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

T.R., a minor, individually, by and through her parent, Barbara Galarza, and on behalf of all others similarly situated,

Barbara Galarza, individually, and on behalf of all others similarly situated,

A.G., a minor, individually, by and through his parent, Margarita Peralta, and on behalf of all others similarly situated,

Margarita Peralta, individually, and on behalf of all others similarly situated,

L.R., a minor, individually, by and through his parent, Madeline Perez, and on behalf of all others similarly situated,

D.R., a minor, individually, by and through her parent, Madeline Perez, and on behalf of all others similarly situated,

J.R., a minor, individually, by and through his parent, Madeline Perez, and on behalf of all others similarly situated,

Madeline Perez, individually, and on behalf of all others similarly situated,

R.H., a minor, individually, by and through his parent, Manqing Lin, and on behalf of all others similarly situated,

Manqing Lin, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

The School District of Philadelphia,

Defendant.

Civil Action No. 15-04782-MSG

FIRST AMENDED CLASS ACTION COMPLAINT

I. PRELIMINARY STATEMENT

1. The School District of Philadelphia ("District"), like the City of Philadelphia, is a richly diverse community and includes at least 26,000 students from families who speak languages other than English. A significant percentage of these families include children with disabilities who are entitled to individualized education programs. Yet, the parents are unable to participate meaningfully in the development of their children's education programs, because the District has systematically failed in its legal duty to translate essential planning documents and to provide sufficient interpretation services.

2. Plaintiff T.R., who does not speak English fluently, was improperly evaluated only in English, leading to her being incorrectly identified as having an intellectual disability. Her parent, Barbara Galarza, was deprived of sufficient oral interpretation and translation of that evaluation. As a result, T.R. did not receive appropriate educational services and was left without any educational services for a prolonged period of time.

3. In the case of Plaintiff A.G., the District did not evaluate him for disabilities until after a Family Court order notified the District that A.G.'s family was Spanish speaking and that A.G. needed to be evaluated. Despite prior notice from A.G.'s family requesting that documents be sent home in Spanish, the District failed to communicate with his family in Spanish. Meanwhile, A.G. was wrongly retained in ninth grade, deprived of special education services, and left without any schooling for several months while recuperating from leg surgery.

4. The District has also failed to provide Plaintiff Madeline Perez with Spanish translations of the District's evaluations and educational plans for her son, Plaintiff L.R. Ms. Perez requested complete translations, but the District has only translated section titles of some documents. Although the District had been informed that L.R. was diagnosed as autistic in 2012,

Ms. Perez did not learn until 2016 that autism had not been addressed in L.R.'s non-translated educational plans.

5. Ms. Perez is also the mother of Plaintiffs D.R. and J.R., who, like L.R., have disabilities and are entitled to special education services. As with L.R.'s educational plans, the District has refused to translate into Spanish anything more than section titles of the plans it has provided for D.R. and J.R., despite Ms. Perez's repeated requests for complete translations.

6. Plaintiff R.H. is a kindergarten student who has been diagnosed with autism and is gifted in mathematics, and he has a number of special education needs. Mandarin is the language spoken in R.H.'s home, and both of R.H.'s parents have limited English proficiency. Although the District agreed to translate some final documents into Mandarin, it refuses to provide translations of more than the heading titles and other limited information for R.H.'s proposed re-evaluation and proposed individualized education program. The District's refusal has left his mother, Plaintiff Manqing Lin, unable to participate meaningfully in the planning process for her son.

7. This case is filed on behalf of thousands of students like Plaintiffs A.G., T.R., L.R, D.R, J.R., and R.H. with disabilities who have parents like Plaintiffs Barbara Galarza, Margarita Peralta, Madeline Perez, and Manqing Lin who are "Limited English Proficient" ("LEP").[1] To communicate effectively with school personnel, these LEP parents and their children, who often have limited English proficiency themselves, need oral interpretation

[1] The term "Limited English proficient" is the terminology used in both the Elementary and Secondary Education Act, § 9101(25) and the Individuals with Disabilities Education Act, 20 U.S.C. § 1401(184). When applicable to a student, the term LEP, or its derivative, student with "Limited English Proficiency" is synonymous with English Language Learner ("ELL") or English Learner ("EL"). While the term ELL or EL is favored and should be used because it accurately connotes that a student is learning English rather than labeling the student limited or deficient, the term LEP remains applicable to parents in the context of identifying and addressing language barriers to ensure parent participation. The term "native language," when used with respect to an individual who is limited English proficient, means the language normally used by the individual or, in the case of a child, the language normally used by the parents of the child. 20 U.S.C. § 1401(20).

services (the act of restating spoken language in a different language) and translation services (the act of rewriting a document in another language).[2] Yet, despite the overwhelming and accumulating evidence of need, the District has systematically and with deliberate indifference denied essential translation and interpretation services to LEP parents of children with disabilities, as well as to the children themselves.

8. By law, meeting the educational needs of children with disabilities occurs within a process of written notice, parent consent, a non-discriminatory evaluation, creation and review of documents, development of a plan, and meetings with school staff and parents – all of which is outlined in the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., and is referred to as the Individualized Education Program (or "IEP") process. LEP parents[3] and their children with disabilities have been deprived of meaningful participation in the IEP process because the District provides insufficient oral interpretation services and refuses to timely provide completely translated documents. These deficiencies violate the IDEA, 20 U.S.C. § 1400 et seq.; 34 C.F.R. Part 300; 22 Pa. Code Chapter 14; the Americans with Disabilities Act as Amended; Section 504 of the Rehabilitation Act; 22 Pa. Code Chapter 15; the Equal Opportunities Act; and Title VI of the Civil Rights Act of 1964.

9. Because the special education process is a parent-driven system, LEP parents, like all parents, must be fully informed in order to provide consent. They also must be able to participate meaningfully in the IEP process through the timely receipt of completely translated documents and sufficient interpretation services. Parent participation is essential to ensuring that

[2] *See* Ex. A, FF ¶ 1, 2. References to the Hearing Officer's explicit findings in the decisions are referred to as "FF" (findings of fact) or as "CL" (conclusions of law). References to the underlying administrative hearing transcript are "N.T." for Notes of Transcript.

[3] The word "parent" or "parents" as used in this Complaint includes all persons included in the definition of parent set forth in the IDEA at 20 U.S.C. § 1401(23).

a child with a disability receives a free appropriate public education in the least restrictive environment.

10. Throughout the IEP process, school staff and parents rely on certain IEP documents. These documents include the Individualized Education Programs ("IEPs"), Notices of Recommended Educational Placement ("NOREP")/Prior Written Notice, Procedural Safeguards Notice, IEP Team Meeting Invitations, Manifestation Determinations, Permission to Evaluate, Permission to Re-Evaluate, Evaluation Reports, Re-Evaluation Reports, Psychoeducational Reports, progress reports, and Medicaid Consent Forms (referred to collectively as "IEP process documents"). In addition, certain regular education form documents which are readily available to non-LEP parents are critical to the parent's knowledge of his or her child's educational progress, placement, and services. These include: report cards, homebound forms, pre-English Language class placement letters, and progress reports (referred to collectively as "regular education forms").

11. These documents are so essential that they must be provided in writing and in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. In contravention of these requirements, the District has refused to timely and completely translate IEP process documents and regular education forms. The District also has failed to provide sufficient comprehensive oral interpretation services and to conduct bilingual evaluations as required by law. As a result, LEP parents of children with disabilities have been shut out of the IEP process and denied their right to notice, informed consent, and meaningful participation, in violation of governing laws and to the significant detriment of their children.

12. Named Plaintiffs, on behalf of themselves and the thousands of members of the "Parent Class" and the "Student Class," defined below, file this action to require the District to provide legally-mandated translation and interpretation services, so that LEP parents and their children can participate meaningfully in the IEP process. Plaintiffs also seek to ensure that all students who have disabilities are properly evaluated in their native language as required by law.

II. JURISDICTION AND VENUE

13. The claims in this action arise under the IDEA, 20 U.S.C. §§ 1400 et seq., and 34 C.F.R. Chapter 300; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; the Equal Education Opportunities Act, 20 U.S.C. § 1703(f); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and 22 Pa. Code Chapter 14. This Court has subject matter jurisdiction over the federal law claims pursuant to 28 U.S.C. § 1331 and 20 U.S.C. §§ 1415(i)(2) and 1415(i)(3)(A).

14. The claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202.

15. This Court may exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. Chapter 14 of the Pennsylvania Code is the state special education law which implements the IDEA and contains additional provisions concerning education for students with disabilities. 22 Pa. Code § 14.1 et seq.

16. Venue in this district is proper under 28 U.S.C. § 1391(b).

17. Plaintiffs A.G. and T.R. have exhausted administrative remedies to the extent required by the IDEA, 20 U.S.C. §§ 1415(i)(2) and 1415(i)(3)(A). They have completed the IDEA hearing process, each of them receiving a due process hearing decision dated May 26, 2015, attached hereto as Ex. A and Ex. B, respectively. *See* Ex. A, *T.R. v. SDP*, ODR No. 15181-13-14 and Ex. B, *A.G. v. SDP*, ODR No. 15166-13-14. In those decisions, the Hearing Officer held that Plaintiff Parents Barbara Galarza and Margarita Peralta were denied meaningful

participation in the federally mandated IEP process, due to the District's failure to provide timely and complete translations of vital IEP documents. Specifically, the Hearing Officer concluded:

> The purpose of an IEP meeting is to develop an IEP for the student. This requires more than a recitation of an IEP. Rather, it requires a conversation about the Student's needs, and what program and placement will satisfy those needs. Reading a mostly-English document in [Spanish], is not the dialogue contemplated by the IDEA. The Parent's ability to follow along in documents while participating in the required dialogue is essential.
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> . . . .
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> District witnesses agreed, and I explicitly find, that having the documents in an accessible form either during the meeting, or prior to the meetings when mandated, is critical to meaningful participation. The Parent was placed at an obvious disadvantage by effectively not having access to these documents.

Ex. B, CL at 11 (citations omitted); *see also* Ex. A, CL at 9-10.

The Hearing Officer also concluded, however, that he did not have the power to order a District-wide systemic change, which is the necessary and appropriate remedy. *See* Ex. C, Consolidated Pre-Hearing Order, *T.R. v. SDP*, ODR No. 15181-13-14 and *A.G. v. SDP*, ODR No. 15166-13-14. As a result, the Hearing Officer awarded limited compensatory education of one hour of time for each IEP process team meeting where he determined there were violations of the parents' meaningful participation due to translation issues, but did not order any corrective action, including requiring the District to timely and completely translate IEPs and other documents for Plaintiffs in the future. Ex. A, CL at 13 (awarding one hour); Ex. B, CL, at 13 (awarding three hours). Plaintiffs A.G. and T.R. appeal from the administrative proceedings by this Amended Complaint, which also constitutes a class action lawsuit on behalf of LEP parents and students with disabilities who are similarly situated.

18. Exhaustion of administrative remedies is not required for L.R, D.R, J.R., and R.H. and for other class members because, as the administrative proceedings of A.G. and T.R. reflect,

administrative remedies are inadequate to address Plaintiffs' allegations of systemic failures and to afford the system-wide relief requested.

19. The Americans with Disabilities Act as Amended and the Rehabilitation Act incorporates the remedies and procedures of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. *See* 29 U.S.C. § 794a; 42 U.S.C. § 12133. The EEOA and Title VI have no exhaustion requirement. *See* 20 U.S.C. § 1706; *Herring v. Chichester Sch. Dist.*, No. 06-5525, 2007 WL 3287400 (E.D. Pa. Nov. 6, 2007).

III. THE PARTIES

20. Plaintiff T.R. was a 17-year-old tenth grade student living within the boundaries of the District at the time the Complaint was filed. She is not fluent in either English or Spanish, speaking a mix of the two languages. Ex. A, FF ¶¶ 3, 4. T.R. has ADHD, a learning disability, and Mood Disorder, and she is currently a special education student.

21. Plaintiff Barbara Galarza ("Ms. Galarza") is T.R.'s mother. Her native language is Spanish and she is limited English proficient. Ex. A, FF ¶ 3. Ms. Galarza speaks and reads Spanish.

22. Plaintiff A.G. was an 18-year-old twelfth grade student living within the boundaries of the District at the time the Complaint was filed. A.G.'s native language is Spanish and he is limited English proficient within the meaning of the IDEA. *See* 34 C.F.R. § 300.27, incorporating by reference § 9101(25) of the Elementary and Secondary Education Act; Ex. B, FF ¶ 4. A.G. has a Specific Learning Disability and a Speech and Language Disorder, and he is currently a special education student. A.G. struggled to graduate from school and is in the process of seeking to enroll in an accelerated educational program in the District in order to obtain a diploma.

23. Plaintiff Margarita Peralta ("Ms. Peralta") is A.G.'s aunt and legal guardian. Her native language is Spanish and she is limited English proficient. Ex. B, FF ¶ 6. Ms. Peralta speaks and reads Spanish.

24. Plaintiff L.R. is a 13-year-old 7th grade student living within the boundaries of the District. L.R.'s native language is Spanish, and he was enrolled in ESOL classes for several years. L.R. has autism and ADHD, and he is currently a special education student placed by the District in a private school.

25. Plaintiff D.R. is a 14-year-old 9th grade student living within the boundaries of the District. D.R.'s native language is Spanish, and she is limited English proficient. D.R. has Oppositional Defiant Disorder ("ODD") and ADHD, and she is currently a special education student. D.R. is enrolled in ESOL classes.

26. Plaintiff J.R. is a 16-year-old 11th grade student living within the boundaries of the District. J.R.'s native language is Spanish, and he is limited English proficient. J.R. has ODD and ADHD, and he is currently a special education student. J.R. is enrolled in ESOL classes.

27. Plaintiff Madeline Perez ("Ms. Perez") is L.R., D.R, and J.R.'s mother. Her native language is Spanish, and she is limited English proficient. Ms. Perez and her children speak Spanish in her home, and Ms. Perez reads Spanish.

28. Plaintiff R.H. is a five-year-old Kindergarten student living within the boundaries of the District. R.H.'s native language is Mandarin, and he is limited English proficient within the meaning of the IDEA. R.H. has autism, for which he requires substantial language therapy and specially designed instruction to address substantial weaknesses in expressive and pragmatic language skills, social skills deficits, and significant behavioral issues that undermine learning.

R.H. is currently a special education student. R.H. is also intellectually gifted in Math, having tested in the 99th percentile for Math problem solving and 99.5th percentile in overall cognitive functioning.

29. Plaintiff Manqing Lin ("Ms. Lin") is R.H.'s mother. Her native language is Mandarin, and she is limited English proficient. Ms. Lin and R.H. speak Mandarin in their home, and Ms. Lin reads Mandarin.

30. T.R., A.G., L.R, D.R, J.R., and R.H. are referred to collectively as the "Student Plaintiffs"; Ms. Galarza, Ms. Peralta, Ms. Perez, and Ms. Lin are referred to collectively as the "Parent Plaintiffs."

31. Defendant, the School District of Philadelphia, is a school district within the Commonwealth of Pennsylvania organized pursuant to the Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §§ 1-101 et seq. The District's headquarters and principal place of business is located at 440 N. Broad Street, Philadelphia, Pennsylvania. The District receives federal funds pursuant to the IDEA and is bound by the IDEA. The District is the Local Educational Agency ("LEA") responsible for ensuring that Plaintiffs receive a free appropriate public education pursuant to the IDEA and Chapter 14. The District, as a public entity, receives federal funds and is subject to the Americans with Disabilities Act as Amended, Section 504 of the Rehabilitation Act, the Equal Education Opportunities Act, and Title VI of the Civil Rights Act of 1964. The District is also required to comply with state education law within 22 Chapter 14 and 22 Chapter 4 of the Pennsylvania Code.

IV. STATUTORY FRAMEWORK

IDEA Statutory Framework

32. The IDEA requires LEAs and other public agencies to provide a free appropriate public education ("FAPE") to all students with disabilities ages 3 to 21. By definition, a FAPE

requires adherence to state agency educational standards. The IDEA seeks to prepare students with disabilities for further education, employment, and independent living, and specifically delineates the rights of children with disabilities and their parents in the special education IEP process and based on IEPs developed through that process. *See* 20 U.S.C. §§ 1401, 1402, 1412(a)(1)(A), 1414(d), 1415; 34 C.F.R. Part 300. The IEP is the "modus operandi" of the IDEA that is to be developed jointly with the parent, the student, and the school staff. *Sch. Comm. of Burlington, Mass. v. Mass. Dep't of Educ.*, 471 U.S. 359, 368 (1985). The IEP is the "primary vehicle" for implementing the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988).

33. Student Plaintiffs and members of the Student Class qualify as "child[ren] with a disability" under the IDEA statute, and each therefore must be provided with an IEP that governs his or her education and afforded meaningful participation in the IEP process. *See* 20 U.S.C. §§ 1401(3), 1414(d), 1415.

34. Parent Plaintiffs and members of the Parent Class qualify as "parents" of a child with a disability as defined by 20 U.S.C. § 1401(23), which includes a natural, adoptive, foster parent, legal guardian or person acting as a parent in the absence of a parent with whom the child lives or individual assigned as a surrogate parent.

35. Each Student Plaintiff and member of the Student Class has or should be provided with an IEP team that is comprised of his or her parent and school staff who are to work collaboratively together to make educational decisions for the child.

36. The IDEA requires that educational decisions about a child's evaluation, educational program, and school placement are made through the IEP team process with the parent's meaningful involvement. 20 U.S.C. § 1414; *see also id.* § 1415; 34 C.F.R. § 300.327. The educational program is then detailed in the IEP document which is legally defined as "a

written statement for each child that is developed, reviewed and revised" through the mandated notice and meeting process. 20 U.S.C. § 1414(d)(1)(A)(i) (emphasis added). The District must give the parent *a copy* of the child's IEP at no cost to the parent. *Id.* §1414(d)(1)(B)(i); 34 C.F.R. § 300.322(f). If changes are made to the IEP, and upon request, the parent must be provided with a *revised copy* of the IEP with the amendments incorporated. 20 U.S.C. §1414(d)(3)(F).

37. The IDEA expressly includes certain procedural safeguards, requirements, and duties of the LEA to ensure meaningful parental participation, notification, and consent throughout the special education process, including protections for parents whose native language is not English. 20 U.S.C. §§ 1400, 1412(a), 1414, 1415; *see also* 34 C.F.R. Part 300.

38. The District must obtain informed written parental consent in order to support an initial evaluation of a student and initial provision of special education services. Parental consent is required to continue to provide special education services and re-evaluations. Parental consent means the parent has been "fully informed of all information relevant to the activity for which consent is sought, *in his or her native language*, or through other mode of communication" and that the parent "understands and agrees" in writing to the carrying out of the activity for which his or her consent is sought. *See* 20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.9 (emphasis added).

39. The District must ensure that the parents of a child with a disability are invited to each IEP team meeting to decide the program and placement of a child and that the parents are afforded the opportunity to participate, including: (1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; (2) providing information to parents; and (3) affording parents the opportunity to know the purpose of the meeting, who will

participate, and to identify other representatives who should be invited. 20 U.S.C. §§ 1400, 1412(a), 1414, 1415; *see also* 34 C.F.R. §§ 300.321, 300.327, 300.501(c).

40. The District must take "*whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter at the IEP team meeting for parents* with deafness or *whose native language is other than English*, and the District must give the parent *a copy* of the child's IEP. *See* 20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.322 (emphasis added).

41. The IDEA also requires that parents of a child with a disability receive prior written notice within a reasonable time before the public agency (1) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (2) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. *See* 20 U.S.C. § 1415(b)(3). In Pennsylvania, the form utilized to provide prior written notice is called a Notice of Recommended Educational Placement ("NOREP").

42. Such required prior written notice must be (1) written in language understandable to the general public; and (2) *provided in the native language of the parent or other mode of communication used by the parent*, unless it is clearly not feasible to do so. *See* 20 U.S.C. § 1415(b)(4); 34 C.F.R. § 300.503(c). If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure that (1) the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; (2) the parent understands the content of the notice; and (3) there is written evidence that the notice requirements have been met. *See* 34 C.F.R. § 300.503(c).

43. The IDEA also requires that a child suspected to have a disability must be evaluated "in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer." 20 U.S.C. § 1414(b)(3)(A); 34 C.F.R. § 300.304(c)(1)(ii). Federal regulations require an IEP team to take the language needs of the child into account. 34 C.F.R. § 300.324(a)(2)(ii).

Section 504 and ADA Statutory Framework

44. Section 504 of the Rehabilitation Act prohibits disability discrimination in federally funded programs. It mandates that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The District is a federal funds recipient within the meaning of 29 U.S.C. § 794(b)(2)(B). Student Plaintiffs and members of the Student Class are entitled to the protection of Section 504.

45. The Americans with Disabilities Act prohibits disability discrimination, including discrimination against those who are associated with individuals having or suspected of having disabilities. 42 U.S.C. § 12101 et seq. The District is subject to the ADA. Student Plaintiffs and members of the Student Class are entitled to the protection of the ADA.

EEOA Statutory Framework

46. The Equal Education Opportunities Act provides that "[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).

Title VI Statutory Framework

47. Title VI of the Civil Rights Act prohibits discrimination within any program or activity receiving federal financial assistance. It states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The District specifically receives federal funding for participating in the IDEA, a program designed to assist students with disabilities.

Pennsylvania State Code Statutory Framework

48. Title 22, Chapter 14 of the Pennsylvania Code governs all Pennsylvania school districts and is the Commonwealth's affirmation that it will fully implement the IDEA statute and accompanying regulations. Section 14.102 states that Pennsylvania will adopt federal regulations to satisfy "the statutory requirements under the IDEA." Sections 14.123 (governing evaluations) and 14.124 (governing re-evaluations) both require that "Copies of the evaluation report and re-evaluation report shall be disseminated to the parents at least 10 school days prior to the meeting of the IEP team, unless this requirement is waived by a parent in writing." Section 14.131(a) of Title 22 adopts 34 C.F.R. § 300.320(a), which defines an IEP as "a written statement for each child with a disability that is developed, reviewed, and revised in a meeting," and 34 C.F.R. § 300.27-300.30.

49. Title 22, Chapter 15 of the Pennsylvania Code governs all Pennsylvania school districts and requires them to not discriminate against students with disabilities. Chapter 15 operationalizes Section 504 and the ADA for school districts in Pennsylvania and sets forth specific protections and procedures to inform parents and students of their rights to be provided an education free from discrimination based on their disabilities.

50. Title 22, Chapter 4 of the Pennsylvania Code governs academic standards and curriculum requirements generally in Pennsylvania. Sections 4.26 and 4.52 of Title 22, respectively, express the state standards for English language instruction and assessments and are clarified by the Commonwealth in official guidance. *See* Basic Educ. Circular, "Educating Students with Limited English Proficiency (LEP) and English Language Learners (ELL)," Pa. Dep't of Educ. (July 1, 2001) (hereinafter "Basic Educ. Circular").

V. CLASS ACTION ALLEGATIONS

51. Plaintiffs bring this suit individually and as a Class Action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of all similarly situated individuals. The classes that Plaintiffs seek to represent are composed of:

> A. All parents as defined by 34 C.F.R. § 300.30(a) with limited English proficiency and whose children now or in the future are enrolled in the School District of Philadelphia and identified or eligible to be identified as children with a disability within the meaning of the IDEA and/or Section 504 and related state laws ("Parent Class"); and
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> B. All students who now or in the future are enrolled in the School District of Philadelphia in grades kindergarten through the age of legal entitlement who are identified or eligible to be identified as children with a disability within the meaning of the IDEA and/or Section 504 and related state laws, whether or not they are classified as English language learners and whose parents as defined by 34 C.F.R. § 300.30(a) are persons with limited English proficiency ("Student Class").

52. Each class is so numerous that joinder of all members is impracticable. During the 2013-2014 school year, the District reported that there were approximately 19,670 families who requested to receive documents in a language other than English; approximately 25,990 families who had a primary home language other than English; over 1,500 ELL students receiving special education services; and 1,887 students with IEPs whose documents stated that their home language was not English. The exact number of members of each class is not fully known to Plaintiffs at the current time, but the members of each class can be ascertained by the District.

53. There are questions of law and fact common to each class. Specifically, there are questions as to whether the District's systemic refusal to provide sufficient interpretation services and to completely and timely translate IEP process documents and regular education forms for parents who are LEP violates the IDEA, ADA, Section 504, the EEOA, Title VI, and provisions of Chapter 14, Chapter 15, and Chapter 4 of the Pennsylvania School Code. Another common question of law is whether the failure to provide an evaluation of a child with a disability in that child's native language violates the IDEA.

54. Plaintiffs' claims are typical of the claims of the classes as all members are similarly treated and affected by the District's conduct in violation of the law that is complained of herein.

55. Plaintiffs T.R., A.G., L.R., D.R., J. R., R.H., and their guardians seek common injunctive relief to have the District adopt and implement a new written special education plan and policy to (1) provide legally mandated translation and interpretation services to members of the Parent Class and the Student Class, including the timely and complete translation of IEP process documents; and (2) require evaluations to be conducted in a child's native language unless it is clearly not feasible to do so.

56. Plaintiffs will fairly and adequately protect the interests of the classes. Student Plaintiffs each qualify as a "child with a disability" under the IDEA, and each has or should be provided an IEP that governs his or her education. 20 U.S.C. §§ 1401(3), 1414(d), 1415. Parent Plaintiffs each qualify as "parents" of a child with a disability. *Id.* § 1401(23). All individually named students and parents are limited English proficient and have experienced a common harm and seek a common remedy. The District's failure to provide sufficient interpretation services

and to completely and timely translate IEP process documents extends to all foreign languages, including but not limited to Spanish.

57. Counsel for Plaintiffs are experienced in handling federal class action litigation and will adequately and zealously represent the interests of the classes. The Public Interest Law Center and Education Law Center have litigated numerous civil rights claims on behalf of persons and children with disabilities. Drinker Biddle & Reath LLP is likewise experienced in complex federal litigation and class action litigation, including representing plaintiffs in class actions asserting civil rights claims.

58. The District has acted or refused to act on grounds that apply generally to the classes, so that final injunctive relief or declaratory relief is appropriate respecting the classes as a whole. T.R. and A.G. filed administrative hearings in June 2014 challenging the legality of the District's policy regarding sufficiency of interpretation and the translation of IDEA-related documents. On May 26, 2015, the Hearing Officer found that the District violated the IDEA by failing to translate a variety of documents during the IEP process. Ex. A, CL at 10; Ex. B, CL at 11. The Hearing Officer also expressly found that his authority was limited, and that he could not issue systemic relief. Ex. C. Subsequently, the District has not changed its policy regarding the sufficiency of interpretation or the complete and timely translation of documents critical to the IEP process.

59. Upon information and belief, no similar litigation concerning the claims herein has already begun by any Class Member.

60. It would be futile to require these named Plaintiffs or other members of the Classes to exhaust or re-exhaust administrative remedies, pursuant to the IDEA, since the District has adopted a systemic policy of failing to provide sufficient interpretation services and

to timely and completely translate IEP process documents and regular education forms. As a result, Pennsylvania's special education administrative hearing system cannot, as expressly noted by the Hearing Officer, adequately remedy the systemic problem. Furthermore, upon information and belief, there are not enough special education hearing officers available to handle the number of due process hearing requests that would be necessary.

VI. FACTS

General Facts and District Practices and Policies.

61. As of November 2013, the District reported that there were approximately 25,990 families whose primary home language was not English and some 19,670 families of students in the District who had expressly requested documents in a language other than English.

62. As of November 2013, the District also reported that there were more than 1,500 ELL students receiving special education services across the District. At that time, the District acknowledged that there was a higher than anticipated number of students who had IEPs and whose parents were LEP and required translation and interpretation services. As of November 2013, there were 1,887 students with IEPs whose records indicated that their home language was not English, but it is not clear that this number captured all of the students with IEPs whose LEP ***parents*** required sufficient oral interpretation and translated IEP process documents.

63. The District's data reported that, during the 2012-2013 school year, only 487 special education documents of *any type* had been orally interpreted. The District's oral interpretation services are provided primarily by Bilingual Counseling Assistants ("BCAs"). The District employs only 54-55 BCAs to serve all schools across the District. BCAs, among other job duties, provide limited interpretation services but do not provide translation services. *See* Ex. B, FF ¶ 24.

64. Additional special education documents might have been translated by an outside contractor during the 2012-2013 school year, but upon information and belief, the outside contractor did not translate IEP process documents for all of the parents who are LEP. Further, by the 2013-2014 school year (and despite its knowledge that a large number of parents needed IEP process documents translated for them), the District no longer had arrangements with that outside contractor to assist with translation. While the District has a Translation and Interpretation Center which routinely translates documents used throughout the school district for students without disabilities, this office has never completely translated an IEP in its entirety. N.T. 422, 461. Moreover, parents cannot request translation services.

65. Despite these numbers and its knowledge of the problem, the District has adopted a policy in which it does not timely and completely translate IEPs, NOREPs, evaluations, re-evaluations, progress reports, assessments, and other IEP process documents outlining students' procedural and educational rights into the native languages spoken and/or read by LEP students and their parents.

66. Further, the District does not provide completely translated evaluations and re-evaluations to parents at least ten school days prior to IEP team meetings, in contravention of 22 Pa. Code Chapter 14, the state's special education law.

67. As evidenced by the experience of Parent Plaintiffs and Student Plaintiffs, the District has attempted to provide some oral interpretation during some IEP team meetings, but this incomplete, inconsistent effort has not and cannot facilitate the requisite meaningful parent participation. It also does not comport with state law requirements that parents have copies of the multiple-page evaluations and re-evaluations at least ten school days prior to IEP team meetings.

68. In the absence of receiving required information in a manner they can comprehend, uninformed parents enter meetings with no knowledge of evaluation reports, IEPs, and other documents and are unable to make informed decisions or provide legally viable consent. The District's policy has denied Parent Plaintiffs and members of the Parent Class their right to informed consent, notice, decision making regarding program and placement, and meaningful participation in the IEP process, including IEP team meetings.

69. The District also has thereby denied members of the Student Class who are LEP equal educational opportunities to participate fully and equally in the IEP process and in the District's educational programs, including programs to address the student's disabilities. The District's policy also has resulted in the inability of Student Plaintiffs and members of the Student Class to receive adequate IEP-related services and has significantly undermined and impaired the ability of members of the Student Class to receive a FAPE or other educational services available to other students.

70. The District deliberately and inexplicably chooses not to utilize TransAct, which is a translation program provided by the Commonwealth of Pennsylvania to school districts to enable them to translate documents.

71. Upon information and belief, the District conducts bilingual evaluations for some but not all LEP students in contravention of the IDEA.

Class Representatives' Experiences – T.R. and Barbara Galarza.

72. T.R. attended elementary school in the District, where she was instructed only in Spanish, and then attended a charter school from 5th to 8th grade. The charter school conducted a bilingual evaluation of T.R. in the spring of 2013, determined that T.R. qualified for special education services under the "Other Health Impairment" category based on an ADHD diagnosis,

and created an IEP for her. The IEP for T.R. included goals for improving her reading and math skills and to decrease truancy. In 2013, Ms. Galarza sought to transfer T.R. back to the District. Despite making this request in writing, there was a delay in arranging for T.R. to return to the District, due in part to the promise of translating IEP process documents. Throughout the fall of 2013, T.R. was deprived entirely of any educational programming at all, and the parties could not come to an agreement regarding her high school placement. Additionally, in the fall of 2013, T.R. became pregnant and needed services at home, which were delayed.

73. On February 26, 2014, the District's non-bilingual school psychologist and non-bilingual speech therapist evaluated T.R. in English. The District's Reevaluation Report and the psychologist's Psycho Educational Evaluation report were provided to Ms. Galarza in English only. The report determined that T.R. had an "Intellectual Disability," a substantial change from her prior designation of "Other Health Impairment." A follow-up meeting was held nearly a month later, on March 25, 2014, to discuss the Reevaluation Report and the Psycho Educational Evaluation. Despite a specific written request for the evaluation and all documents to be provided in Spanish, the District did not provide the Meeting Invitation, Psychoeducational Report, or Evaluation Report to Ms. Galarza in Spanish either before or during the meeting. Ms. Galarza was therefore unable to participate fully in the meeting, during which an oral interpreter informed her for the first time that T.R. had an intellectual disability. Additionally, at the meeting, Ms. Galarza requested home instruction for T.R. due to complications related to her pregnancy. The District provided a Physician's Referral Form for homebound instruction in English only, causing delay in the services.

74. Despite the District's awareness that Ms. Galarza only spoke and read Spanish, at a subsequent IEP meeting on June 12, 2014, the District provided Ms. Galarza with a 52-page

draft IEP, again in English only. The District proposed an Approved Private School for T.R., removing her from a regular high school. An interpreter was present at the meeting via telephone but did not orally interpret the entire 52-page IEP and other documents or completely translate the IEP. The District did not provide documents related to T.R,'s placement, such as the NOREP/PWN, APS Recommendation Form, or APS Directory in Spanish. Ms. Galarza was therefore unable to understand the IEP or the placement options provided to her and was unable to participate meaningfully in the meeting.

75. The District provided a NOREP to Ms. Galarza on June 17, 2014 in English only. Ms. Galarza rejected the NOREP and filed a Due Process Complaint.

76. On June 27, 2014, four months after the February 26, 2014 evaluation identifying her daughter as having an intellectual disability, the District finally provided Ms. Galarza a Spanish version of the District's February 2014 Evaluation Reports of her daughter.

77. Throughout the 2014-2015 school year, and despite repeated parental requests, the District did not completely translate IEP process documents in a timely manner, such that Ms. Galarza was unable to participate meaningfully in the IEP process. The District also provided insufficient oral interpretation services during the IEP team meetings; in particular, the interpreters did not fully and completely orally interpret each IEP process document.

78. As part of T.R.'s IEP, she was entitled to receive a "transition assessment" by the District. Transition services are designed to ensure a coordinated set of activities to help the student move on to postsecondary education, or employment. The student's and parent's involvement is an important part of this process. No information, however, about transition services, including a transition services packet or handout, was provided to T.R. or Ms. Galarza in Spanish, and T.R.'s transition assessment was completed by an English speaking teacher.

79. Ms. Galarza has been denied sufficient oral interpretation services to enable her to speak with school personnel about various everyday educational problems, such as transportation and math class issues that T.R. has experienced. Ms. Galarza was denied translation of report cards and ESOL progress reports.

Class Representatives' Experiences – A.G. and Margarita Peralta.

80. A.G. was born in the Dominican Republic on September 24, 1996. He was enrolled in ninth grade in the Dominican Republic when his mother passed away in August 2010. He came to the United States in 2011 and has lived in Philadelphia continuously since the fall of 2012.

81. The District refused to place A.G. into eleventh or twelfth grade until May 2015. Instead, A.G. was assigned to ninth grade in 2012-2013 at one high school, and again assigned to ninth at another high school for the 2013-2014 school year. Although A.G. was enrolled in English language classes in the fall of 2012, he was never formally tested for English language placement until the following year, in November of 2013. In addition, progress testing for his ESOL classes was done incorrectly.

82. A.G.'s Parent (first his uncle, and currently Ms. Peralta, his aunt and legal guardian), notified the District in October 2012 and in September 2013, by way of the District's Home Language Questionnaire, that the family is Spanish speaking and requested documents be provided in their native language of Spanish. In March 2014, Ms. Peralta provided an order from a Philadelphia Family Court judge and a letter to the District requesting that A.G. be evaluated for special education services and again explicitly informing the District that the family's native language was Spanish.

83. Despite the family's notifications to the District about their native language and need for language assistance, and despite A.G.'s participation in ESOL classes, the District failed to provide sufficient oral interpretation and timely and complete translation of IEP process documents. For example, in response to the request for special education evaluation, Ms. Peralta met with a non-Spanish speaking teacher, ESOL grade reports were provided only in English, and communications about evaluating A.G. for special education were conducted primarily in English.

84. On June 23, 2014, Ms. Peralta filed a Due Process Complaint on behalf of A.G., resulting in the decision at Ex. B.

85. Even after the filing of the Due Process Complaint, the District continued to issue documents to Ms. Peralta in mostly English or partially in English. Throughout the 2014-2015 school year, Ms. Peralta attended IEP meetings for A.G. in an effort to establish a program for him. Despite both oral and written requests, the District repeatedly refused to provide complete and timely translations of IEP process documents and regular education forms and refused to provide sufficient oral interpretation services. On September 3, 2014, the District sent Ms. Peralta a letter, in English, stating that A.G. would be attending another high school "due to ESOL services [A.G.] require[d]." During the 2014-2015 school year, A.G. underwent intensive surgery on his leg, necessitating his need for homebound instruction provided by the District. Information about homebound instruction was initially not provided completely in Spanish, causing a substantial delay in the provision of services. In addition, Ms. Peralta was not provided a Spanish version of A.G.'s evaluation report prior to the October 16, 2014 IEP team meeting, and at the meeting, she received a draft IEP in English, with only the generic headings of the paragraphs translated into Spanish. On November 21, 2014, the District created an

updated IEP and NOREP, which were again only partially translated. Despite a prior written request for a completely translated IEP, on December 2, 2104, the District once again provided an IEP with headings in Spanish and the majority of the IEP in English. A District employee provided on-the-spot, oral interpretation (also referred to as "sight translation") during the December 2, 2014 IEP meeting. Because the "sight translation" process took so long, the District's employee had only "sight translated" three of the forty-four pages of the IEP by the end of the meeting. The pages that were sight translated related to the Medical Assistance Program Billing Notice, a standard form, rather than the substantive content of the IEP addressing A.G.'s special education needs and proposals to meet those needs. At the end of the meeting, Ms. Peralta still did not have a completely translated IEP or a translated copy of the Medical Assistance Program Billing Notice to read at the meeting or take home to review.

86. As part of A.G.'s IEP, he was entitled to receive a "transition assessment" by the District, which was completed in January 2015. No information, however, about transition services, including a transition services packet or handout, was provided to A.G. or Ms. Peralta in Spanish. A.G. stopped attending school in 2016, but he is considering a return to school to earn his high school diploma. At the time A.G. stopped attending school, the District still refused to provide him with a completely translated IEP and to ensure such translations would be provided in the future.

Class Representatives' Experiences – L.R., D.R., J.R., and Madeline Perez

87. L.R., D.R. and J.R. attended school in Puerto Rico until they moved to Philadelphia in 2012. All three received special education services in Puerto Rico and had IEPs from Puerto Rico when they enrolled in the District.

88. L.R. has ADHD. In 2012, L.R. was evaluated at the Center for Autism and additionally diagnosed with autism. The District was notified of this evaluation and diagnosis,

which were provided to Ms. Perez in Spanish. The District then undertook to create a separate Evaluation Report for L.R. in 2012, but it did not translate its own evaluation into Spanish for Ms. Perez.

89. L.R. was enrolled in two elementary schools and one middle school in the District between 2012 and 2016, and the District has given him a private school placement. The District has refused to translate L.R.'s IEP process documents into Spanish for Ms. Perez, despite her requests that the District do so. After receiving some IEP documents with section titles translated into Spanish, she asked that the District translate the entire documents but was told that the District could not provide any further translation.

90. Because Ms. Perez is limited English proficient and can only read simple words or phrases in English, she could not understand the evaluation of L.R. or the IEP process documents provided to her. As a result, she has not been able to understand what services the District was providing to L.R., and she has not been able to participate meaningfully in the IEP process for L.R. Furthermore, the District had omitted L.R.'s 2012 diagnosis of autism from his IEPs. Because Ms. Perez did not understand the untranslated IEP documents, she was unaware of this omission until 2016.

91. Like L.R., D.R. and J.R. also attended two elementary schools in the District. D.R. and J.R. are now enrolled in two different District high schools. D.R. and J.R. have both been diagnosed with ODD and ADHD.

92. Ms. Perez has attended IEP meetings for D.R. and J.R. As with L.R.'s IEP documents, the District did not translate D.R.'s and J.R.'s IEP process documents into Spanish for Ms. Perez, even though she requested that the District do so.

93. Ms. Perez's most recent IEP meeting for J.R. occurred in January 2017. At this meeting, she reiterated her request for a fully translated IEP for J.R. The District told her that it could only provide translated caption headings.

94. Ms. Perez's most recent IEP meeting for D.R. occurred on March 6, 2017. At this meeting, Ms. Perez understood the District to have agreed to provide a translated copy of D.R.'s IEP by March 15, 2017. She still has not received a translated copy of D.R.'s IEP.

95. Absent translations of the IEP process documents into Spanish, Ms. Perez has difficulty understanding what services D.R. and J.R. are receiving and is unable to participate meaningfully in the IEP planning process for her children.

96. The District also provided insufficient oral interpretation services to Ms. Perez during the IEP team meetings. At some meetings, the District did not provide any interpreter. At other meetings, the interpreters did not fully and completely interpret the IEP process documents orally for Ms. Perez. As a result, Ms. Perez could not understand what was included and what services her child was being provided, and she was unable to participate meaningfully in the IEP planning process for her children.

Class Representatives' Experiences – R.H. and Manqing Lin

97. R.H. is a Kindergarten student at an elementary school in the District.

98. In 2014, R.H. underwent several evaluations and was ultimately diagnosed with Autism Spectrum Disorder. As an infant and toddler, R.H. received early intervention services that included speech, special instruction, and occupational therapy, and independently received physical therapy services for poor muscle tone.

99. In a subsequent 2015 evaluation, R.H. was also found to be Mentally Gifted according to the Kaufman Assessment Battery for Children, with a non-verbal standard score

placing R.H. in the 99.9% superior range for aptitude in math and at the age equivalent of a 9-year-old.

100. Beginning with R.H.'s transition to Kindergarten from early intervention services, the District has failed to provide Ms. Lin with translations of forms, evaluations, and IEP documents into Mandarin or to provide sufficient oral interpretation services. Although Ms. Lin is able to understand and speak some English words, she has limited English proficiency and speaks only Mandarin at home with R.H.'s father and their children. R.H.'s father understands very little English and does not read or write English.

101. At the first meeting Ms. Lin attended in February 2016 regarding R.H.'s transition to Kindergarten, the District gave Ms. Lin forms, including a "Permission to Evaluate" ("PTE") form, in English only and provided no translation at all and no oral interpretation prior to the meeting. Ms. Lin had to rely on a friend and an interpreter provided by R.H.'s early intervention provider for oral interpretation at the meeting, whose assistance was nevertheless insufficient to assist her in understanding how to answer the questions in the PTE form or whether she had any choice about whether to permit the proposed evaluation of her son. She later signed the PTE form without understanding that this gave consent for the District to conduct a limited evaluation of R.H.

102. Furthermore, due to the lack of translation and interpretation services, Ms. Lin had to request assistance from R.H.'s preschool teacher in completing the required forms she received. Because she could not understand them fully without translation to Mandarin, she only learned later that the teacher had omitted information that was needed to develop appropriate programming for R.H.

103. After the District conducted its evaluation of R.H., it sent Ms. Lin an Evaluation Report in English and only later in Mandarin. The report concluded only that R.H. qualified for speech services, and it omitted his needs for occupational therapy and physical therapy, a functional behavior assessment or a behavior plan, and gifted programming in math.

104. As a result of a mediation regarding the District's evaluation of R.H. and the need for an Independent Educational Evaluation ("IEE"), the District agreed to provide translated copies of the IEE and other documents, which allowed Ms. Lin and her husband to understand R.H.'s diagnosis and complex academic and behavioral needs. The District, however, has refused to provide translations of anything other than the "final" Re-Evaluation Report and "final" IEP, and continues to refuse to provide translated versions of its proposed Re-Evaluation and IEP to Ms. Lin.

105. On or about March 3, 2017, the District provided a proposed IEP that is to be discussed at the next IEP meeting for R.H. The District translated only the section titles and a few sentences regarding R.H.'s placement into Mandarin. When Ms. Lin requested that the proposed IEP be fully translated, the District claimed that it had only agreed to translate the "final" IEP, and the section titles were the most the District would translate.

106. In the absence of a fully translated proposed Re-Evaluation Report and proposed IEP, Ms. Lin is unable to participate meaningfully in IEP meetings for R.H. and to ensure that the District addresses his special education needs.

VII. LEGAL CLAIMS

Count One: Violation of the Individuals with Disabilities Education Act:
Failure to Provide Meaningful Parental and Student Participation
(On Behalf of the Parent Class and Student Class)

107. Plaintiffs incorporate the preceding paragraphs of this Complaint as if set forth in full herein.

108. Parent Plaintiffs and members of the Parent Class have not received legally-mandated written information regarding their children's education in their native language and at times, if written information was received in their native language, it was not provided at the same time the rest of the IEP team received the information and in a manner to ensure meaningful parent and student participation in the IEP process. These documents include IEP-process documents and regular education forms as defined herein.

109. Student Plaintiffs and members of the Student Class were injured by the inability of their LEP parents to participate meaningfully in the IEP process. In addition, Student Plaintiffs and members of the Student Class who are LEP have been deprived of legally-mandated written information, including evaluations, re-evaluations, transition services information, assessments relating to transition planning and services, and their IEPs, prohibiting them from participating in the IEP process, including engaging in transition planning.

110. The practice of providing sporadic and incomplete oral interpretation of IEP process documents during an IEP meeting is not an adequate substitute for timely receipt of completely translated, IEP process documents. It is also contrary to 22 Pa. Code 4.26 and state educational standard interpretations. *See* Basic Educ. Circular.

111. The District has denied Parent Plaintiffs and members of the Parent Class the right to participate meaningfully in their children's IEP process.

112. The District's refusal to translate IEPs and other IEP process documents has resulted in a lack of special education services for Student Plaintiffs and members of the Student Class. As a result of the inability of Parent Plaintiffs and members of the Parent Class to participate adequately in the formation and execution of their IEP plans, Student Plaintiffs and members of the Student Class have been denied a free appropriate public education guaranteed to

them under the IDEA. Many students have been denied special education services designed to enable them to make progress, such as specially designed instruction, transition planning services, related services, and proper school placement to meet the students' academic needs.

113. Plaintiffs T.R. and A.G. secured the services of the Public Interest Law Center of Philadelphia and Drinker Biddle & Reath LLP to represent them in the due process hearings and are entitled to their fees at same as prevailing parties, in part. 20 U.S.C. § 1415(c). The Law Center incurred approximately $120,117.00 in representing T.R. and $78,724.00 in representing A.G. in the administrative due process hearings. Drinker Biddle & Reath incurred approximately $264,617.50 in representing T.R. and A.G. in the due process hearings. As Plaintiffs were prevailing parties, in part, the District is responsible for these fees, which can be resolved after the merits of this matter.

114. Wherefore, Parent Plaintiffs, members of the Parent Class, Student Plaintiffs, and members of the Student Class demand judgment in their favor and against the District for declaratory and injunctive relief, as set forth herein.

Count Two: Violation of the Individuals with Disabilities Education Act:
Failure to Conduct Evaluations of Students in Native Language
(On Behalf of the Parent Class and Student Class Members Who Are LEP)

115. Plaintiffs incorporate the preceding paragraphs of this Complaint as if set forth in full herein.

116. Student Plaintiffs and some members of the Student Class who are LEP were never evaluated or were not timely evaluated for special education services in their native language. The District's failure to conduct timely evaluations for every LEP child in his or her native language to determine eligibility for special education services deprived Student Plaintiffs and members of the Student Class who are LEP of their rights under the IDEA to receive a non-discriminatory, accurate evaluation to inform the IEP process. As a result, Student Plaintiffs and

members of the Student Class who are LEP were inappropriately assessed and failed to receive needed special education services or said services were wrongfully delayed.

117. The District's failure to conduct evaluations in a student's native language and in the form most likely to yield accurate information violated the IDEA. *See* 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. § 300.304(c)(1)(ii).

118. Wherefore, Student Plaintiffs and members of the Student Class who are LEP demand judgment in their favor and against the District for declaratory and injunctive relief, as set forth herein.

Count Three: Violation of the Section 504 of the Rehabilitation Act, Americans with Disabilities Act as Amended, and 22 Pa. Code Chapter 15
(On Behalf of the Student Class)

119. Plaintiffs incorporate the preceding paragraphs of this Complaint as if set forth in full herein.

120. Student Plaintiffs and members of the Student Class are students with disabilities who were otherwise qualified to participate in school activities and receive equal benefit from them as non-disabled students pursuant to the protection of Section 504.

121. By failing to translate regular education forms for the members of the Parent Class, including homebound forms and information about those services, the District has substantially undermined the ability of members of the Student Class to receive equal access to education services on the same basis as students without disabilities.

122. Wherefore, Student Plaintiffs and members of the Student Class demand judgment in their favor and against the District for declaratory and injunctive relief, as set forth herein.

Count Four: Violation of the Equal Education Opportunity Act
(On Behalf of the Student Class)

123. Plaintiffs incorporate the preceding paragraphs of this Complaint as if set forth in full herein.

124. Federal law provides that: "No 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).

125. National origin discrimination has been defined to include but is not limited to, the denial of equal opportunities due to an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group, including limited English proficiency. The District has denied equal education opportunity to Student Plaintiffs and members of the Student Class on account of their race and/or national origin or that of their parents by failing to take appropriate action to overcome language barriers of these students and/or their parents. This failure has impeded equal participation by Student Plaintiffs and the members of the Student Class in the District's special education and other instructional programs.

126. Wherefore, Student Plaintiffs and members of the Student Class demand judgment in their favor and against the District for declaratory and injunctive relief, as set forth herein.

Count Five: Violation of Title VI of the Civil Rights Act of 1964
(On Behalf of the Parent Class and Student Class Members Who Are LEP)

127. Plaintiffs incorporate the preceding paragraphs of this Complaint as if set forth in full herein.

128. The District has been aware of the widespread need of LEP parents and LEP students to obtain timely and complete translations of IEP process documents in order to participate meaningfully in the IEP process and to ensure access to appropriate education services for their children. Despite this knowledge, the District has acted intentionally, repeatedly, and with deliberate indifference by refusing to timely and completely translate IEP process documents and by refusing to provide sufficient oral interpretation services, in order to ensure meaningful participation by Parent Plaintiffs and members of the Parent Class and in order to ensure access to appropriate educational services for their children.

129. The District has been and continues to be aware that LEP parents and LEP students need timely and complete translations of regular education forms that pertain to their children's educational placement and needs, such as home instruction forms, ESOL placement letters, and progress reports. Instead, the District has adopted a policy and procedures which are ineffective to provide adequate support and which it knows does not fulfill its obligations or fails to meet the needs of Parent Plaintiffs, members of the Parent Class, Student Plaintiffs, and members of the Student Class who are LEP.

130. The failure to assist Parent Plaintiffs, members of the Parent Class, Student Plaintiffs, and members of the Student Class who are LEP to participate effectively in or benefit from federally assisted programs and activities violate the prohibition under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title VI regulations prohibiting discrimination against LEP persons on the basis of race and national origin. Recipients must take appropriate action to ensure that such persons have meaningful access to the programs, services, and information those recipients provide. *See, e.g.*, 34 C.F.R. Part 100.

131. Regulations promulgated pursuant to Section 602 of Title VI forbid the District from utilizing methods of administration which subject individuals to discrimination because of race and/or national origin or that have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. These regulations provide in part that no person shall, on the ground of race or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program; be denied a benefit which is different, or is provided in a different manner, from that provided to others under the program; or restrict an individual from receiving any service, financial aid, or other benefit under the program. 34 C.F.R. § 100.3.

132. The District failed in its obligation to avoid discrimination against LEP persons on the grounds of race and/or national origin by failing to take reasonable steps to ensure that such persons have meaningful access to the programs, services, and information the District provides to others.

133. By refusing to completely and timely translate IEP process documents necessary for Parent Plaintiffs, members of the Parent Class, Student Plaintiffs, and members of the Student Class who are LEP to participate meaningfully in the District's IEP process on the same basis as their counterparts who speak and read English, refusing to provide sufficient oral interpretation, and refusing to provide them with the necessary regular education forms in their native language, the District has intentionally discriminated against Parent Plaintiffs, members of the Parent Class, Student Plaintiffs, and members of the Student Class who are LEP on account of their race and/or national origin. Such actions are also contrary to 22 Pa. Code § 4.26 and state educational standard interpretations. *See* Basic Educ. Circular.

134. Wherefore, Parent Plaintiffs, members of the Parent Class, Student Plaintiffs, and members of the Student Class who are LEP demand judgment in their favor and against the District for declaratory and injunctive relief, as set forth herein.

Count Six: Violation of 22 Pennsylvania Code Chapter 14
(On Behalf of the Student Class and Parent Class)

135. Plaintiffs incorporate the preceding paragraphs of this Complaint as if set forth in full herein.

136. By failing to provide complete and timely translated evaluations and re-evaluations ten days prior to IEP team meetings, or to make any attempt to interpret evaluations at any time prior to the IEP team meetings, the District has violated 22 Pa. Code §§ 14.123 and 14.124.

137. By its failure to provide sufficient oral interpretation and complete and timely translated IEP process documents, the District has violated and is continuing to violate the IDEA and Chapter 14, especially the state's educational standards for special education. 20 U.S.C. § 1401(9)(A-D); 22 Pa. Code Chapter 14; 22 Pa. Code § 4.26.

138. Wherefore, Parent Plaintiffs, members of the Parent Class, Student Plaintiffs, and members of the Student Class demand judgment in their favor and against the District for declaratory and injunctive relief, as set forth herein.

Count Seven: Violation of 22 Pennsylvania Code Chapter 15
(On Behalf of the Student Class and Parent Class)

139. Plaintiffs incorporate the preceding paragraphs of this Complaint as if set forth in full herein.

140. By failing to provide complete and timely translated regular education forms as defined herein, including those for home instruction, the District has violated 22 Pa Code Chapter 15.

141. Wherefore, Parent Plaintiffs, members of the Parent Class, Student Plaintiffs, and members of the Student Class demand judgment in their favor and against the District for declaratory and injunctive relief, as set forth herein.

VIII. RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Assert jurisdiction over this matter and certify the two classes as defined herein.
2. Order that the District adopt and implement a new written special education plan and District policy to provide legally mandated translation and sufficient interpretation services to members of the Parent Class and the Student Class. This policy shall delineate all documents to be completely and timely translated and the protocol for requesting and obtaining translations and interpretation services.
3. Order that the District develop a method and written protocol to proactively identify all LEP Parents who may need translation and interpretation services.
4. Order that the District timely translate and deliver all IEP process documents to all members of the Parent Class and the Student Class as needed in the appropriate native language in advance of IEP meetings to ensure meaningful participation.
5. Order that the District notify all parents at the time of enrollment of their right to receive translated IEP process documents and interpretation services if their child is entitled to services as a student with a disability. This notice shall be provided in the parent's native language if the parent notifies the District that he or she does not read English but does read another language. Alternatively, if the parent notifies the District that he or she does not read or speak English and speaks a language that is not a written language, this notice and future communications

shall be provided through sufficient oral interpretation, recorded for the parent, and a copy of the recording provided to the parent.

6. Order that, at any time a student becomes entitled to an evaluation for special education services pursuant to IDEA, or becomes entitled to a 504 Plan, the District shall provide notice to the LEP parent and student that they are members of, respectively, the Parent Class and the Student Class, and are entitled to certain documents in his or her native language pursuant to court order.

7. Order that the District shall conduct evaluations to determine eligibility for special education services in the native language of the LEP student to the extent required by the IDEA and shall revise its Special Education Plan and policies accordingly.

8. Appoint Plaintiffs' counsel to monitor the Order identified above.

9. After adjudication of the merits, award Plaintiffs their costs and attorneys' fees for the underlying required due process administrative hearings.

10. Award to Plaintiffs their costs and attorney fees for the bringing of this action.

11. Retain jurisdiction over this matter until such time as the District demonstrates full compliance.

12. Grant such other and further relief as may be just and proper.

Dated: March 27, 2017

Respectfully submitted,

s/ Paul H. Saint-Antoine

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EXHIBIT A

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: T.R.

Date of Birth: redacted

Dates of Hearing: 8/4/2014, 9/22/2014, 9/24/2014, 11/3/2014, 11/7/2014, 11/10/2014, 11/12/2014, 1/21/2015, 1/22/2015, 1/23/2015, 1/26/2015, 1/27/2015, 1/28/2015, 1/30/2015, 2/23/2015, 2/27/2015, 3/17/2015, 3/23/2015, 3/25/2015, 3/26/2015, 3/31/2015, 4/6/2015 and 4/7/2015

OPEN HEARING

ODR File No. 15181-13-14

Parties to the Hearing:
Parents
Parent[s]

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Date Record Closed: May 4, 2015
Date of Decision: May 26, 2015
Hearing Officer: Brian Ford, Esquire

Introduction

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4. It is the companion to the case at ODR No. 15166-1314KE. Both hearings were heard together.

The Parent, who speaks [a language other than English], alleges that the District violated the Parent's right to meaningfully participate in meetings concerning the provision of FAPE to the Student. The Parent also alleges that the District failed to implement an IEP that carried over from the Student's prior charter school enrollment, failed to properly evaluate the Student, incorrectly identified the Student as a student with an intellectual disability, and failed to offer an appropriate program and placement for the Student.

Issues

1. Did the District seriously infringe upon the Parent's meaningful parental participation in the IEP Process, by its failure to provide her with vital IEP documents and other school documents in [her native language] and in a timely manner?

2. Did the District deny the Student a free and appropriate public education during the 2013-14 and/or 2014-15 school year by its overall by failing to implement the Student's IEP?

3. Did the District err in identifying the Student as having an Intellectual Disability and propose an inappropriate and unspecified out of district placement in June, 2014?

4. What placement is currently appropriate for the Student?

Findings of Fact

The very large record of this hearing and its companion case was carefully reviewed in its entirety. In special education due process hearings, there is a world of difference between what is technically admissible and what is truly necessary to resolve the issues presented. I have limited my findings of fact to what is necessary to resolve the parties' dispute.

1. "Interpretation" describes the act of restating spoken language in a different language. Interpretation can either be simultaneous (in which the interpreter restates the communication as it is said) or consecutive (in which the interpreter restates the communication just after it is said).

2. "Translation" describes the act of re-writing a document in another language.

3. It is not disputed that the Parent's native language is [not English], or that the Parent has limited English proficiency.

4. Based on *the totality of the record*, I find that the Student[1] is best able to communicate using a combination of [mother's native language] and English, and switches between the two depending on the circumstances of the communication and the vocabulary involved.

5. Based on *the totality of the record*, I find that the Student's ability to communicate is impaired if the Student is required to communicate in either [mother's native language] or English exclusively.

6. The Student attended a charter school (Charter) within the District during the 2010-11 and 2012-13 school years.

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1 Typically, identifying information is not included in due process decisions. For reasons that will be apparent, the Student's gender cannot be omitted from this decision without yielding vague or overly-wrought findings.

7. The Student enrolled in the District for the 2013-14 school year. The District became the Student's Local Educational Agency (LEA) at that time, and has remained the Student's LEA since.

8. The Student was evaluated for special education eligibility shortly before leaving the Charter. An evaluation report (ER) was drafted on May 23, 2013. The ER concluded that the Student was a "child with a disability" as defined by the IDEA. S-9C

9. The ER concluded that the Student fell under the disability category of Other Health Impairment (OHI). S-9C.

10. The Charter drafted an IEP for the Student dated June 27, 2013. S-9E.

11. The Charter's IEP called for:

    a. 2000 minutes (33 hours) a month of counseling support as a related service.

    b. 60 minutes of skills training (2 sessions at 30 minutes each) per week.

    c. Counseling in the counselor's office.

    d. Implementation of a 5 point rating scale to address behaviors.

    e. Implementation of a truancy elimination plan.

12. The Charter's IEP contemplated the immediate development and implementation of a positive behavior support plan (PBSP). S-9E.

13. The Student did not receive special education from the Charter but rather transferred to the District.

14. On July 30, 2013, parent, via her attorney, placed the District on notice that the Student would enroll for the coming 2013-14 school year, and requested special education programming. P-5.

15. In response to parent's July 30, 2013 letter, the District convened a meeting. Counsel for both parties attended.

16. During the August 20, 2014 meeting, the District offered programming at [a District] High School ("High School"), the Student's neighborhood school. More specifically, the District offered programming at High School if the Student enrolled. S-3, S-7,

17. Language Line is a service available to District personnel that provides interpreter services by phone. The District used Language Line during the August 20, 2014 meeting. NT 3086-3087.

18. The Parent rejected placement at High School prior to the Student's enrollment, and requested other placement options. S-7.

19. On September 4, and 12, and October 3, 2013, the District proposed five different alternative placements. Four of those five placements were located on the same campus (one of the District's high schools). These placements were proposed prior to the Student's enrollment. NT 3061-3062, 3090-3091, S-7.

20. The Parent did not register the student immediately after receiving the District's alternative placement proposals. *Id.*

21. The District translated the Charter's ER and IEP into [mother's native language] and provided the translation to the Parent on September 23, 2013. S-5, S-7, S-9, S-21.

22. On September 25, 2013, the District sent Parent's attorney a Notice of Recommended Educational Placement (NOREP) dated September 24, 2013 in English and [mother's native language]. The NOREP was an offer of special education. Specifically, the District offered supplemental learning support with services in accordance with the Charter's IEP. NT 1096, 1098-1099, 3090-3091, 3090-3091, 3108, S-6, S-21.

23. On October 2, 2013, via counsel, the District invited the Parent to participate at an IEP meeting. The same invitation was sent to the Parent on October 3, 2013. The meeting was scheduled for October 9, 2013 at High School. The meeting convened as scheduled with counsel for both parties in attendance. S-9A through S-9J, S-10, S-13.

24. The District employs Bilingual Counseling Assistants (BCA) who, among other job duties, provide interpretation services. NT 14014-1405.

25. A [mother's native language-speaking] BCA attended the October 9, 2013 IEP meeting.

26. During the October 9, 2013 IEP meeting, all of the placements previously offered by the District were still on the table. After the meeting, on October 15 and 16, the Parent and Student toured two of those placements. The Parent and Student were accompanied by a [mother's native language-speaking] BCA on both tours. NT 1415, 1419-1421 3094-3095, S-10, S-13.

27. Another meeting convened, with counsel for both parties in attendance, on October 16, 2013. During that meeting, the District proposed [another] High School (Second High School) a sixth potential placement (or a seventh potential placement including High School). S-13.

28. On October 24, 2013, the District sent a Permission to Re-Evaluate (PTRE), seeking the Parent's consent for the District to conduct a multidisciplinary evaluation of the Student. The District also sent a NOREP proposing placement at Second High School. These forms were sent in both English and [mother's native language] to both the Parent and the Parent's attorney. S-12, S-13, S-14, P-14.

29. On November 1, 2013, the District sent additional paperwork (an EH-36 form) to the Parent to complete as part of the placement into Second High School. The Parent completed and returned the form on November 8, 2013. *Id.*

30. On December 3, 2013, the District sent an invitation to participate in an IEP team meeting, along with a revised NOREP. The meeting was scheduled for December 19, 2013. The NOREP proposed implementation of the Charter's IEP at Second High School (until the District could complete its own evaluation and offer its own IEP). The revised NOREP also provided yellow bus service. S-21.

31. The Parent enrolled the Student on December 3, 2013 and the Student started attending school on December 4, 2013. S-18, S-21, S-21, S-50, S-61. This enrollment was accomplished with the help of Second High School's Special Education Liaison (SEL), who speaks [mother's native language], and a BCA.

32. On December 4, 2013, the Parent also approved the NOREP of December 3, 2013. *Id.*

33. An IEP meeting convened on December 19, 2013 as scheduled. A [mother's native language-speaking] BCA was in attendance. The Parent approved the District's PTRE the same day.

34. The Student [had a physical condition] from December of 2013 through March of 2014. [Redacted.] NT *passim*.

35. The District evaluated the Student on February 26, March 18 and March 25, 2014. Based on the evaluation, the District concluded that the Student is a student with an Intellectual Disability (ID), not OHI, an emotional disturbance (ED), or a speech and language impairment. S-24, S-25, S-29.

36. Prior to conducting the reevaluation, the District concluded that a bilingual reevaluation was not necessary, and so the evaluation was conducted in English by English speaking evaluators. NT *passim*.

37. On March 25, 2014, the District convened an IEP meeting with a [mother's native language-speaking] BCA in attendance. The District's reevaluation, the ID diagnosis, and the Student's need for [redacted reason for] homebound instruction were discussed at the meeting. NT 679, 688-689, 760-761, 1142-1148, 1228-1229, 2775, 2778-2781, 3069-3070, 3073-3075, 3122, S-25, S-26, S-29.

38. The District translated its evaluation report into [mother's native language], and provided a [mother's native language], copy to the Parent via counsel.

39. The District offered [redacted] homebound instruction to the Student in April of 2014. S-28, S-29, S-30, S-32.

40. The Student returned to Second High School on May 5, 2014.

41. After the Student's return in May of 2014, the parties agree that the Student was absent from school several times. The parties disagree about whether those absences should have been marked as excused or unexcused.

42. After the Student's return in May of 2014, the Student frequently came to class late or skipped class. The parties disagree about what specifically constitutes a "tardy" or "late" or "cut" etc. I find that the Student frequently did not attend the entirety of class periods, regardless of the reason (or the legitimacy of the reason).

43. On June 6, 2014, the District issued English and [mother's native language], invitations to participate in an IEP meeting on June 12, 2014. S-33. The meeting convened as scheduled with a [mother's native language-speaking] BCA in attendance.

44. During the June 12, 2014 IEP meeting, the District provided a draft IEP, offered extended school year (ESY) services for the summer of 2014, discussed the Student's current behavioral needs and strategies for the Student to attend class more frequently, and discussed various placement options for the 2014-15 school year.

45. One placement option discussed during the June 12, 2014 IEP meeting was placement at an approved private school (APS). APSs are private schools in Pennsylvania that have been approved to educate students with disabilities. The record is ambiguous as to whether specific APSs were discussed during the meeting, or whether the general idea of an APS placement was discussed.

46. The District finalized an IEP and drafted a NOREP on June 17, 2014. Both documents were provided to the Parent's counsel and were later translated and provided to the Parent. The NOREP proposed full time learning support at an unspecified APS. S-35, S-39. Although the APS was not specified, the District communicated (via counsel) that four specific schools were under consideration, pending the Student's acceptance.

47. On June 25, 2014, the Parent rejected the NOREP and requested this due process hearing.

48. After this hearing was requested, the Parent obtained an independent educational evaluation (IEE) at the District's expense. The IEE was conducted by a bilingual evaluator. The bilingual evaluator deviated from standard testing protocols in an effort to obtain accurate information about the Student's abilities. P-34, P-42.

Legal Principles

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary

responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit,* 2003 LEXIS 21639 at *28 (2003); *See also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

In this case, I find that all witnesses testified to the best of their ability, relaying facts as they recalled them. To whatever extent one witness's testimony is inconsistent with another's, they legitimately remembered events differently.

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

> Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time

it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial

educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorsees this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endured by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that the would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount of what type of compensatory education is needed to put the Student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> "... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F., Civ. No. 04-1395, 2006 WL 840334, *9*

(W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Meaningful Parental Participation

The IDEA requires schools to use procedures that afford parents an "opportunity ... to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child..." 20 U.S.C. § 1415(b)(1). Similarly, parents must receive prior written notice whenever a school district proposes to the educational placement of a child. 20 U.S.C. § 1415(b)(3). The IDEA explicitly details the type of information that must be contained in such prior written notice. *See, e.g.* 20 U.S.C. § 1415(c)(1)(A)-(B), (E)-(F). This includes an explanation of why the change is proposed, what other options were considered and why those other options were rejected. *Id.* These participation requirements are in addition to the procedural safeguards notice requirements found at 20 U.S.C. § 1415(c)(1)(C).

In Pennsylvania, the NOREP is the document that provides the prior written notice to parents that is contemplated by the IDEA. As explained by the Pennsylvania Training and Technical Assistance Network (PaTTAN), "The NOREP explains the recommended educational placement or class for [a] child, and explains [parental] rights." http://parent.pattan.net/iep/WhatisaNOREP.aspx. Moreover, the United States Supreme Court has recognized that parents have a right to receive prior written notice whenever a school district intends to alter a student's "program or placement." *Honing v. Doe*, 484 U.S. 305, 311-12 (1988); *see also Petties v. District of Columbia*, 238 F.Supp.2d 114, 123 -124 (D.D.C., 2002).

Parent's Native Language

The notification required by 20 U.S.C. § 1415(b)(3) must be sent "in the native language of the parents, unless it clearly is not feasible to do so." 20 U.S.C. § 1415(b)(4). The same is true for the IDEA's procedural safeguards. 20 U.S.C. § 1415(d)(2).

As applied individuals with limited English proficiency, the term "native language" is defined as the "language normally used by that individual." 34 C.F.R. § 300.29.

As drafted, these rules do not permit consideration of the individual's ability to understand written or spoken English. If the individual has limited English proficiency (as the Parent does in

this case), procedural safeguards and prior written notices must be sent in the individual's native language.

Evaluation Criteria – Language

The IDEA and its regulations set forth extensive criteria for evaluations and reevaluations *See* 20 U.S.C. § 1414. Of those, one is pertinent here:

> Each local educational agency shall ensure that – assessments and other evaluation materials used to assess a child under this section… are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer…

20 U.S.C. § 1414(3)(A)(ii).

In drafting this language, congress did not focus on any student's native language. Rather, congress explicitly instructs schools to administer tests in whatever language is most likely to yield accurate results. Moreover – perhaps in recognition that not all tests are offered in multiple languages – congress also instructs schools to administer tests in the *form* most likely to yield accurate information. As such, given the choice between strict adherence to testing protocols, or variation to assess a child's actual abilities, the IDEA unsurprisingly favors accurate information.

Discussion

Meaningful Parental Participation

At the outset of this hearing, there was significant discussion about the District's obligation to translate documents into [mother's native language]. The District is correct that the IDEA's regulations require translation of only the procedural safeguards notice and the prior written notices issued pursuant to 20 U.S.C. § 1415(b)(3) – NOREPs in Pennsylvania. The IDEA does not explicitly require the translation of any other documents.

However, the IDEA requires schools to facilitate meaningful parental participation in the IEP development process. Unlike the strict translation rules, meaningful participation requires inquiry into the Parent's ability to participate in meetings without translation. In this case, it is not possible for the Parent to meaningfully participate in meetings concerning the provision of FAPE to the Student unless the documents presented at that meeting are fully translated.

The purpose of an IEP meeting is to develop an IEP for the student. This requires more than a recitation of an IEP. Rather, it requires a conversation about the Student's needs, and what program and placement will satisfy those needs. Reading a mostly-English document in [mother's native language], is not the dialogue contemplated by the IDEA. The Parent's ability to follow along in documents while participating in the required dialogue is essential.

In this case, the District put people in place so that the Parent could engage in dialogue during the meetings (either through Language Line or by having a BCA in the room). Moreover, the District fully translated its evaluations, IEPs and NOREPs for the Parent. However, the IEP and NOREP from the June 17, 2014 meeting ready in [mother's native language], at the time of the meeting, and were often provide later only after parental request.

District witnesses agreed, and I explicitly find, that having the documents in an accessible form either during the meeting was critical to meaningful participation. (*see, e.g.* NT at 2995-2997).

Given the parties' vastly different views regarding the Student's needs and abilities, the Parent was placed at an obvious disadvantage.

The heavy participation of counsel for both parties at every turn is somewhat confounding. The Parent's attorneys speak English.[2] It is reasonable for the District to assume that anything communicated to the Parent's attorney will be relayed to the Parent in a way that the Parent will understand the information. I also have no doubt that communicating via counsel was often the fastest, easiest way for the parties to communicate with each other. Even so, it is the District's obligation to ensure meaningful parental participation. The Parent has no obligation to retain services, let alone hire an attorney, in order to meaningfully participate.

In sum, I find that the District satisfied the IDEA's narrow *translation* requirements but, even in doing so, did not satisfy the IDEA's requirements for meaningful parental participation during the June 17, 2014 meeting. The District put personnel in place so that the Parent could literally speak during that meeting, but did not make meaningful accommodations so that the Parent could prepare for it, or participate as it was happening. This is a violation of the Parent's rights.

Denial of FAPE – 2013-14 School Year

When a student places a school district on notice that he or she will leave a charter school and return to the district, the district is obligated to put an IEP in place for the Student's return even before the Student enrolls. *See I.H. v. Cumberland Valley Sch. Dist.*, 2012 U.S. Dist. LEXIS 101056 (M.D. Pa. July 20, 2012). This can be accomplished by simply offering to implement the charter's IEP until the district can evaluate and offer its own. However, even in those very rare cases in which a school district is required to do something more than adopt the charter's program, districts have no liability to provide a FAPE to a student before the student enrolls in the district. *See id.*[3]

In this case, tragically, the Student received nothing from the start of the 2013-14 school year through December 4, 2013 (the date that the Student started attending school). During this period of time, despite substantial communication between the District and the Parent – the bulk of which was via counsel – the Parent never actually enrolled the Student. I do not question the Parent's choice to not enroll until acceptable services were in place, but that choice comes with consequences. Even if the facts of this case were completely analogous to the facts of *I.H. v. Cumberland Valley* (and they are not), the District's only obligation is to say what program and

placement it would offer upon the Student's enrollment. The District not only satisfied that obligation, but went a step further to negotiate many placement options. As such, the District's obligation to provide a FAPE was not triggered until December 3, 2013 (the date that the Parent enrolled the Student).

From the time of the Student's enrollment through this due process hearing, the District has been obligated to implement the Charter's IEP because the Parent has rejected the District's subsequent proposals.

From December of 2013 through March of 2014 the District insists that the Student made progress. The question that I am called upon to answer, however, is whether the District implemented the Charter's IEP. I have no doubt that the Parent did not meaningfully participate in the development of the Charter's IEP, and I question the appropriateness of that document. However, again, the issue that I must resolve is whether the District implemented the Charter's IEP. If the District did not implement the Charter's IEP, the Student's right to a FAPE has been violated *per se*.

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2 I do not know if any of the Parent's attorneys also speak [mother's native language], but that is not relevant.

3 In *I.H. v. Cumberland Valley*, the school district was required to draft an IEP for a student who was potentially returning to from a charter school. Even then, Cumberland Valley had no obligation to actually provide a FAPE until the Student returned.

In this case, there is evidence that the District placed the student into learning support classes. There is no evidence that the District provided any of the services explicitly required by the Charter's IEP. Technically, it is the Parent's burden to establish what the District did not do. In this case, the near-absolute lack of persuasive evidence suggesting that the Charter's IEP was implemented is more than ample proof of the District's inaction.

This does not imply that the District made no effort to educate the Student. The record is to the contrary. The District placed the Student into its own program and honestly thought that it was doing right by the Student. But the District's obligation was to implement the Charter's program until it evaluated the Student and offered its own program. The District's failure to implement the Charter's program from December 3, 2013 through the end of the 2013-14 school year is a violation of the Student's right to a FAPE.

The exception to the foregoing is the period of time during which the Student received homebound instruction after [redacted]. Although there is no extensive record about the Student's actual ability to attend school immediately after [that event], none is needed. It was appropriate for the District to offer homebound instruction, and the District cannot be faulted for any failure to implement the Charter's IEP during this time.

Appropriateness of the District's Evaluation

The District's evaluation was inappropriate because it was conducted in English only. Per FF #4, English is not the language most likely to yield accurate information about the Student. Rather, permitting the Student to hear questions in both English and [mother's native language], and allowing the Student to respond to questions in English, [mother's native language], or both is the "language" that will yield the most accurate information.

Although this finding is based on the totality of the record, I make special note of the testimony of an independent, bilingual evaluator who assessed the student on behalf of the parent and at the District's expense. This was the only person who testified who is bilingual and who evaluated the Student. The District's evaluators spoke English only, and consulted with bilingual evaluators prior to evaluating the Student in English. This consultation did not give the District's evaluators any ability to determine how restricting the Student to English impacted upon the

Student's ability to communicate. Further, none of the District's bilingual evaluators evaluated the Student. Their conclusion that a bilingual evaluation was not necessary is both conclusory and, as presented in this case, mostly hearsay.

The record reveals that there are [mother's native language], versions of some common, standardized assessments. These [mother's native language], versions are not literal translations, but a [mother's native language], version normed against a [mother's native language], speaking sample population. When administering either the English or [mother's native language], tests, translating or interpreting questions and answers from language to language is (generally) a volition of testing protocols. Yet this is precisely the sort of deviation in form that the IDEA contemplates. Deviation for the purpose of getting accurate information is not only permitted, but required.

Whenever deviating from standardized testing protocols, evaluators are wise to proceed with extreme caution. Deviation, and the reason for it, must be explicitly noted in the final evaluation report. Also, the deviation must be carefully considered when an evaluator interprets the testing results for the purposes of providing a diagnosis or educational recommendations.

In sum, the District failed to evaluate the Student in the language most likely to yield accurate information, and failed to make necessary deviations from testing protocols to enable testing in that language. As a result, the District's evaluation was inappropriate, even assuming that all other requirements of 20 U.S.C. § 1414 were met.

Intellectual Disability

In substance, any student's eligibility category is not determinative of what services the student will receive. Programming is driven by need, not by label. This applies even to students with an intellectual disability. However, unlike the other disability categories, students who are classified as having an ID receive enhanced protections in disciplinary proceedings, and are evaluated more frequently.

I do not discount the mental toll that hearing an ID diagnosis puts on parents. In this case, to hear those words for the first time at the Student's age was no doubt shocking to the Parent. The Parent's legitimate surprise, however, is not a factor in determining whether the District applied the proper disability category.

In this case, the only evaluations concluding that the Student has an ID are the District's evaluations. I have concluded that the District's evaluations are inappropriate. Consequently, the ID label must be removed immediately.

Both parties should note that my determination is based exclusively on the inappropriateness of the District's evaluation. It is possible that an appropriate evaluation could conclude that the Student is a student with an ID. I find only that no such evaluation has occurred.

Denial of FAPE – 2014-15 School Year

The District was obligated to implement the Charter's IEP until it evaluated the Student and offered its own. After evaluating the Student, the District offered an IEP with a NOREP on June 17, 2014. That IEP was inappropriate.

The District's IEP was based on the District's evaluation. The District's evaluation was not calculated to yield accurate information about the Student. An IEP can only be as good as the evaluation upon which it is based. The IEP in this case is inappropriate as a matter of law, because it was based upon an inappropriate evaluation.

The fact that the District's only evaluation of the Student is inappropriate compels the conclusion that all subsequently offered programs are inappropriate for the same reason. This makes the District's subsequent offers irrelevant to show mitigation.

Current Placement

The issue of where the Student should go to school, and what services the Student must receive, are properly before me. I have concluded that the District's evaluations of the Student were not appropriate and, as a result, the District's placement offers were not appropriate as a matter of law.

The Parent urges that I should determine that IEE was appropriate, and that I should compel the District to offer what the IEE recommends. I decline to do so. LEAs are obligated to consider IEEs, they are not obligated to adopt them as their own. However, the IEE in this case satisfies the deficiencies of the District's evaluation. The District, therefore, is free to either adopt the IEE and modify its IEP accordingly. The District may also consider the IEE and reevaluate the Student in accordance with this decision. Either way, the ID label must be removed unless or until an appropriate evaluation yields a conclusion that ID is the proper classification for the Student.

Remedies

For reasons articulated above, the Student was denied a FAPE during these periods of time:

- December 4, 2013 through April of 2014
- May of 2014 through the end of the 2013-14 school year
- The start of the 2014-15 school year through the present (ongoing).

Prior to June 17, 2014, the denial of FAPE was based on the District's failure to implement the Charter's IEP. With no better evidence, I find that the portions of the IEP that were not provided come to 37 hours per month (33 hours per month of counseling in a counselor's office and 1 hour per week of social skills training), or 1.85 hours per school day.

After June 17, 2014, the denial of FAPE was based on the District's offer of programming based on inappropriate evaluations. From the time of the District's own offer forward, the Charter's IEP sheds no light on a compensatory education award. The standard is either what services it will now take to remediate the Student, or how much the District failed to offer. With little evidence to conduct the calculation either way, I find that the Student was denied 2.5 hours of compensatory education per school day from June 17, 2014 though the present.

In addition, the Parent was denied meaningful participation during one IEP meeting. The IDEA explicitly makes violation of meaningful participation rules a *substantive* violation. 20 U.S.C. § 1415(f)(3)(E)(ii)(II). Compensatory education is the remedy for substantive violations.

Neither party presented evidence as to how much compensatory education is owed to the Student to compensate for the parental participation violation on its own. It could be argued that this lack of evidence indicates that compensatory education should not be awarded at all, given the Guardian's burden of proof. I decline to reach this conclusion. In the absence of better evidence, I look to the meeting that the Parent could not meaningfully participate in and award one (1) additional hour of compensatory education as a remedy.

Regardless of whether the Student's absences should have been excused or unexcused, in this case I find that the District is not liable to provide services when the Student does not attend school. Compensatory education shall be awarded only on the days that the Student actually attended school, or will attend school until a FAPE is offered.

The Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device. The Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP, or via dual enrollment or equitable participation should the Student remain in private school, to assure meaningful educational progress.

ORDER

Now, May 26, 2015, it is hereby **ORDERED** as follows:

1. The Intellectual Disability classification shall be immediately removed from any IEP offered by the District.

2. The District may either adopt the Parent's IEE as its own evaluation, or may propose a reevaluation of the Student consistent with this order. If choosing to reevaluate, the District must complete its evaluation and offer programming expeditiously.

3. The Student was denied a FAPE as described above.

4. The Parent was denied meaningful parental participation as described above.

5. The Student is awarded 1.85 hours of compensatory education for each day that the Student attended school between December 4, 2013 and June 17, 2014, excluding the period during which the Student received homebound instruction in April of 2014.

6. The Student is awarded 2.5 hours of compensatory education for each day that the Student attended school between June 17, 2014 and the present.

7. The Student is awarded one (1) hour of compensatory education to remedy the denial of meaningful parental participation during the June 17, 2014 IEP meeting.

8. Compensatory education is subject to the limitations described above.

9. Compensatory education shall continue to accrue at the rate of 2.5 hours for each day that the Student attends school after the date of this order until the District proposes programming in accordance with #2 of this order.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER

EXHIBIT B

Introduction

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4. It is the companion to the case at ODR No. 15181-1314KE. Both hearing were heard together.

The Parent, who speaks [a language other than English], alleges that the District violated the Parent's right to meaningfully participate in meetings concerning the provision of FAPE to the Student. The Parent also alleges that the District violated Child Find, failed to provide an appropriate IEP, and denied the Student a FAPE.

Issues[1]

1. Did the District violate its Child Find responsibilities?
2. Did the District deny the Guardian's right to meaningful parental participation?
3. Did the District violate the Student's rights by failing to provide an appropriate IEP or Section 504 plan?
4. Is the Student entitled to compensatory education?

Findings of Fact

The very large record of this hearing and its companion case was carefully reviewed in its entirety. In special education due process hearings, there is a world of difference between what is technically admissible and what is truly necessary to resolve the issues presented. I have limited my findings of fact to what is necessary to resolve the parties' dispute.

1. "Interpretation" describes the act of restating spoken language in a different language. Interpretation can either be simultaneous (in which the interpreter restates the communication as it is said) or consecutive (in which the interpreter restates the communication just after it is said).
2. "Translation" describes the act of re-writing a document in another language.
3. "Sight translation" describes the act of reading text in one language out loud in another language.
4. The Student's native language is [not English]. The Student has limited English proficiency.
5. The Guardian is the Student's legal guardian and "parent" for purposes of the IDEA.
6. The Guardian's native language is [not English]. The Guardian has limited English proficiency.

January 2011 to November 2012

1 The issues identified flow from the Guardian complaint and opening statement. The Complaint includes claims regarding the District's systemic practices, which were dismissed at the start of this hearing, and a demand for IEE reimbursement that is now moot. The Complaint does not include a demand for compensatory education. The Guardian argued at the hearing that if the District was permitted to present evidence of mitigation arising after the hearing was requested, the Guardian must also be permitted to include demands that were not apparent at the time that the Complaint was filed. I accept this argument, as the Guardian presents a new remedy, not a new issue, entitlement to which was not clear when the Complaint was filed.

7. The Student first arrived in Philadelphia from [another country] in January of 2011. NT 32, 832.

8. The student enrolled in 7th grade at [redacted parochial school] from February 21, 2011 until March 30, 2011 S-42. The Student lived with the Student's [relative] during this time.

9. From March 30, 2011 through sometime shortly prior to November 5, 2012, the Student moved back to the [other country]. The Student did not attend school while in the [other country].

November 2012 to February 2013

10. When the Student came back to Philadelphia, the Student lived with [another relative], who was [the Student's] guardian at that time.

11. On November 5, 2012, the Student enrolled in the District and was placed into [a District] High School. S-29, S-30.

12. The Student stopped attending school on February 8, 2013. S-29.

13. During the 57 school days between the Student's enrollment and withdraw, the Student was absent or late on 28 days. S-29.

14. While enrolled at [the high school], the Student spent 90 minutes per day in English for Speakers of Other Languages (ESOL) classes.

15. The District did not identify the Student as in need of special education or propose to evaluate the Student to determine a need for special education while attending [the high school].

February 2013 to October 2013

16. On or around February 8, 2013, the Student moved back to the [the other country] and stayed there for about a year. NT 836.[2]

October 2013 to End of 2013-14 School Year

17. On October 25, 2013, the Student re-enrolled in the District. The Student was re-enrolled by the Guardian, who had become the Student's legal guardian.

18. Upon re-enrollment, the Student was placed in [a second] High School. From enrollment through the end of the school year, there were 148 days. The student was late or absent during 97 of those days. S-29.

19. At [the second High School], the Student was placed in ESOL classes for three periods per day. While the Student attended, teachers reported that the Student was able to comprehend the classroom instruction and participate appropriately. S-29, NT 1839, 1851.

20. On March 28, 2014, the Guardian presented a letter and Court Order to [the second High School] staff. In the context of an IDEA proceeding, these documents are tantamount to a written request for a special education evaluation. S-22, S-23.

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2 The timeline of the Student's travels to and from the [other country] were highly disputed. I find the Student's testimony regarding the Student's own whereabouts to be the most persuasive. While testifying, the Student was forthright and honest about what the Student could and could not remember. The Student is commended for this notable candor.

21. On April 4, 2014, the District sent a permission to evaluate form (PTE), to the Guardian, seeking consent to conduct a special education evaluation. S-19. The PTE was sent in English. The Guardian denies receiving the PTE, but recalls attending meetings concerning the evaluation request.

22. Between April of 2014 and the end of the 2013-14 school year the Student was absent or late about 40 times. The Student's attendance was such an issue that some of the Student's teachers wondered if the Student had withdrawn from school. S-29, NT 1840-1846.

Summer of 2014

23. On June 23, 2014 the Guardian requested this due process hearing.

24. The District employs Bilingual Counseling Assistants (BCA) who, among other job duties, provide interpretation services. NT 14014-1405.

25. The Parties communicated, mostly via counsel, in the summer of 2014. It was agreed that the District would fund an independent educational evaluation for the Student conducted by a bilingual evaluator selected by the Guardian.

26. The IEE was completed on July 17, 2014 and was provided to the District shortly thereafter. The evaluator concluded that the Student was eligible for special education as a student with a specific learning disability (SLD). S-15.

27. The IEE mentions that the Student was scheduled for surgery during the week of July 21, 2014, to address an issue with the Student's knee. According to the independent evaluator, the Student's knee never developed properly. *Id.*

28. The Student by that time had been diagnosed with Blount's Disease, a condition that causes [a physical condition] and, in some cases, pain. Blount's Disease is corrected though a complex surgical procedure followed by intense physical rehabilitation, both of which can be painful. During rehabilitation, the patient's bones are screwed into a brace, which is adjusted during rehabilitation and ultimately removed.

29. The Student was first diagnosed with Blount's Disease sometime in 2014. NT 3268.

30. There is no preponderant evidence on the record to suggest when the Student first started experiencing the symptoms of Blount's Disease. The symptoms can appear in childhood or adolescence, and may progress rapidly. There is no preponderant evidence that anybody at [the second High School] noticed a problem with the Student's mobility prior to the summer of 2014. There is no preponderant evidence that the Guardian or Student alerted the District to the Student's condition prior to the IEE. NT, *passim.*

31. According to the Student's surgeon, the Student's case of Blount's Disease may not have been readily apparent to a layperson. NT 3268-3278.

32. The Student did not have surgery during the week of July 21. Some testimony indicates that the District was under the impression that the Student had surgery during the week of July 21 up until the start of the 2014-15 school year.

33. On August 18, 2014, in response to the IEE, the District issued a Notice of Recommended Educational Placement (NOREP) and another PTE. Both documents were provided in English and in Spanish. The purpose of the NOREP was to obtain parental consent to provide specially designed instruction in the areas of literacy and mathematics as a stopgap until a full IEP could be developed. Literacy and math are areas identified in the IEE. The

purpose of the PTE was to both enable the District to review and consider the IEE[3], and to conduct a bilingual speech evaluation recommended in the IEE. S-10.

2014-15 School Year

34. During the summer and early fall of 2014, the District and Parents continued to meet and negotiation via counsel. Several placement options for the 2014-15 school year were discussed. Ultimately, it was agreed that the Student should attend the [a] Learning Academy (LA), which is housed within [a third] High School.

35. LA is a program primarily for students who have just immigrated to the United States from other countries and have little to no English. LA is an ESOL placement, not a special education placement. However, the District can provide special education to LA students.

36. The Student had surgery to correct Blount's Disease just a few days after the start of the 2014-15 school year. The District was not immediately informed about the Student's surgery, but was aware of the Student's absence from school. The District was notified about the surgery in late September of 2014. NT 2069, 2685.

37. On October 6, 2014, the District provided forms in English and [Guardian's native language] so that the Student could receive homebound instruction. S-6. It is not clear whether these forms were provided just before or just after the Guardian presented a doctor's note requesting homebound services. S-6. Regardless of the timing, the District informed the Guardian that the doctor's note was insufficient, and gave the Guardian the proper forms in both English and [Guardian's native language].

38. On October 6, 2014, the District also sent forms in English and [Guardian's native language] inviting the Parent to an IEP meeting. The purpose of the meeting was to review the District's reevaluation report ("RR" - mostly a copy of the IEE plus the bilingual speech evaluation), and to draft an IEP. S-6.

39. The IEP meeting convened as scheduled on October 16, 2014. A [Guardian's native language] speaking BCA was in attendance, as was the Guardian and counsel for both parties. S-44.

40. The District had a copy of its RR translated into [Guardian's native language] and provided that the Guardian. S-44.

41. The District agreed with the IEE's conclusion that the Student was a student with a disability, specifically SLD, as evidenced by the Student's deficits in literacy and mathematics. S-3. The District disagreed with the IEE's conclusion that the Student should be placed in either 11th or 12th grade. *Id.*

42. The IEE recommended placement in 11th or 12th grade in consideration of the Student's age and to (in essence) foster the Student's positive perception of both school and the Student's own abilities. Through March of 2015, the District refused this recommendation on the basis that grade placement was only available to students who earned sufficient credits, and the Student was lacking credits for an 11th or 12th grade placement. S-1, S-3, NT 1730-1731.

43. From October 16, 2014 onward, the District has consistently proposed that the Student should graduate on IEP goals, as opposed to academic credits. *See, e.g.* S-1. The Student's principal testified that students who graduate on IEP goals could be placed into any grade,

3 It is a common misconception that LEAs need any further consent to "review" or "consider" evaluations that are handed to them by parents. If review and consideration prompts the need for more testing, further consent must be sought. This distinction is not entirely pertinent to this case, as the District proposed a speech evaluation in the August 18, 2014 IEE.

regardless of academic credits. This testimony notwithstanding, the District refused to place the Student into 11th or 12th grade until May of 2015. NT 2669.

44. The District also disagreed with the IEE's recommendation for "private language school courses." S-3. That recommendation was based on the independent evaluator's understanding that the Student had not made progress towards mastery of English after two years with ESOL services. *Id.* At the time of the IEE, based on number of days of full attendance, the Student had spent less than one full school year in an ESOL (155 days).

45. For many of the same reasons, the District also disagreed with the IEE's recommendation to provide instruction to the Student in [Guardian's native language]. During the hearing, the independent evaluator clarified that her preference would be for the ESOL instructor to be bilingual, but that actual instruction in ESOL programming need not be in [Guardian's native language]. S-4, NT 2278-2279.

46. During the October 16, 2014 IEP meeting, the District maintained that LA was an appropriate placement for the Student. NT *passim*.

47. Although the District intended to discuss an IEP for the Student during the October 16, 2014 meeting, the Guardian had to leave after the evaluations were discussed and so an IEP was not discussed in the Guardian's absence. NT 1618.

48. On October 21, 2014 the District scheduled a second IEP meeting for October 28, 2014. Invitations were sent in English and [Guardian's native language] to the Guardian and counsel. On the October 28, 2014, the Guardian was not able to attend and the meeting was canceled. S-1, S-2.

49. On November 3, 2014, the Guardian returned the homebound instruction forms. S-50.

50. The Student's surgeon testified that the Student could have returned to school in November of 2014. NT 3279. It is not clear whether the Guardian knew this. This was never communicated to the District prior to this hearing.

51. On November 19, 2014, the District scheduled a third IEP meeting for December 2, 2014. Invitations were sent in English and [Guardian's native language] to the Guardian and counsel. A [Guardian's native language] speaking BCA was present at the meeting. S-54. The Guardian arrived late to the meeting and had to leave early. Consequently, the IEP team could not review the entire IEP. NT 1624-1628.

52. The majority of the IEP meeting on December 2, 2014 was a discussion of the Student's need for, and the District's obligation to provide, homebound instruction or instruction in the home. NT 1626, P-25. The record does not enable a definite conclusion about which terms were used during the meeting.

53. During the December 2, 2014 meeting, the parties agreed to meet again on December 17, 2014 (the District's fourth attempt to discuss the IEP). S-55. The District issued invitations in English and [Guardian's native language]. S-55.

54. The Guardian canceled the December 17, 2014 IEP meeting due to illness. S-55.

55. On December 22, 2014 the District issued invitations in English and [Guardian's native language] to an IEP meeting on January 6, 2015 (the District's fifth attempt to convene). The Guardian canceled the meeting due to concerns about the weather. S-55.

56. Pursuant to its homebound instruction policy the District offered to provide three hours per week of homebound instruction to the Student.

57. The District's policy permits certain District personnel to authorize up to three hours of homebound instruction to high school students who are expected to be out of school for more than four weeks. *See* NT at 2046, 2102, 2640-2643.

58. Despite the District's policy, the District increased the Student's level of homebound instruction to four hours per week, and sometimes instructors stayed longer. As a result, from December 2014 through February 2015, the Student received 3.5 to 4.5 hours of homebound instruction per week. S-56.

59. In February of 2015, the Student returned to LA with bus transportation and elevator access, but with no IEP in place. S-58.

60. The Student's IEP team convened again in March of 2015. It is not clear if the IEP in its entirety was reviewed during this meeting, which was the District's sixth attempt to discuss the IEP. NT 2669.

61. Starting with the first attempt to convene the Student's IEP team in October of 2014 through its latest attempt in March of 2015, the District has always prepared a draft IEP to discuss at the meetings.

62. In the course of six attempts to convene the IEP team in as many months, the District did not fully translate the draft IEP into [Guardian's native language]. Rather, the District relied upon its IEP writing software to translate portions of the IEP. Specifically, in Pennsylvania, IEPs are drafted on a form promulgated through PaTTAN. The District's software translated the form, but not the content written on it. For example, the text identifying a section of the IEP as goals was translated but the goals themselves were not. The District intended to rely upon [Guardian's native language] speaking BCAs to sight translate the English portions of IEPs during IEP meetings. S-1, S-51, S-44; NT 161-167, 248, 256-258, 1614, 1625-1627.

63. Other than IEPs, all other IDEA documents were fully translated into [Guardian's native language].

Legal Principles

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit,* 2003 LEXIS 21639 at *28 (2003); *See also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

In this case, I find that all witnesses testified to the best of their ability, relaying facts as they recalled them. To whatever extent one witness's testimony is inconsistent with another's, they legitimately remembered events differently.

As stated above, the Student's candor is both noteworthy and commendable.

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir.

2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent the party seeking relief and must bear the burden of persuasion.

Child Find

The IDEA statute and regulations require school districts to have in place procedures for locating all children with disabilities, including those suspected of having a disability and needing special education services although they may be "advancing from grade to grade." 34 U.S.C. §300.311(a), (c)(1).

Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

> Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorsees this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endured by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting

Reid and explaining that compensatory education "should aim to place disabled children in the same position that the would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount of what type of compensatory education is needed to put the Student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> "... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F., Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006)*; *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Meaningful Parental Participation

The IDEA requires schools to use procedures that afford parents an "opportunity ... to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child..." 20 U.S.C. § 1415(b)(1). Similarly, parents must receive prior written notice whenever a school district proposes to the educational placement of a child. 20 U.S.C. § 1415(b)(3). The IDEA explicitly details the type of information that must be contained in such prior written notice. *See, e.g.* 20 U.S.C. § 1415(c)(1)(A)-(B), (E)-(F). This includes an explanation of why the change is proposed, what other options were considered and why those other options were rejected. *Id.* These

participation requirements are in addition to the procedural safeguards notice requirements found at 20 U.S.C. § 1415(c)(1)(C).

In Pennsylvania, the NOREP is the document that provides the prior written notice to parents that is contemplated by the IDEA. As explained by the Pennsylvania Training and Technical Assistance Network (PaTTAN), "The NOREP explains the recommended educational placement or class for [a] child, and explains [parental] rights." http://parent.pattan.net/iep/WhatisaNOREP.aspx. Moreover, the United States Supreme Court has recognized that parents have a right to receive prior written notice whenever a school district intends to alter a student's "program or placement." *Honing v. Doe*, 484 U.S. 305, 311-12 (1988); *see also Petties v. District of Columbia*, 238 F.Supp.2d 114, 123 -124 (D.D.C., 2002).

Parent's Native Language

The notification required by 20 U.S.C. § 1415(b)(3) must be sent "in the native language of the parents, unless it clearly is not feasible to do so." 20 U.S.C. § 1415(b)(4). The same is true for the IDEA's procedural safeguards. 20 U.S.C. § 1415(d)(2).

As applied individuals with limited English proficiency, the term "native language" is defined as the "language normally used by that individual." 34 C.F.R. § 300.29.

As drafted, these rules do not permit consideration of the individual's ability to understand written or spoken English. If the individual has limited English proficiency (as the Parent does in this case), procedural safeguards and prior written notices must be sent in the individual's native language.

Discussion

Child Find

The District did not violate its child find obligations. There is no serious dispute in this case as to whether the District has a system in place to identify students who may have disabilities. There is a debate in this case as to whether the District's child find materials are easily averrable in [Guardian's native language]. Regardless, it is the Student's right to be found, not the Guardian's obligation to seek out child find information.

In this case, I accept the District and Student's account of when the Student was in Philadelphia and when the Student was in the [other country]. I also accept the District's accounting of the Student's attendance. There was some dispute as to whether the District properly marked the Student's absences as excused or unexcused. Whether the Student's absences were lawful does not change the fact that the Student's inconsistent school attendance inhibited the District's ability to form an opinion as to the need to evaluate any suspected disability.[4]

The Student did not enroll in the District until November 5, 2012, and left the District 57 school days later. The Student was absent or late for much of those 57 days, but appear to participate well when present. The record does not indicate any Child Find triggers during this time.

The Student re-enrolled in the District on October 25, 2013. The Guardian requested a special education evaluation on April 4, 2014. The pertinent question, therefore, is whether the District should have seen any child find triggers between those two dates. Again, the record does not preponderantly reveal child find triggers or "red flags" during this period of time. Consequently, the Guardian has not established by preponderant evidence that the District violated its child find obligations.

Meaningful Parental Participation

4 In some cases, chronic absenteeism can be a child find trigger in and of itself. The evidence in this case does not indicate that the Student's absences were a child find trigger.

At the outset of this hearing, there was significant discussion about the District's obligation to translate documents into [Guardian's native language]. The District is correct that the IDEA's regulations require translation of only the procedural safeguards notice and the prior written notices issued pursuant to 20 U.S.C. § 1415(b)(3) – NOREPs in Pennsylvania. The IDEA does not explicitly require the translation of any other documents.

However, the IDEA requires schools to facilitate meaningful parental participation in the IEP development process. Unlike the strict translation rules, meaningful participation requires inquiry into the Parent's ability to participate in meetings without translation. In this case, it is not possible for the Parent to meaningfully participate in meetings concerning the provision of FAPE to the Student unless the documents presented at that meeting are fully translated.

The purpose of an IEP meeting is to develop an IEP for the student. This requires more than a recitation of an IEP. Rather, it requires a conversation about the Student's needs, and what program and placement will satisfy those needs. Reading a mostly-English document in [Guardian's native language] is not the dialogue contemplated by the IDEA. The Parent's ability to follow along in documents while participating in the required dialogue is essential.

In this case, the District put people in place so that the Parent could engage in dialogue during the meetings. It is significant that the District went out of its way in its effort to schedule an IEP meeting six separate times. I must note, however, that by the time that the team actually got to addressing the IEP, that time would have been better spent discussing the draft IEP than reading the English sections of the document to the Guardian out loud in [Guardian's native language]. To the extent that meetings were devoted to reading documents out loud in [Guardian's native language], the requisite discussion did not happen at all.

District witnesses agreed, and I explicitly find, that having the documents in an accessible form either during the meetings, or prior to the meetings when mandated, is critical to meaningful participation. (*see, e.g.* NT at 2995-2997). The Parent was placed at an obvious disadvantage by effectively not having access to these documents.

The heavy participation of counsel for both parties at every turn is somewhat confounding. The Parent's attorneys speak English.[5] It is reasonable for the District to assume that anything communicated to the Parent's attorney will be relayed to the Parent in a way that the Parent will understand the information. I also have no doubt that communicating via counsel was often the fastest, easiest way for the parties to communicate with each other. Even so, it is the District's obligation to ensure meaningful parental participation. The Parent has no obligation to retain services, let alone hire an attorney, in order to meaningfully participate.

In sum, I find that the District satisfied the IDEA's narrow *translation* requirements but, even in doing so, did not satisfy the IDEA's requirements for meaningful parental participation. The District put personnel in place so that the Parent could literally speak during meetings, but did not make meaningful accommodations so that the Parent could prepare for meetings or participate in meetings as they were happening. This is a violation of the Parent's rights.

Provision of an Appropriate IEP

After accepting the IEE's findings that the Student was a student with an SLD and in need of special education, it was the District's obligation to offer an appropriate IEP. The District drafted an IEP for the meeting on October 16, 2014 (S-1). There is some ambiguity in the record as to when the District formally proposed that IEP with a NOREP, but the totality of the record leaves no doubt whatsoever that the District was ready to implement that IEP the moment it received parental consent.[6]

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5 I do not know if any of the Parent's attorneys also speak [Guardian's native language], but that is not relevant.

6 It must be noted that the District has no right to request a hearing to override parental rejection of a proposed initial placement.

The District has no right to request a hearing to override parental rejection of a proposed initial placement. 22 Pa. Code § 14.162(c). Since the Guardian has never consented to the District's proposed IEP, the Student cannot claim a denial of FAPE if 1) the proposal was appropriate and 2) the District did not implement the IEP based on the Guardian's rejection of it.

The District's offered IEP was appropriate. It is derived in substantial part from the undisputed portions of the IEE (which was most of the IEE), and paints an accurate picture of the Student's abilities and needs at the time the document was drafted. The IEP's goals are directly related to those needs, and present clear statements as to how the Student's progress is to be monitored.[7] The IEP also includes short term goals and objectives despite the fact that none are technically required. Further, the IEP provides modifications and specially designed instruction, both in an absolute sense and targeted on a goal-by-goal basis. In short, the IEP clearly explains where the Student is, where the team wants the student to be by the expression of the IEP, and what the District will do to get the Student from here to there. This is what the IDEA requires.

The most significant testimony challenging the IEP came from the independent evaluator. I find the independent evaluator's critique to be hypercritical in the sense that her quarrel with the IEP was that it is sub-optimal. Assuming *arguendo* that the independent evaluator is correct, the independent evaluator argues for a standard beyond the District's legal obligations. I am not persuaded by this testimony. The Student could derive a meaningful educational benefit from the District's offered IEP.

The Guardian also challenges the IEP on the basis that it does not provide extended school year (ESY) services. I find no preponderant evidence in the record to substantiate a claim that the Student is entitled to ESY based on regression/recoupment data or that ESY services are required in order for the Student to complete IEP goals.

I also consider whether the District should have provided instruction in the home. As discussed at various points during this hearing, homebound instruction is a regular education service that LEAs may provide to students who are unable to attend school for a finite period of time. Instruction in the home is an IDEA placement (part of the IDEA's continuum of placements) for Students who cannot be educated in school. In this case, although unbeknownst to the parties, the Student's surgeon opined that the Student was able to attend school around the same time

that the Guardian was completing the homebound instruction forms. It is, therefore, unlikely that the Student should have qualified for homebound instruction, let alone instruction in the home, which is the most restrictive of all IDEA placements. When a student is able to attend school and receive appropriate special education there, that student has no right to the IDEA's most restrictive placement option.

The District's offered IEP is appropriate. By offering an appropriate IEP, the District has also discharged its obligations under Section 504.

Compensatory Education

The Student is not entitled to compensatory education for any failure on the District's part to offer appropriate programming. However, the IDEA explicitly makes violation of meaningful participation rules a substantive violation. 20 U.S.C. § 1415(f)(3)(E)(ii)(II). Compensatory education is the remedy for substantive violations.

Neither party presented evidence as to how much compensatory education is owed to the Student to compensate for the parental participation violation on its own. It could be argued that this lack of evidence indicates that compensatory education should not be awarded at all, given

7 The IEP is not *flawless* in regard to its measurability or objectivity, but that is not the standard. The IEP's goals are appropriately measurable, objective and baselined.

the Guardian's burden of proof. I decline to reach this conclusion. In the absence of better evidence, I look to the meetings that the Parent could not meaningfully participate in. Of the six scheduled IEP meetings, the Guardian attended three. I therefore award three hours of compensatory education to the Student to compensate for the District's denial of the Guardian's right to manfully participate in IEP meetings.

The Guardian may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device. The Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP, or via dual enrollment or equitable participation should the Student remain in private school, to assure meaningful educational progress.

ORDER

Now, May 26, 2015, it is hereby **ORDERED** as follows:

1. The Parent was denied meaningful parental participation as described above.
2. The Student is awarded three (3) hours of compensatory education as described above.
3. Compensatory education is subject to the limitations described above.
4. All other claims are denied.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER

EXHIBIT C

M.P., Guardian A.G., Student v. School District of Philadelphia AND B.G., Parent T.R., Student v. School District of Philadelphia	ODR No. 15166-1314KE AND ODR No. 15181-1314KE CONSOLIDATED

CONSOLIDATED PRE-HEARING ORDER

Introduction and Procedural History

This consolidated pre-hearing order applies to both of the above-captioned due process hearings. Those hearings, described briefly below, have been consolidated. This pre-hearing order resolves two questions of law that are equally applicable in both cases. A third pre-hearing issue that applies only in ODR No. 15181-1314KE is also resolved. To the extent that this order applies to one case but not the other, that is explained herein. Prior pre-hearing orders in these cases speak for themselves and are not discussed.

On June 23, 2014, M.P. requested Due Process Hearing No. 15166-1314KE against the School District of Philadelphia (District). M.P. is the legal guardian of A.G., a student in the District.[1] M.P.'s Compliant raises claims under three statutes: the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*; Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4; and the Americans with Disabilities Act as Amended (ADA), 42 U.S.C. § 12101 *et seq*.

On June 26, 2014, B.G. requested Due Process Hearing No. 15181-1314KE against the District. B.G. is the parent and legal guardian of T.R., a student in the District. B.G.'s Complaint raises claims under the same three statutes: the IDEA, Section 504, and the ADA.

M.P. demands, *inter alia*, a finding that the District "has a systemic practice of failing to timely evaluate students who are English Language Learners and who may have a disability, and further find that the [District] has a systemic practice of not informing parents of ELL students of the process for an initial special education evaluation." M.P. further demands a finding that the District "fails to fully inform parents, including [M.P.], of their rights and the [District's] responsibilities in situations where the parent does not speak English as a first language, and on information and belief, this is a systemic deficiency of the [District.]"

[1] It is not disputed that M.P. is A.G.'s "parent" for purposes of the IDEA.

B.G. demands, *inter alia*, a finding that the District "fails to fully inform parents, including [B.G.], of their rights and the [District's] responsibilities in situations where the parent does not speak English as a first language, and on information and belief, this is a systemic deficiency of the [District.]"

On July 3, 2014, the District filed an Answer and Motion to Dismiss (MTD) in Hearing 15166-1315KE . Through the MTD, the District seeks dismissal of M.P.'s ADA claims and the "systematic practice" claims. M.P. responded to the MDT on September 26, 2014.

On September 30, 2014, the District moved in Hearing 15181-1314KE to limit claims arising before the first day of the 2013-14 school year, arguing that those claims are barred by the IDEA's two-year statute of limitations. B.G. responded to that motion on October 15, 2014.

These cases were consolidated on September 11, 2014. After consolidation, the District essentially filed the existing MTD in both cases. The District also filed a reply to the Parent's response. The parents in both cases submitted a sur-reply to the MDT on October 15, 2014.

With this background, I now resolve questions of my authority to hear ADA claims in both cases, my authority to hear claims of systemic violations in both cases, and the applicability of the IDEA's statute of limitations in Hearing 15181-1314KE.

Jurisdiction to Hear ADA Claims

In its motion, the District argues that ODR lacks jurisdiction over ADA claims. In making this argument, the District points to 34 CFR §300.507(a)(1) as the basis of ODR's jurisdiction. This is an oversimplification. The referenced regulation establishes the right of a parent or public agency to request a due process hearing to resolve IDEA disputes. Were that the sole basis of ODR's jurisdiction, ODR would have no authority to hear claims arising under Section 504. The District does not challenge ODR's authority to hear Section 504 claims.

It is instructive, however, examine the basis of ODR's jurisdiction to hear IDEA claims as a starting point for an analysis of ODR's authority to hear ADA claims. Although the IDEA establishes the right to a due process hearing, much is left to the states to create a system of administrative dispute resolution. In Pennsylvania, the Commonwealth's special education regulations empower the Secretary of Education to establish such a system. *See* 22 Pa. Code § 14.162. Pursuant to this authority, Pennsylvania created ODR both to adjudicate IDEA claims, and to provide resources for parents and educational agencies to resolve educational disputes for children served by the early the intervention system, students who are gifted, and students with disabilities.

As with the IDEA, Pennsylvania also has its own regulations for the implementation of Section 504. These regulations cite back to the Commonwealth's special education regulations, establishing that ODR has jurisdiction over Section 504 claims.[2]

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[2] Pennsylvania's special education regulations, 22 Pa. Code § 14 (Ch. 14), has been updated more recently than Pennsylvania's regulations for "protected handicapped students," 22 Pa. Code § 15 (Ch. 15). As such, Ch. 15 cites to sections of Ch. 14 that are currently "reserved" but served the same function as 22 Pa. Code § 14.162.

Unlike the IDEA and Section 504, there is no clear statute or regulation that serves as the basis of ODR's jurisdiction to hear ADA claims. This conspicuous lack of authority strongly suggests that ODR has no ADA jurisdiction.

In light of the nonexistent state-level statutory basis for ODR's ADA jurisdiction, it is remarkable that the IDEA's federal regulations impose an administrative exhaustion requirement on ADA claims whenever the IDEA is implicated. Whenever a parent or student may seek relief under both the IDEA and the ADA, the parent or student must exhaust the IDEA's administrative procedures before brining an ADA civil action. 20 U.S.C. § 1415(l) provides:

> Rule of Construction
>
> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

See also, 34 C.F.R. § 300.516.

I do not construe this language as a requirement to pursue ADA claims within an IDEA hearing. Rather, this provision stops ADA civil actions until IDEA claims are administratively exhausted. As discussed in detail below, however, my interpretation of this language is not compatible with current case law.

This case presents the circumstances anticipated at 20 U.S.C. § 1415(l). The Parent's ADA claims are entirely derivative of their Section 504 claims. Whether or not I dismiss the ADA claims, I will hear all of the same evidence. Moreover, the Parents are not seeking remedies under the ADA in addition to remedies under the IDEA and Section 504, with the exception of declaratory relief. Consequently, resolving this jurisdictional issue will have no impact whatsoever on what will actually happen during the hearing.[3]

Perhaps in recognition of this practical consideration, a number of judges have concluded that when parents assert ADA violations that are coextensive with IDEA violations, they are required to pursue the ADA claims during the special education due process hearing:

> Parents of children with disabilities are not limited to suing local educational authorities under the IDEA and may pursue actions under other laws, including the ADA and Section 504. However, "when parents choose to file suit under another law that protects the rights of handicapped children—and the suit could have been filed under the [IDEA]—they are first required to exhaust the [IDEA's]

[3] This is not to minimize the importance of declaratory relief. A declaration that the District has or has not violated the ADA may have a real-world impact upon the parties, and it is not proper for me to make such a determination absent jurisdiction to do so.

> remedies to the same extent as if the suit had been filed originally under the [IDEA's] provisions." *Mrs. W. v. Tirozzi*, 832 F.2d 748, 756 (2d Cir.1987); *see also* 20 U.S.C. § 1415(l).

R.B. ex rel. L.B. v. Board of Educ. of City of New York, 99 F.Supp.2d 411, 415 (S.D.N.Y., 2000).

See, also, Hesling v. Avon Grove School Dist., 428 F.Supp.2d 262, 276 -277 (E.D. Pa., 2006):

> In count five of her complaint, Ms. Hesling asserts an attendant claim under §1983 for violation of the IDEA (as well as claims under §1983 for violations of the ADA and Section 504, discussed infra). She seeks both monetary damages and declaratory relief for violation of § 1983. Here again, some of the relief Ms. Hesling seeks is available under the IDEA and exhaustion is therefore required for Ms. Hesling to proceed with this claim. *Cf. W.B.*, 67 F.3d at 495 (finding that money damages are available in a § 1983 action premised on a violation of the IDEA, but "observ[ing] that the exhaustion requirement may not be circumvented by casting an IDEA claim as a § 1983 action predicated on IDEA").

Another clear indication that ODR has jurisdiction to hear ADA claims is found in *Swope v. Central York School District*, 796 F.Supp.2d 592 (M.D. Pa. 2011). In *Swope*, the parent requested a due process hearing, and raised only IDEA claims during the hearing. After the hearing, the parent raised derivative Section 504 and ADA claims for the first time in the district court. The district court dismissed the Section 504 and ADA claims because Parent had not included those claims in the due process complaint. In doing so, the district court explicitly rejected the parent's argument that administrative exhaustion of ADA claims was not required because he hearing officer lacked jurisdiction over the ADA. To the contrary, as in the *Hesling* case, the court concluded that administrative exhaustion was required if some of the relief demanded under the ADA was also available under the IDEA. *Id* at 599-600.

It would be exceedingly weird for a court to force parents to present ADA claims within a special education due process hearing if ODR had no jurisdiction over ADA claims. Such a result would place parents in an awkward position: they would have to present ADA claims to hearing officers knowing that those hearing officers had no jurisdiction to hear those claims, or risk losing the right to bring an ADA civil action at the conclusion of the due process hearing.

The *Swope* court never explicitly says that ODR has jurisdiction to hear derivative ADA claims (meaning that the ADA claims arise out of the exact same actions or omissions as the IDEA and § 504 claims, and the same relief is sought). However, the only logical way to read *Swope* – the only way that avoids an absurd result – is that parents do not get two bites at the apple. If relief is available under the IDEA or Section 504, parents may not double their total remedy by seeking the same relief a second time through an ADA civil action. For this reason, ADA claims that are derivative of IDEA or Section 504 claims must go to ODR first. That way, a hearing officer may award all of the relief that a parent may be entitled to at the administrative level, satisfying all administrative exhaustion requirements in one fell swoop.

The focus on the coextensive relief available for derivative ADA claims is apparent not only in *Swope*, but also in every other case in Pennsylvania to consider the issue. All of the case law on this issue clearly indicates that when the entirety of the demanded relief can be obtained administratively, all claims must proceed through a due process hearing before going to court. In

Batchelor v. Rose Tree Media Sch. Dist., 2013 U.S. Dist. LEXIS 44250(E.D. Pa., 2013), the court dismissed ADA and Section 504 claims for failure to exhaust administrative remedies because the parents could obtain all relief through an IDEA due process hearing. This focus on the availability of relief at the administrative level is further emphasized in *Gaudino v. Stroudsburg Area Sch. Dist.*, 2013 U.S. Dist. LEXIS 102382 (M.D. Pa., 2013). In *Gaudino*, the court found that a parent could bring a civil action under the ADA and Section 504 without first going through ODR *only because the parent was seeking relief that is not available under the IDEA*. *Id* at 23-24.

The most blunt statement on the issue is found in *D.F. v. Red Lion Area Sch. Dist.*, 2012 U.S. Dist. LEXIS 6925, 2012 WL 175020, (M.D. Pa., 2012):

> Defendants contend, and Magistrate Judge Methvin agreed, that because Plaintiffs did not raise their ADA or Rehabilitation Act claims at their due process hearing, that those claims are now barred. Plaintiffs counter that they were not required to exhaust their ADA and Rehabilitation Act claims at the IDEA due process hearing because the IDEA claims raised at the due process hearing were nearly identical to the ADA and Rehabilitation Act claims. The Court cannot agree. The statute and case law make clear that "IDEA-related claims brought under the ADA or the Rehabilitation Act [must] be submitted in the first instance to administrative review." *R.R. v. Manheim Twp. Sch. Dist.*, 412 F. App'x 544, 549-50 (3d Cir. 2011); *see also Swope v. Cent. York Sch. Dist.*, No. 1:10-cv-02541, 796 F. Supp. 2d 592, 2011 U.S. Dist. LEXIS 65804, at *19 (M.D. Pa. June 21, 2011)

D.F. at *18[4]

Apart from one unpublished decision, this issue has not been addressed by Pennsylvania state courts. The unpublished decision, however, is in total agreement with the referenced federal cases. *Collins v. State,* 2013 Pa. Commw. Unpub. LEXIS 797(Pa. Commw. Ct.2013).

In sum, there is no explicit statutory or regulatory foundation for ODR's jurisdiction to hear ADA claims. However, every court in Pennsylvania to have considered the issue has concluded that when ADA claims are entirely derivative of IDEA or Section 504 claims, the ADA claims must go through ODR before going to court. Although my reading of the applicable statutes and regulations may differ from the analysis of the various courts (particularly in regard to 20 U.S.C. § 1415(l); 34 C.F.R. § 300.516), I will not substitute my own legal analysis for the analysis of every judge to consider the issue. Consequently, the District's motion to dismiss the ADA claims is denied in both cases.

Systematic Violations

There is a world of difference between consolidating two cases for the sake of efficiency and convenience, and certifying a class action at the administrative level. In her complaint, M.P. asks me to find that the District violated not only her rights, but the rights of all other similarly situated parents. M.P. demands remedies not only for herself, but for all parents within the District who

[4] *R.R. v. Manheim Twp. Sch. Dist.* is not precedential, per Rule 5.7. The same is not true for *D.F. v. Read Lion Area Sch. Dist.*

do not speak English as a first language. Similarly, B.G. seeks a finding that the District systemically violates the rights of parents who do not speak English as a first language. Both case include allegations that the District not only violated the rights of the named students, but also of other similarly situated students.

I have no authority to make such findings. The scope of claims that I may hear may be broader that what is indicated in a strict reading of applicable statutes (e.g. ADA claims, discussed above). Yet for each type of claim that I have jurisdiction over, my inquiry is limited to whether the rights of an *individual* student or parent have been violated.

The IDEA gives parents, not classes of parents, the right to request a due process hearing. 34 CFR §300.507(a)(1). If a systemic policy or practice yields a violation of an individual student or parent's rights, it is within my purview to take evidence regarding the policy or practice. Further, it is appropriate for me to enjoin schools from implementing a policy that yields a violation. 20 U.S.C. § 1415(f)(3)(E)(iii). However, at the administrative level, such remedies must be awarded on a student-by-student or parent-by-parent basis. *See, e.g., M.M. v. Sch. Dist. of Phila.*, ODR No. 01539-1112KE (Ford, 2011); *P.V. v. Sch. Dist. of Phila.*, ODR No. 01541-1112KE (Ford, 2011). *See also P.V. v. Sch. Dist. of Phila.*, 2011 U.S. Dist. LEXIS 125370 (E.D. Pa. Oct. 31, 2011) (in which Judge Davis took note of my conclusion that I lacked authority to order wholesale changes to the District's procedures) *and P.V. v. Sch. Dist. of Phila.*, 289 F.R.D. 227 (E.D. Pa. 2013) (in which Judge Davis did what I lacked authority to do: certifed a class).

In both of these cases, if the District's policies or practices violated either parent/guardian or either students' rights, evidence of those polices or practices my be relevant – along with other evidence to show how those polices or practices were applied to the individual complainants. Further, if a policy or practice resulted in a violation, I am empowered to order the District to correct procedural violations on a case-by-case basis. I have no authority to find that a policy or practice results in violations *per se*, or results in violations for all similarly situated students or parents. Similarly, I have no authority to order wholesale changes in the District's policies or practices. Therefore, I grant the District's motion to dismiss claims of systemic violations.

Statute of Limitations - Hearing 15181-1314KE

In sum, the IDEA imposes a two-year statute of limitations, and then carves out two exceptions to the statute of limitations. The Third Circuit has resolved exceptions are narrowly construed. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3d Cir. Pa. 2012). Currently, in the Third Circuit, there is much debate over whether the statute of limitations bars claims arising more than two years before a due process hearing is requested, or if the IDEA should be construed to create a longer period of time. This debate is coming to a head in the Third Circuit Court of Appeals.[5] In this case, none of this matters, given B.G.'s claims and demanded relief.

The IDEA's statute of limitations never precludes evidence or testimony *per se*. Evidence that falls outside of the potential liability period is always admitted to establish necessary background and context. Rather, the statute of limitations bars relief that accrues outside of the liability period. In this case, the Complaint was filed on June 6, 2014. By the District's method,

[5] An appeal of a decision from the U.S. District Court for the Western District of Pennsylvania, *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 2013 U.S. Dist. LEXIS 180923, 2013 WL 6858963 (W.D. Pa.Dec. 30, 2013), is currently pending in the Third Circuit Court of Appeals.

claims arising before June 6, 2012 are barred. Assuming, *arguendo*, that the District is correct, the first inquiry is whether B.G. seeks a remedy that accrued before June 6, 2012.

None of B.G.'s demands specify a period of time. For example, B.G. demands a finding "that the [District] has wholly failed to comply with its responsibilities to provide [T.R.] a free appropriate public education designed to meet [T.R.'s] unique educational needs and order compensatory education accordingly." That demand, by itself, sheds no light on when compensatory education allegedly began to accrue.

The complaint alleges that T.R. attended school in the District from kindergarten through the present, although a portion of that time was spent in a District school that became a charter school. It is not clear exactly when T.R. started attending the charter school, but T.R. returned to the District sometime in the first half of the 2013-14 school year, according to the Complaint. There is also no dispute that T.R. is currently a 17 year old high school student. This information is presented in a portion of the Complaint titled "[T.R.'s] Educational Background." *Complaint* at 5-9. The next section of the Compliant is titled "Nature of the Problem." *Complaint* at 9-10. In this section, B.G. alleges a denial of FAPE during the fall term of the 2013-14 school year through the present (ongoing). All of this falls within the statute of limitations, according to the District. The "Nature of the Problem" section also alleges that the District denied B.G. meaningful participation in the IEP development process, but this section concerns the period of time starting in the fall of 2013. This time period syncs with the time period referenced in the section of the Complaint titled "Claims."

Despite the extensive background information, in the language of the IDEA, the Complaint includes a description of the nature of the problem occurring from the fall of 2013 through the present.[6] The entirety of this period falls within the IDEA's statute of limitations, according to the District's calculation. Therefore, the District's motion to limit claims is denied as moot.

An order consistent with the foregoing follows.

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[6] In her "Answer to District's Motion to Limit," B.G. argues that the District's obligations to T.R. are not limited by T.R.'s enrollment, and that the District's interpretation of the IDEA's statute of limitations is wrong. This Answer does not specifically allege violations occurring before the fall of 2013 and, moreover, I am confined by the four corners of the Complaint. 20 U.S.C. § 1415(f)(3)(B). Although claims can be amended, B.G.'s Answer is not an amendment. *See* 20 U.S.C. § 1415(c)(2)(E).

ORDER

Now, October 22, 2014, it is hereby **ORDERED** as follows:

1. The District's motion to dismiss ADA claims is **DENIED** in both ODR No. 15166-1314KE and ODR No. 15181-1314KE.

2. The District's motion to dismiss claims of systemic violations is **GRANTED** in both ODR No. 15166-1314KE and ODR No. 15181-1314KE.

3. The District's motion to dismiss claims falling outside of the IDEA's statute of limitations in ODR No. 15181-1314KE is **DENIED** as moot.

/s/ Brian Jason Ford
HEARING OFFICER