and 7th grade and were already 16 years old *and not enrolled in school*.[10] Y.M. turned 16 on April 4, 2015 before the beginning of the Fall 2015 school term and had not completed the 8th grade.

Based on the allegations, none of the Plaintiffs were (or are now) qualified to be admitted to regular public high school, given their ages and lack of academic achievement. As will be discussed more fully below, nothing in federal law requires a school board to admit such unqualified students to regular high school, nor requires that the School Board disregard its

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[8] In Florida by law, "[a]ll high school equivalency diplomas issued under the provisions of this section shall have equal status with other high school diplomas for all state purposes, including admission to any state university or Florida College System institution." § 1003.435(6), Fla. Stat. (2015).

[9] The policy does not explicitly address persons between the ages of 16 and 17.

[10] Plaintiffs' discussion of the application of Florida's "age out" statutes to currently *enrolled* students is therefore irrelevant. (Compl. at ¶ ¶ 14-16.)

policies and state statutes, because Plaintiffs desire to be in a regular high school program and not an adult education program.[11]

Moreover, even accepting the Plaintiffs' allegations as true, Plaintiffs assert they were "funneled" into an adult education program to learn English. By any benchmark, knowledge of English is a precondition to advance academically in an American school. This is certainly in line with *Lau v. Nichols*, 414 U.S. 563, 568 (1974), in which the U.S. Supreme Court determined that a school district "must take affirmative steps to rectify the language deficiency in order to open its instructional program," to non-English speaking students.

Therefore, Plaintiffs have failed to state a claim.

COUNT I: EEOA

Plaintiffs have not pled that by age or academic qualifications that they could be admitted to high school. Further, Plaintiffs' have not alleged the School Board or Patton "failed to take appropriate action to overcome language barriers." In fact, the Plaintiffs repeatedly allege that they were placed in English language instruction programs. Compl. at ¶ ¶ 32, 36-39. Plaintiffs make no allegation whatsoever about the appropriateness of those English language programs. Further, Plaintiffs plead no facts supporting their legal conclusions that the decisions made about Plaintiffs were based on their national origin. Rather, Plaintiffs allege something that the EEOA does not require: that the EEOA requires them to be admitted to a regular high school[12] even

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[11] Common sense would at least question the wisdom of placing every 16-21 year old who has been out of school for a number of years into a regular high school. Plaintiffs' insistence on individualistic self-determination, both assumes too much about theses students' knowledge and wisdom, and assumes too little about the impact of such decisions on teachers and other students, which perhaps is why that determination is left to States and local school boards. *Holton v. City of Thomasville School Dist.*. 425 F.3d. 1325, 1347 (11th Cir. 2005).

[12] Even the Dear Colleague Letter acknowledges that it would not be "age appropriate" to place high-school-aged persons in middle school. U.S. Dep't of Justice and U.S. Dep't of Educ., English Learner Students and

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

The Equal Educational Opportunity Act, 20 U.S.C. § 1703 prohibits discrimination educational opportunities "based on race, color, sex, or national origin." Section 1703 says in relevant part:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> ***
>
> (f) 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.

"Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA." *Horn v. Flores*, 5576 U.S. 433, 440-441 (2009); see also, *U.S. v. Texas*, 601 F.3d 354, 365 (5th Cir. 2015). The EEOA does not require the "equalization of results between native and non-native speakers." *Id*. at 2605. Rather, it "grants States broad latitude to design, fund, and implement ELL programs that suit local needs and account for local conditions." *Id*. Crucially, "the EEOA plainly does not give the federal courts the authority to judge whether a State or a school district is providing 'appropriate' instructions in other subjects." *Id*. at 2606. Finally, the EEOA, unlike other federal programs, such as the IDEA, does not preempt a State's "age out" laws.

Limited English Proficient Parents, January 7, 2015, n.50. The Letter also recognized the propriety of beginning with an English acquisition program. Id., p. 19.

Plaintiffs appear to be asking this Court to order the School District to admit to regular high school persons who are academically unqualified -- regardless of any language deficiencies -- rather than to alternative education programs, in this case adult English instruction programs. Federal law places no such requirement on the States. Rather, State law provides a pathway through an alternative high school diploma program to get students ready for college or the work world.[13]

Further, for purposes of Plaintiffs national origin discrimination claims, they have not alleged that any similarly situated person of another national origin was treated differently. On the contrary, they allege an "age out" policy that applies to all such persons *regardless of national origin or language deficiencies.* Plaintiffs therefore are apparently arguing for preferential treatment of persons of academically unqualified persons *on the basis of* their national origin or English language deficiencies. Plaintiffs do not say why such persons should receive this preferential treatment not enjoyed by persons who either speak English or are American born and have sought a return to school, like the Plaintiffs, after years of absence.

The EEOA ensures appropriate treatment; it does not provide preferential treatment based on national origin or English language deficiencies. Plaintiffs cannot read such preferential treatment into the EEOA nor have this Court eviscerate the State high school attendance prerequisites of age and educational achievement, as the determinations of such prerequisites are left to the States. "By simply requiring a State 'to take appropriate action to overcome language barriers' without specifying particular actions that a State must take, 'Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA." *Horne v. Flores*, 557

[13] § 1003.435(6), Fla. Stat. (2015).

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 education programs in subjects other than English are without merit. The Supreme Court of the United States has made this perfectly clear. "[T]he EEOA plainly does not give the federal

[14] Defendants vigorously dispute Plaintiffs' allegation that no educational opportunities other than English language instruction are available to them in the adult education programs, as they may receive high school equivalency diplomas that has "equal status with other high school diplomas for all state purposes." § 1003.435.

[15] See U.S. Dep't of Justice and U.S. Dep't of Educ., Dear Colleague Letter, English Learner Students and Limited English Proficient Parents (Jan. 7, 2015).

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

[17] While the Eleventh Circuit does not appear to have formally adopted the *McDonnell Douglas* 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-facie case, the burden then shifts to the defendant to rebut the presumption by articulating legitimate, nondiscriminatory reasons for its action. *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000). The defendant has the burden of production, not of persuasion, and thus does not have to persuade a court that it was actually motivated by the reasons advanced. *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 142 (2000) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)); *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253-55, 258; *McDonnell Douglas*, 411 U.S. at 802. Once the defendant satisfies this burden of production, the presumption of discrimination falls away and the plaintiff has the opportunity to come forward with evidence, including the previously produced evidence establishing a prima-facie case, sufficient to permit a reasonable fact finder to conclude that the reasons given by the defendant were not the real reasons for the adverse decision. *Id*. at 1275.

Plaintiffs may establish a prima-facie case of discrimination in assignment to the adult education programs by alleging: (1) they are within the protected class; (2) they were qualified for the regular high school program; (3) they were rejected; and (4) the School Board granted admission non-members of the class with similar qualifications.

With the exception of being members of a protected class, Plaintiffs have not alleged any of the other relevant elements of national origin discrimination. As noted in the EEOA section

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.

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[18] 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, such as a school board, the Supreme Court has fashioned a third element. A plaintiff must allege and prove that a policy or custom was the moving force of the deprivation. *Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 694 (1978).[19]

The first inquiry in any section 1983 suit is whether the plaintiff has been deprived of a right "secured by the Constitution and laws." *Baker v. McCollan*, 443 U.S. 137, 140 (1979). Here Plaintiffs are claiming of violation of the equal protection clause of the Fourteenth Amendment, which says in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its protection of the equal protection of the laws.

The Supreme Court has extended the protections against violations by a "State" to violations by local governments and their employees, saying; "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 690 (1978).

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[19] Ie., claims against governmental entities may not be brought under a theory of *respondeat superior*. *Id*.

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.

Second, Policy 5112.01 is facially neutral with respect to national origin. It says: "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)." Plaintiffs have not alleged: 1) why this policy reason is pre-textual; (2) nor have they alleged generally that is pre-textual, (3) and, they have not even alleged that it is discriminatory facially or as applied.

Regarding the School Board, Plaintiffs have not stated a policy or custom of discriminatory treatment against them based on national origin. The policy and the custom, ascribed by the Plaintiffs to the School Board, neutrally prevents persons from enrolling the regular high school program who are unqualified by age and academic achievement. Rather, the School District sends them to adult education programs, in this case, beginning with language instruction. This kind of ability grouping has been held in the Eleventh Circuit as legally permissible and does not violate the Equal Protection Clause. *Holton*, 490 F.3d 1257.

Therefore, Plaintiffs' Equal Protection claim should be dismissed.

COUNT IV: 14th Amendment (Procedural Due Process)

Again, "[t]he first step in [a § 1983] claim is to identify the specific constitutional right allegedly infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994). "[E]ducation is not a right protected by the Constitution." *Goss v. Lopez*, 419 U.S. 565, 586 (1975). Rather, "the right or

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*. As noted above, Plaintiffs had no right to attend regularly high school under Florida Law, as they were not qualified by age and academic achievement, so they have no procedural due process claim. Further, in Florida there is no right granted by the state to participate in extra-curricular activities.[20] Because Plaintiffs have not stated any right of which they were deprived, they have not stated a claim for a procedural due process violation.

Therefore, Plaintiffs' procedural due process claim should be dismissed.

COUNT V: Violation of Florida Statute 100.05 et seq., and F.A.C. 6A-19.01 et seq.

With respect to the State law claims, Plaintiffs have failed to allege the pre-suit notice requirements of section 768.28(6)(a), Florida Statutes (2016).

Section 768.28, Florida Statutes (2010), sets forth the state's waiver of sovereign immunity for suits against government entities. It provides, in pertinent part, that "[a]n action may not be instituted ... unless the claimant presents the claim in writing to the appropriate agency, and also ... presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues." § 768.28(6)(a). "This requirement is a condition precedent, § 768.28(6)(b); a claimant must perform it in order to bring suit, and this compliance must be alleged in the complaint." *Scullock v. Gee*, 161 So. 3d 421, 423 (Fla. 2d DCA 2014) (citing Fla. R. Civ. P. 1.120(c)).

Therefore, Plaintiffs' State law claims should be dismissed.

[20] Any claim concerning a property right in extracurricular activities is therefore without merit. Compl. at ¶ 41.

Additional Reasons for Dismissal of Patton

The claims against Defendant Patton should be dismissed for a number of reasons.

First, there are no factual allegations meeting the pleading standards under any count against Patton.

Second, as to the section 1983 claim she is entitled to qualified immunity to the extent that a claim is being made against her in her individual capacity.[21]

Qualified immunity insulates a defendant from personal liability for actions taken in good faith pursuant to his discretionary authority. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). It is not merely protection from liability, but protection from suit. *Ashcroft,* 129 S.Ct. at 1946. As such, qualified-immunity defenses must be adjudicated at the earliest opportunity. *Id.*; *Crawford*, 529 F.3d at 977-78.

> "Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. Howards*, 566 U. S. ___, ___; 132 S.Ct. 2088 (2012) (slip op., at 5). "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ibid*. "When properly applied, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id*. citing *Ashcroft v. al-Kidd*, 563 U. S. ___, ___; 131 S.Ct. 204 (2011) (slip op., at 12) (internal quotation marks omitted). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id*., at ___.

Stanley Taylor, et al. v. Karen Barkes, 135 S.Ct. 2042, 2044 (2015)(brackets and internal quotation marks omitted).

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[21] The allegations of the Complaint do not state in what capacity she is being sued. However, the caption says she is being sued in her official capacity. To the extent that she in her official capacity and the School Board are both being sued under section 1983, those claims are duplicative. In *Kentucky v. Graham*, 473 U.S. 159 (1985), "the Supreme Court held that a plaintiff need no longer bring official-capacity actions against local government officials since the local government could now be sued directly." *DeSisto Coll., Inc. v. Line*, 888 F.2d 755, 764 (11th Cir. 1989).

To receive qualified immunity, a defendant must first establish that he "acted within the scope of discretionary authority when the allegedly wrongful acts occurred." *Dalrymple v. Reno*, 334 F.3d 991, 995 (11th Cir. 2003). "Discretionary authority" includes "all actions of a governmental official that (1) were undertaken pursuant to the performance of his duties, and (2) were within the scope of his authority." *Jordan v. Doe*, 38 F.3d 1559, 1566 (11th Cir. 1994) (quotations and citations omitted).

Here there is no clearly established constitutional law that required Patton to violate School Board policies and admit to regular high school persons who have "aged out" and are not qualified by educational achievement.

Third, as to the State Law claim, the exclusive remedy for a person aggrieved by an officer or agent of the state, such as a school superintendent, is by an action against the entity. § 768.28(9)(a), Fla. Stat. (2016).

Therefore, the claims against Patton should be dismissed.

Plaintiffs Lack Standing

Finally, Plaintiffs lack standing because they have "aged out" of the regular public school system. "An order that the school must … conform to certain legal requirements will not redress the injuries alleged by these students." *Mumid v. Abraham Lincoln High Sch*., 618 F.3d 789, 797 (8th Cir. 2010) citing *City of Los Angles* v. *Lyons*, 461 U.S. 95, 106 n.7. (1983). The party invoking federal jurisdiction bears the burden of establishing elements of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). The general rules of Article III Standing require an injury in fact, causation, and redressability.

> a. Injury in fact: There must be an injury in fact and the injury or interest must be special; i.e., greater than that of the population as a whole,
>
> b. Causation: The injury must have been caused by the action or inaction of the defendant, and
>
> c. Redressability: The injury must be of a nature that it can be remedied through an action in Court.

Lujan, 504 U.S. 560-561.

Stated another way by the Eleventh Circuit:

> Constitutional requirements for standing are: (1) injury in fact, meaning injury that is concrete and particularized, and actual or imminent; (2) causal connection between injury and conduct; and (3) likelihood that injury will be redressed by favorable decision. Const. Art. 3, § 2, cl. 1.

Alabama v. US Army Corps of Engineers, 424 F.3d 1117 (11th Cir. 2005).

Even in the light most favorable to Plaintiffs, their alleged injuries arise from "aging out" and being academically unqualified for high school. The federal court cannot rewrite state laws providing for a different age and academic standards, and thus cannot redress Plaintiffs' claims. *Mumid v. Abraham Lincoln High Sch*., 618 F.3d 789, 797 (8th Cir. 2010) (saying, "[t]he students lack standing to seek this injunctive relief. None of the plaintiffs currently attends [high school] and none will ever return, because all have graduated high school or aged out of the public school system. An order that the school must close or conform to certain legal requirements will not redress the injuries alleged by these students.").

Therefore, Plaintiffs lack standing.

Conclusion:

"The merits of a program which places students in classrooms with others perceived to have similar abilities are hotly debated by educators; nevertheless, it is educators, rather than courts, who are in a better position ultimately to resolve the question of whether the practice is, on the whole, more beneficial than detrimental to the students involved." *Holton v. City of Thomasville School Dist*.. 425 F.3d. 1325, 1347 (11th Cir. 2005)(quoting *Castaneda v. Pickard*, 648 F.2d 989, 996 (5th Cir. 1981).

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,

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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*
James D. Fox