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

T.R., et al.,	:	
	:	
Plaintiffs,	:	Case No. 15-cv-04782-MSG
v.	:	
	:	
THE SCHOOL DISTRICT OF PHILADELPHIA,	:	
	:	
Defendant.	:	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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This case is not about special education students being deprived of services. Rather, it is an attempt to rewrite federal law and dictate to a school district which already has appropriate, informed practices and procedures in place, how it should allocate its resources to facilitate meaningful participation of limited English proficient ("LEP") parents in the special education process. Plaintiffs' claims are as unmoored from the procedural standards to certify a class as they are from the legal requirements of the Individuals with Disabilities Education Act (IDEA) and other statutes upon which they rely. This is particularly apparent where Plaintiffs seek to impose blanket mandates as to the services provided by the District. Plaintiffs' requested relief is unsupported by the text of the IDEA and, often, is directly contrary to IDEA regulations and the Third Circuit's interpretation thereof, which confer discretion on the District to determine what steps are necessary to ensure meaningful parental participation. Given the discretion afforded to the District, along with numerous other reasons, Plaintiffs' Motion for Class Certification fails as a matter of law to establish *any* of the requirements of Rule 23, the burden for which *all* lie exclusively with Plaintiffs.

I. BACKGROUND

This case has changed dramatically since its inception. None of the original Named Plaintiffs remain in the suit, which is significant because only those original Named Plaintiffs exhausted their administrative remedies through due process hearings, as required by the IDEA.[1] The Amended Complaint added Ms. Lin and her son, R.H., and Ms. Perez and her children, J.R.,

[1] Plaintiffs' rehashing of those hearings is irrelevant. The Hearing Officer's decision is the subject of the District's appeal, brought as a counterclaim in this action, and the District disputes a number of the factual and legal findings. Additionally, although Plaintiffs state former Named Plaintiff T.R.'s claims were dismissed as moot, T.R. plainly testified that she had no interest in pursuing the case, and her mother, Ms. Galarza, did not understand what this litigation was about and felt the District had done what it could to help T.R. do well at school and graduate. Ex. A (T.R. dep.) at 53:3-14, 56:1-14, 59:14-24; Ex. B (Galarza dep.) at 52:12-17, 145:10-19.

D.R., and L.R., as Named Plaintiffs, none of whom have exhausted their administrative remedies.[2]

Plaintiffs' theory of the case, originally predicated on a theory of total inaction on the part of the District, has also changed dramatically as discovery shed light on the District's robust practices and procedures for engaging parents of special education students so they may meaningfully participate in the development of their student's Individualized Education Program ("IEP"). In fact, the District provides an array of services to LEP parents in the special education realm and more broadly, because the District values parental participation and recognizes the valuable contributions parents make as members of the IEP team. Ex. C (Hess Decl.). At the start of the school year, special education teachers reach out to parents and, as part of that outreach, determine the best manner to communicate with them. *See, e.g.*, Ex. D (Capitolo dep.) at 17:7-19:22. Parents are advised of the District's translation and interpretation services, which are available throughout the school year and utilized at key meetings (IEP meetings, report card conferences, etc.) as well as for day-to-day communications (attendance issues, permission slips need signed, etc.). *See* Ex. E (Special Education Parental/Guardian Rights); Ex. F (Soderman dep.) at 51:3-23, 97:7-23; Ex. G (Monley dep.) at 75:5-21, 77:4-81:20.

The District's practices and procedures require that parents receive Permission to Evaluate (PTEs), Notice of Recommended Placement (NOREPs), Procedural Safeguards, and Permission to Re-evaluate (PTRE), in the native language of the parent. Ex. H (Quick Ref. Guide). Bilingual psychologists employed by the District evaluate students in the form most likely to yield accurate information. Ex. I (Hess dep.) at 184:5-18; Ex. J (Velez dep.) at 44:6-45:6. The Procedural Safeguards are provided to parents of special education students when

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[2] Plaintiffs agree this case is not about services received by the Student Plaintiffs. Pl. Br. at 17 ("Significantly, Ms. Lin and Ms. Perez are not seeking individualized damages or remedies of any kind based on the particular placement of their children within the District or the absence or duration of any individualized special education service.").

students are initially identified and annually at IEP meetings, together with a Special Education Parental/Guardian Rights notice – both are translated into the eight languages most commonly used among District families. Ex. C (Hess Declaration); Ex. E (Special Education Parental/Guardian Rights). In scheduling IEP meetings, the District translates meeting invitations into eight languages, and makes every effort to ensure that a parent is present at the meeting. Ex. H (Quick Ref. Guide).

District practice is to prepare a draft IEP in advance of the meeting for greater efficiency in the meeting itself. Ex. D (Capitolo dep.) at 42:15-44:18, 97:10-98:16. While the draft is in English because that is the common language of the IEP team, the draft is sent to parents before the meeting and District practice is to give parents the opportunity to meet with the Special Education Liaison ("SEL") for their child's school and one of the Bilingual Counseling Assistants ("BCAs") to review the draft IEP, including after regular school hours as necessary to accommodate the parent's schedule. Ex. H (Quick Ref. Guide); Ex. C (Hess Decl.); Ex. X (Lin Aff.); Ex. Y (Capitolo Declaration). In addition to the interpretation service, parents may also seek translation of drafts prior to the IEP meeting. For example, before signing a Mediation Agreement, Ms. Lin requested and received draft IEPs translated into Simple Chinese. Ex. D (Capitolo dep.) at 73:23-74:6.

At the IEP meeting itself, parents are encouraged to ask questions, suggest revisions to the plan, provide information on their child's current levels of functioning, and discuss strategies that may help the child's development. Ex. D (Capitolo) dep. at 41:18-42:14; Ex. I (Hess dep.) at 165:12-167:7. The goal of the IEP meeting is to ensure parents understand their child's special education needs, services that the District is proposing, and what the IEP team, including the parent, can provide to support the student in their education. *Id.* SELs play a critical role in

ensuring meaningful parental participation at the IEP meeting by coordinating the attendance of the interpreter (usually a BCA) and ensuring that parents understand the special education process and terminology.[3] Ex. I (Hess dep.) at 50:6-18, 167:8-168:15; Ex. D (Capitolo dep.) at 41:18-42:14; Ex. H. BCAs and school staff are trained on best practices for providing interpretation, generally, and regarding special education issues and terminology. Ex. F (Soderman dep.) at 45:4-46:10.

What type of interpretation services are utilized is at times determined based on parent preference. For example, Ms. Perez has often chosen to bring her own advocate to meetings to serve as interpreter, foregoing the use of a District interpreter; and Ms. Galarza had a positive relationship with a bilingual teacher so that teacher acted as the interpreter. Ex. D (Capitolo dep.) at 222:12-223:3; Ex. B (Galarza dep.) at 14:8-15:20; Ex. L (Perez dep.) at 33:8-34:4, 78:3-10. Language Line, a telephonic interpretation service, is used as a backup option, including when the parent's language is not spoken by a BCA. Ex. F (Soderman dep.) at 39:4-40:17.

Special education staff are trained on all District practices and procedures, including those aimed at encouraging parental participation in the IEP process. Ex. I (Hess dep.) at 34:5-35:21; Ex. Y (Capitolo Decl.). More specifically, special education staff are trained on the District's practices and procedures in providing interpretation and translation and how to obtain those services for a parent. Ex. I (Hess dep.) at 133:7-23. Special education Directors work with

[3] Parents are encouraged to further communicate with the District throughout the school year, not just during the IEP meeting. Ex. C (Hess Decl.); *see, e.g.*, Ex. K (Lin dep.) at 41:9-44:1, 84:5-14 (describing her regular meetings and communications with a number of District staff providing services to her son including the speech therapist, occupational therapist, and R.H.'s 1:1 aide). The Office of Specialized Services ("OSS") employs a parent coordinator who is responsible for all parental issues related to special education, with the purpose of ensuring parental engagement and effective responses to any complaints or issues that may arise. Ex. C (Hess Decl.). The District's Office of Family and Community Engagement ("FACE") strives to engage parents as essential partners in helping students navigate the District. Ex. G (Monley dep.) at 28:8-30:11. The OSS parent coordinator works with the FACE office to ensure that any concerns raised by the parents of special education students are addressed in an efficient and effective manner. Ex. C (Hess Decl.).

special education staff to ensure that appropriate services are provided to parents to facilitate their meaningful participation. *Id.*; Ex. H; Ex. D (Capitolo dep.) at 218:14-220:5.

II. ARGUMENT

Plaintiffs do not meet their burden of establishing that the proposed class action satisfies the various requirements of Rule 23.

A. Simply Alleging A Systemic Failure Does Not Establish A Class.

Plaintiffs appear to be operating under the mistaken notion that they can avoid the rigorous analysis for class certification by repeatedly referring to the District's alleged systemic failures to provide adequate foreign language services to parents during the special education process. Plaintiffs are wrong. "Framing a complaint as a class action challenge to a general policy does not automatically convert the case into the kind of systemic violation that renders the [IDEA's] exhaustion requirement inadequate or futile." *J.T. ex rel. A.T. v. Dumont Pub. Sch.*, 533 F. App'x 44, 54 (3d Cir. 2013) (quotation omitted); *see also Blunt v. Lower Merion Sch. Dist.*, 559 F. Supp. 2d 548, 559 (E.D. Pa. 2008), *aff'd*, 767 F.3d 247 (3d Cir. 2014) ("Allowing plaintiffs to bypass the administrative process by merely including conclusory allegations of systemic deficiencies would permit the exception to the exhaustion requirement to swallow the rule."). While the Court was required to accept Plaintiffs' allegations of systemic deficiencies as true at the pleading stage, it acknowledged that "[i]t is certainly possible that a developed record may not establish Plaintiffs' systemic legal deficiency theory." *T.R. v. Sch. Dist. of Philadelphia*, 223 F. Supp. 3d 321, 330 (E.D. Pa. 2016).

"Mere allegations of systemic violations of the law . . . will not automatically satisfy Rule 23(a)'s commonality requirement." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 844 (5th Cir. 2012) (quotation omitted); *see also Lightfoot v. D.C.*, 273 F.R.D. 314, 324 (D.D.C. 2011). "The reciting of the word 'systemic' in mantra-like fashion throughout the briefing and argument does

not overcome the prerequisites to class certification." *Reinholdson v. State of Minnesota*, 2002 WL 31026580, *8 (D. Minn. 2002), *vacated in part on other grounds*, 346 F.3d 847 (8th Cir. 2003); *see also J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999) ("We refuse to read an allegation of systematic failures as a moniker for meeting the class action requirements.").

The Third Circuit has explained that "[a] claim 'is not 'systemic' if it involves only a substantive claim having to do with limited components of a program, and if the administrative process is capable of correcting the problem.'" *J.T.*, 533 F. App'x at 54 (3d Cir. 2013) (quoting *Doe By & Through Brockhuis v. Arizona Dep't of Educ.*, 111 F.3d 678, 682 (9th Cir. 1997)). As in *J.T.*, this matter involves only one component of the District's special education program – foreign language services for parents. *See id.* Significantly, like the claims in *J.T.*, resolving each of the Named Plaintiffs' claims will entail "a factually intensive inquiry." *See id.* This factor alone renders the class action vehicle inappropriate.

B. <u>Plaintiffs Bear the Burden on Every Element of Rule 23.</u>

As the party seeking class certification, Plaintiffs bear the burden of affirmatively demonstrating by a preponderance of the record evidence that each of the requirements of Rule 23 are met. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-52 (2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320-21 (3d Cir. 2008). That Plaintiffs are pursuing injunctive relief does not lessen their burden; "the requirements of Rule 23 must always be satisfied regardless of the type of class seeking certification." *Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 482 n.16 (3d Cir. 2018).

Rule 23 "does not set forth a mere pleading standard" and class certification is only appropriate if the trial court is satisfied after a "rigorous analysis" that each of the prerequisites of Rule 23 has been met. *Dukes*, 564 U.S. at 350; *Comcast Corp. v. Behrend*, 569 U.S. 27, 33

(2013). This "'rigorous analysis' of the evidence and arguments put forth" may necessitate "'a preliminary inquiry into the merits' of the plaintiffs' claims to ensure they can be 'properly resolved as a class action.'" *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 380 (3d Cir. 2013) (quoting *In re Hydrogen Peroxide*, 552 F.3d at 317-18, and *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001)). "When courts harbor doubt as to whether a plaintiff has carried her burden under Rule 23, the class should not be certified." *Mielo*, 897 F.3d at 483 (citing *In re Hydrogen Peroxide*, 552 F.3d at 321).

Plaintiffs here fail to establish any of the Rule 23(a) requirements – numerosity, commonality, typicality, or adequacy. Nor can they establish that the District has acted on grounds that apply generally to the class, as required for certification under Rule 23(b)(2).

C. Plaintiffs' Class Definition is Ambiguous, Unworkable, and Does Not Allow the Court to Determine Readily Who is A Member of the Class.

Plaintiffs' proposed class definitions are fatally flawed. Plaintiffs must provide a proper class definition "with reference to objective criteria" and "some assurance that there can be 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd v. Aaron's Inc.*, 784 F.3d 154, 164 (3d Cir. 2015) (citing FRCP 23(c)(1)(B) and *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)). This requirement is equally applicable to an injunctive class, which must be "capable of the type of description by a 'readily discernible, clear, and precise statement of the parameters defining the class.'" *In re Processed Egg Products Antitrust Litig.*, 312 F.R.D. 124 (E.D. Pa. 2015) (quoting *Shelton v. Bledsoe*, 775 F.3d 554, 563 (3d Cir. 2015)); *see* F.R.C.P. 65 (any injunction must "state its terms specifically…and describe in reasonable detail…the act or acts restrained or required.").

Membership in either of Plaintiffs' proposed classes hinges on a parent's status as "limited English proficient" or "LEP." Plaintiffs' brief, however, does not even attempt to define what "limited English proficient" means or offer any proposal for determining class membership. When the District proffered interrogatories seeking information about the "level of English proficiency of each Plaintiff," Plaintiffs actually objected to the term as vague and ambiguous. Ex. M (Plaintiffs' Objections and Second Supplemental Responses to the First Set of Interrogatories) at No. 14.

If Plaintiffs are looking to the law to supply definitions, they have not pointed to a statutory definition of LEP that makes any sense when applied to parents. The definition of LEP incorporated into the IDEA regulations that Plaintiffs reference in the Amended Complaint relates explicitly to students and becomes nonsensical when applied to a parent. *See* 34 C.F.R. § 300.27 ("Limited English proficient has the meaning given the term in section 9101(25) of the ESEA."); 20 U.S.C. §9101(25) (stating a multi-part definition for LEP applicable to individuals "aged 3 through 21" and who are "enrolled or preparing to enroll in an elementary school or secondary school").

The remainder of the ESEA definition of LEP is equally problematic when applied to parents, stating that LEP means an individual:

> (C)(i) who was not born in the United States[4] or whose native language is a language other than English; (ii)(I) who is a Native American or Alaska Native, or a native resident of the outlying areas; *and*
>
> (II) who comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or (iii) who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; *and*

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[4] Notably, the District is prohibited by U.S. Department of Justice guidance from asking about the citizenship or immigration status of a parent or student.

> (D) *whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual*—
>
> (i) the ability to meet the challenging State academic standards;
>
> (ii) the ability to successfully achieve in classrooms where the language of instruction is English; or
>
> (iii) the opportunity to participate fully in society.

20 U.S.C. §9101(25) (italics supplied).

Focusing just on subsection D's consideration of ability to meet state academic standards and achieve in the classroom shows the definition relates to school children, not their parents. Furthermore, these definitional requirements are conjunctive, so even if this section could be borrowed to assess parents, it requires a type of individualized, multi-layered, fact-intensive assessment which cannot possibly be appropriate to determine class membership. Subsection D alone necessitates a comprehensive factual determination concerning whether a parent has a difficulty in speaking, reading, writing or understanding English and of how that difficulty affects that person. 20 U.S.C. § 9101(25)(D). "Where determining a membership in a class or subclass would require 'a mini-hearing on the merits of each class member's case,' a class action is inherently inappropriate for addressing the claims at issue." *Contawe v. Crescent Heights of Am., Inc.*, 2004 WL 2966931, *6 (E.D. Pa. 2004) (quoting *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 446 (E.D. Pa. 2000); *see also Kline v. Security Guards, Inc.*, 196 F.R.D. 261, 266-67 (E.D. Pa. 2000)).

Indeed, Plaintiffs' expert, Dr. Flores, uses the term LEP to describe people with a "*preference for* a language other than English," a definition which on its face could include people who are perfectly fluent in English but simply have a *preference* for another language. Ex. N (Flores dep.) at 106:5-109:10 (emphasis added). A definition that relies on individual preference simply cannot meet the Third Circuit's requirement that a class definition be reliable and based upon objective criteria. *Byrd*, 784 F.3d at 164.

The Third Circuit's requirement that the class definition be objective and administratively feasible makes practical sense – where Plaintiffs are asking the Court to require the District to provide relief to a class of people, it follows that the District needs to be on fair notice of who exactly falls within that class. Here, where no workable definition has been proffered and class membership is predicated upon preferences or traits for which the District has no viable or verifiable mechanism to assess, class certification must be denied.

D. Plaintiffs' Evidence of Numerosity is Impermissibly Speculative.

Plaintiffs fail to meet their burden of establishing numerosity, a requirement which has "real teeth" and is not satisfied by the perfunctory statement that "members of both the Student Class and the Parent Class is in the thousands." *Mielo*, 897 F.3d at 484; Pl. Br. at 13. While Plaintiffs do not have to offer exact numbers or identities of class members, they do have to offer "circumstantial evidence specific to the products and problems involved [in] the litigation." *Hayes*, 725 F.3d at 356. Thus, Plaintiffs are required to present evidence that enables the Court to make a factual determination as to the number of putative class members "without resorting to mere speculation." *Mielo*, 897 F.3d at 484 (citing *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 597 (3d Cir. 2012)).

The proffered evidence of numerosity is so general – the number of special education students who speak a language other than English in the home – that it cannot meet their burden. Consequently, Plaintiffs ask the Court to engage in the exact speculation that the Third Circuit rejected in *Mielo*, *Marcus*, and *Hayes*. *See Mielo*, 897 F.3d at 486 ("Mere speculation as to the number of class members – even if such speculation is 'a bet worth making' – cannot support a finding of numerosity." (quoting *Hayes*, 725 F.3d at 357, quoting *Marcus*, 687 F.3d at 596)).

Plaintiffs reliance upon the number of special education *students* who live in a household with a home language other than English as proof of the number of *parents* that are LEP is a

false and illogical leap that has no support in the record and fails to acknowledge the diversity of situations from which students come to the District.[5] Pl. Br. at 13. For example, there are a significant number of families in Philadelphia that are multilingual – i.e. the parent is proficient in English, but also speaks a language other than English in the home with their child. *See* Ex. W (Sharer Dep.) at 10:16-11:16 (describing IEP meetings she attended where the family spoke a language other than English in the home, but the parent was also proficient in English and did not require an interpreter); *see also id.* at 26:10-29:10, 51:24-53:7 (discussing the District's records regarding the Home Language Survey, which do not reflect a parent's language proficiency, family size, or situations where a student may not live with a parent). Plaintiffs' conclusion rings of stereotyping rather than evidence.

Perhaps realizing they can only speculate as to the number of class members, Plaintiffs deflect by complaining that the District does not track whether parents are LEP. Of course, the Third Circuit has plainly stated that the "nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden to fulfill Rule 23's requirements." *Hayes*, 725 F.3d at 356 (citation omitted). In any event, the District maintains significant records about students receiving special education services, as required by the IDEA, but no such requirement exists for the District to keep records about the language proficiency of parents.[6] Ex. I (Hess dep.) at 58:19-60:19

Consistently, Plaintiffs fail to point to *any* members of the putative classes who have suffered an alleged violation of any of the statutes cited in the Amended Complaint, let alone

[5] The letter from counsel that contains this information is not admissible evidence and cannot be relied upon as proof "that there are *in fact* sufficiently numerous parties," as required by Rule 23(a). *Behrend*, 569 U.S. at 33; *see In re Hydrogen Peroxide*, 552 F.3d at 307 ("Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence."). Moreover, the letter from counsel stressed that the numbers provided do not reflect the language abilities of *parents*. *See* Pl. Br. Ex. 3.

[6] To be clear, the District and OSS does maintain records of interpretation and translation services, as needed to manage the District's resources and ensure that such services are available. *See, e.g.*, Ex. F (Soderman dep.) at 112:1-113:16; Ex. I (Hess dep.) at 304:24-305:21; Ex. H (Quick Ref. Guide).

who have suffered the same alleged violations as the Named Plaintiffs. This runs directly afoul of the requirement that the evidence supporting numerosity be specific to the "problems involved in the litigation." *Hayes*, 725 F.3d at 357.

Plaintiffs similarly fail to present evidence supporting their argument that joinder is impracticable under the factors laid out by the Third Circuit in *Modafinil*, as is their burden. *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 259 (3d Cir. 2016). Instead, Plaintiffs presumptuously claim that "[t]he classes are also largely made up of individuals with limited financial resources," and who would be "greatly challenged in bringing their own individual lawsuits," which has no basis in the record, discounts the abilities of class members, and flies in the face of the fee shifting provisions of the IDEA. Pl. Br. at 14.

To the contrary, Plaintiffs are themselves rebuttal evidence that supposedly similarly-situated individuals would be greatly challenged in bringing their own individual lawsuits. Plaintiff Lin and former Plaintiffs Galarza and Peralta each utilized either the mediation and/or due process frameworks, both of which provide language services as a matter of course and without charge. Ex. D (Capitolo dep.) at 60:17-61:5. Ms. Perez has previously been represented by counsel in raising issues pertaining to her children's' special education services to the District (none relating to the provision of language services) and those issues were resolved to the parties' mutual satisfaction. *See, e.g.*, Doc. 54-1. By their own conduct, therefore, Named Plaintiffs have demonstrated that they can seek to prosecute their claims individually.

E. Plaintiffs' Claims are Not Premised Upon Common Conduct.

Plaintiffs fail to meet their burden as to commonality, which requires a showing that "there are questions of law or fact common to the class," which are "capable of classwide resolution." Rule 23(a); *Dukes*, 564 U.S. at 350. "The focus of the commonality inquiry is not on the strength of each class member's claims but instead 'on whether the defendant's conduct was

common as to all of the class members.'" *In re Community Bank of Northern Virginia Mortg. Lending Practices Litigation*, 795 F.3d 380, 397 (3d Cir. 2015).

Where the complained-of conduct is a discretionary practice, the plaintiffs "must show that each class member was subjected to the specific challenged practice in roughly the same manner." *Rodriguez*, 726 F.3d at 383 (citing *Dukes*, 564 U.S. at 355-58). To establish commonality Plaintiffs must further demonstrate that the putative class members "have suffered the same injury." *Mielo*, 897 F.3d at 487 (citing *Dukes*, 564 U.S. at 349-50). Plaintiffs point to no evidence that the District's conduct is common to all class members, nor allege that the putative class members have suffered the same injury. Thus they cannot establish commonality.

Plaintiffs' purported common claim is that "the District fails on a systemic basis to provide members of the Parent Class adequate interpretation and translation services to allow them to *participate meaningfully* in the special education planning process for their children." Pl. Br. at 15-16 (emphasis added). This argument disregards that meaningful participation is not a one-size-fits-all standard.

When evaluating whether parents have participated meaningfully, the Third Circuit looks to the individual factual circumstances at issue, giving particular weight to (i) whether parents were present at the IEP meeting, (ii) whether they were given the opportunity to ask questions and make suggestions, and (iii) whether parental contributions were honestly considered by the IEP team. *Fuhrmann on Behalf of Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1036 (3d Cir. 1993) (finding meaningful parental participation where parents were present at the IEP meeting and made suggestions, some of which were incorporated into the final IEP); *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565-66 (3d Cir. 2010) (same); *R.K. v. Clifton Bd. of Educ.*, 587 F. App'x 17, 21 (3d Cir. 2014) (same); *L.G. ex rel. E.G. v. Fair Lawn Bd. Of Educ.*, 486 F.

App'x 967, 972 (3d Cir. 2012) (noting meaningful parental participation does *not* require parents "be included in 'preparatory activities that public agency personnel engage in to develop a proposal…'" (citing 34 C.F.R. § 300.501(b))); *W.R. v. Union Beach Bd. Of Educ.*, 414 F. App'x 499, 500-501 (3d Cir. 2011) (finding meaningful parental participation where there was "considerable back-and-forth between the District and the parents regarding the best method for teaching [the child]"); *see also Colonial School District v. G.K. by and through A.K.*, 2018 WL 2010915 at *12-13 (E.D. Pa. 2018) (characterizing the meaningful participation requirement as "basic").

The Third Circuit's interpretation of the meaningful participation requirement necessitates a fact-intensive inquiry into the individual situation. Applying that approach here, the Court would have to consider both what services the District made available to the LEP parent *and* whether those services were sufficient to enable the LEP parent to participate meaningfully in the IEP process. The District's practice provides wide latitude to the appropriate personnel (usually the SEL, who has a direct relationship with the parent) to take the necessary steps to effectively engage parents through the variety of language services that are available.[7] Ex. H. These considerations can vary parent-to-parent, school-to-school, language-to-language, IEP issue-to-IEP issue. Ex. D (Capitolo dep.) at 120:17-121:9; Ex. v. (Winterbottom Report). Analysis of the considerations is variable because the language services necessary to ensure

[7] Applying the Third Circuit's standard to the Parent Plaintiffs, both Ms. Perez and Ms. Lin have certainly meaningfully participated in the IEP processes for their children. With the language services provided by the District, Ms. Lin provides input about her son's behavior to the IEP team, is able to voice concerns and disagreement with the plan, ask questions, and understand the services proposed for her son in the IEP in order to fully participate at the IEP meeting, as well as the services that are actually implemented once the IEP is finalized. Ex. K (Lin dep.) at 127:1-3, 140:24-141:7, 157:15-21, 162:11-12; Ex. D (Capitolo dep.) at 67:12-69:18. Ms. Perez, with interpretation services, understands the special education needs of her children, the services they receive, provides input to the school about her children, has received helpful suggestions from the IEP team, asks questions, and those questions are appropriately addressed. Ex. L (Perez dep.) at 18:24-23:12, 66:7-10. Furthermore, Ms. Perez and the District have collaborated on numerous occasions to reach appropriate placements and services for her children. *See, e.g.*, Ex. L (Perez dep.) at 25:2-24, 34:5-35:1, 37:14-23, 59:7-61:10, 64:17-66:10.

meaningful participation will depend on the particular parent and situation, and, therefore, incapable of classwide proof.[8]

The varying degree of services the District provides to meet parents' needs is precisely why Plaintiffs' reliance on *Baby Neal* is misplaced. In *Baby Neal*, although the class members had varying individual circumstances, the "pattern of conduct" by the defendant was consistent. 43 F.3d 48, 62 (3d Cir. 1994). Here, there is no common "pattern of conduct" on the part of the District – indeed, the practice is purposefully discretionary and cannot be established as a legal violation without a case-by-case determination. The discretion built into the District's practice conforms to applicable IDEA regulations which require the "[u]se of interpreters or other action, *as appropriate*." 34 C.F.R. § 300.322 (emphasis added).[9] "As appropriate" in and of itself connotes a subjective, individualized, judgment-based process.

When complaining of a discretionary policy like the District's, Plaintiffs "must show that each class member was subjected to the specific challenged practice in roughly the same manner," and "identify some 'common mode' in which [the decisionmakers] exercised their discretion." *Rodriguez*, 726 F.3d at 383-84 (citing *Dukes*, 131 S.Ct. at 2554). Plaintiffs agree that the District's practice is discretionary, but have no factual foundation upon which to make a

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[8] In addition to being legally incorrect, Plaintiffs' argument characterizes the factual record in a way that is highly misleading. For example, Plaintiffs rely upon the deposition testimony of District employee Chris Marino, an administrator in the Office of Specialized Services, as evidence that the translation and interpretation procedure has not been implemented. Pl. Br. at n.11, n.12, and n.13; Ex. N (Marino dep.) at 15:22-16:11. Given Mr. Marino's plain statement that he is not part of the decision-making process with regard to translation requests, Plaintiffs reliance on his testimony is disingenuous. *Id.* at 40:23-41:20. Mr. Marino's role in the process is to manage the contract with the vendor, make sure they get paid timely, and the District does not exceed the amount of the contract. Plaintiffs' reliance on his testimony for anything beyond that is deceptive. *Id.* at 17:2-22, 19:1-5, 31:6-32:10, 35:4-22, 40:23-41:20. This mischaracterization of Mr. Marino's deposition further supports that Plaintiffs have no factual evidence for their position, and, to the contrary, the District personnel with a direct role in ensuring meaningful parental participation consistently testified that the practice is in place and reflects what has been the District's practice for years. *See, e.g.*, Ex. D (Capitolo dep.) at 184:24-187:1.

[9] There is no statutory or regulatory mandate for the District to translate IEPs. In fact, the regulations implementing the IDEA explicitly identify several documents which do have to be translated into the parent's native language, **all of which the District translates**, and the IEP is not one of them. *See*, 34 C.F.R. § 300.503. If this Court were to mandate that such translations were required it would be a significant expansion of the IDEA beyond the text approved by Congress.

claim that the discretion is being exercised across the District in a common manner that deprives LEP parents of their right to meaningful participation.[10] Pl. Br. at 18. In fact, Plaintiffs do not have evidence of even one parent being denied meaningful participation – even the Named Plaintiffs themselves agreed they were able to understand the plan for their child, ask questions, make suggestions, and that those questions and suggestions were honestly considered and implemented by the IEP team. *See, supra* n.7.

Finally, alleging that all Plaintiffs "suffered a violation of the same provision of law," as Plaintiffs have done here, is not sufficient to establish commonality. Pl. Br. at 17; *Dukes*, 564 U.S. at 350; *Mielo*, 897 F.3d at 487-490 (rejecting class certification where the putative class encompassed a "wide variety of potential ADA violations"). As such, Plaintiffs' kitchen-sink allegation "[w]hether the policies, procedures, and practices of the District with respect to language services (translations and interpretations) provided to members of the Parent Class and Student Class violates the IDEA, ADA, Section 504, the EEOA, Title VI, and [state law provisions]" cannot possibly establish commonality. Each of these claims have vastly different elements, rely upon Plaintiffs' membership in various protected classes (i.e. race and national

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[10] The affidavits of Anna Perng and Bonita McCabe do not provide factual evidence of a common practice. Pl. Br. Ex. 19, Pl. Br. Ex. 20. First, neither affidavit is admissible evidence. Ms. Perng's affidavit contains hearsay (and, sometimes, double hearsay, such as ¶¶ 16, 21, and 23), does not establish whether her statements are based upon personal knowledge, and is of limited relevance insofar as it reflects her experiences with early intervention, which is not part of this case. Ms. McCabe's affidavit lacks the requisite personal knowledge to be admissible, as she admits that her experience with LEP parents is extremely limited and her broad-brush statements about the quality of the interpretation services of the District (¶¶ 8-12, 14-15) are entirely lacking in foundation. Aside from their admissibility issues, neither affidavit establishes that the issues discussed are "systemic." Neither Ms. Perng nor Ms. McCabe identify **even one** LEP parent whose experiences are reflected in their Affidavits. Both Ms. Perng and Ms. McCabe have acted as advocates for Plaintiff Lin, so their statements about LEP parents may just be reflective of Ms. Lin's experiences. See Ex. D (Capitolo dep.) at 58:1-61:5. Ms. Perng only refers to **one** school (of the District's over 200), and Ms. McCabe described **one** instance in which a parent requested translated documents and did not receive them. Despite requests to Plaintiffs for such information, Plaintiffs never identified a single parent that was denied translated documents after engaging in the District's practice. Ex. M at No. 3, 4. Without any identifying information about this parent's purported experience, the District is unable to comment on the alleged request or the dialogue that occurred between the parent and the District relating to the services provided and whether she was able to meaningfully participate. Nonetheless, Plaintiffs proffered evidence of one parent allegedly being denied translated documents falls far short of establishing a systemic failure by the District.

origin for the EEOA and Title VI claims and disability for ADA and Section 504 claims), and can be complied with (and conceivably violated) in myriad ways, none of which Plaintiffs' brief addresses. Plaintiffs point to absolutely no common contention that would resolve these claims in "one stroke," as is required by *Dukes*.[11] 564 U.S. at 350; *see, e.g., Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 132 (3d Cir. 2017) (outlining elements of an EEOA claim); *Andrew M. v. Del. Cnty. Office of Mental Health and Mental Retardation*, 490 F.3d 337, 349 (3d Cir. 2007) ("[E]ven in cases also brought under the IDEA, a plaintiff must still prove that there was a violation of [Section 504]"); *Blunt*, 767 F.3d at 293 (establishing a prima facie case under Title VI requires a showing that defendant acted with discriminatory intent). Plaintiffs' cursory allegation of a statutory violation does not meet their burden and the attempt to back-door claims for which there is no evidence to support class certification must be rejected.

F. Plaintiffs' Claims are Subject to Unique Defenses not Typical of the Class.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The Third Circuit has plainly stated that "[a] proposed class representative is neither typical nor adequate if the representative is subject to a unique defense that is likely to become a major focus of the litigation." *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006).

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[11] Plaintiffs ignore that in their Amended Complaint the IDEA and Title VI claims were brought by the subclass of "Student Class Members Who Are LEP." Because Plaintiffs have failed to move for certification of this subclass, the class that Plaintiffs currently seek to certify is overbroad as it contains students without a language barrier for whom no cause of action exists. Furthermore, parents do not have standing to pursue Title VI claims on behalf of themselves, as they are not the intended beneficiary of the federal funds. *Monaco v. Mitsubishi Motors Credit of Am., Inc.*, 34 F. App'x 43, 45 (3d Cir. 2002) ("It is well settled that 'to be a class representative on a particular claim, the plaintiff himself must have a cause of action on that claim.'"); *see, e.g. Brown-Dickerson v. City of Phila.*, 2016 WL 1623438 at *8 (E.D. Pa. 2016) ("To establish standing under Title VI, the plaintiff must be the intended beneficiary of the federal spending program."); *Williams v. Lenape Board of Educ.*, 2018 WL 916364 at *6 (D.N.J. 2018) (same); *R.W. ex rel. Williams v. Delaware Dept. of Educ.*, 2008 WL 4330461 at *3 (D. Del. 2008) ("The intended beneficiaries of a federally funded public school program are school children, not their parents.") (quoting *Jackson v. Katy Indep. Sch. Dist.*, 951 F.Supp. 1293, 1298 (S.D. Texas 1996)).

Plaintiff Lin's claims are barred by a Mediation Agreement that she entered into with the District on August 18, 2016. Ex. O. Therein, Ms. Lin specifically agreed to receive translations of only *final* versions of IEP and evaluation reports. Only now, after receiving the benefit of the bargain (including a litany of District-funded independent evaluations for her son, R.H.), does Ms. Lin claim she is also entitled to an unlimited number of translated *drafts* of those documents.[12]

The Mediation Agreement plainly states on its face that it is "legally binding and enforceable in a state court of competent jurisdiction or in a district court of the United States[,]" and judicial policy favors the finality of such agreements. *See Grieco v. N.J. Dept. of Educ.*, 2007 WL 1876498 (D. N.J. 2007) ("[T]o permit plaintiffs…who have resolved their IEP issues with the school district, to undo such settlements through a class action lawsuit contravenes long established judicial policy which promotes the finality of settlements"); Ex. O. The Agreement was negotiated with a neutral mediator, Ms. Lin was represented by *two* advocates (Ms. Perng and Ms. McCabe), and interpretation services were used. Ex. D (Capitolo dep.) at 60:17-61:5. This defense, which is unique to Ms. Lin, has a significant likelihood of eclipsing other issues in the course of the litigation. A finding that the Mediation Agreement bars Ms. Lin's claims means that she is not entitled to the relief that she seeks in this matter, and would render her both atypical and inadequate as a class representative. *Beck*, 457 F.3d at 301; *In re Schering Plough Corp. ERISA Litigation*, 589 F.3d 585, 602 (3d Cir. 2009) (vacating class certification where the representative had entered into a Separation Agreement).

Regardless of whether the Mediation Agreement forecloses Ms. Lin's claims, its very existence renders Ms. Lin atypical because the translation and interpretation services she

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[12] A settlement agreement is "not void because a party settled for less than s/he believes the law provides." *Ballard ex rel. Ballard v. Philadelphia School Dist.*, 273 F. App'x 184, 188 (3d Cir. 2008).

received from the District were according to the terms negotiated in the Mediation Agreement, and not according to the District's practices and procedures.[13] To be abundantly clear, Ms. Lin received the particular language services from the District that she did because they were agreed to in the Mediation Agreement. As such, Ms. Lin's experience with the District's language services is not typical of the members of the putative class because she was not subject to the same practices as other members of the putative class.

Similarly, the claims of Ms. Perez and L.R. are not typical. First, Ms. Perez's claims as to L.R. are barred insofar as they arose prior to February 27, 2017, when the settlement agreement between Ms. Perez and the District was executed. *See,* Doc. 54-1. Plaintiffs' note that Ms. Perez did not waive any future rights to raise claims is of no moment. Pl. Br. at 9. Since L.R.'s transfer to private school Ms. Perez has had regular communications with L.R.'s Spanish-speaking case manager and has not requested that the District translate any documents. Ex. L (Perez dep.) at 35:2-37:13; 45:19-46:1. These circumstances, plus the unique defense that the settlement agreement bars claims prior to February 2017, are simply not typical of the other members of the Student Class, nor is Ms. Perez's experience as L.R.'s parent typical of the Parent Class.

G. None of the Named Plaintiffs are Adequate Class Representatives.

The final element of Rule 23(a) requires that "the representative parties will fairly and adequately protect the interests of the class." Contrary to Plaintiffs' assertion, "[t]he party seeking certification bears the burden of establishing each element of Rule 23 by a preponderance of the evidence." *Marcus*, 687 F.3d at 591 (citing *Hydrogen Peroxide*, 552 F.3d at 307). The Third Circuit has held that "[a]dequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed

[13] This argument should not be read as implying that Ms. Lin would in fact have received any different degree of services without the Mediation Agreement. The point is simply that the District's protocol was not followed as to Ms. Lin because of the Agreement, which renders her atypical of the class she purports to represent.

litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Wetzel v. Liberty Mut. Ins. Co.,* 508 F.2d 239, 247 (3d Cir.1975).

1. Plaintiff Lin is an inadequate class representative.

Ms. Lin is not an adequate class representative because there are significant issues with her credibility, most notably that she "speaks terrific English." Ex. P; *Dotson v. Portfolio Recovery Assocs., LLC*, 2009 WL 1559813 at *2 (E.D. Pa. 2009) ("A district court may consider the credibility of the named plaintiff in determining adequacy of representation."). Where issues regarding a class representative's credibility are likely to "divert the jury's attention from the substance of the basic claim and thus harm the remaining class members," class certification may be denied. *Karnuth v. Rodale, Inc.*, 2005 WL 747251 at *3 (E.D. Pa. 2005) (internal quotations omitted); *see Coyle v. Hornell Brewing Co.*, 2011 WL 2147218 at *4 (D.N.J. 2011) ("The issue is not simply whether Plaintiff in fact lied, but whether her inconsistent testimony makes her vulnerable …"). Here, there is significant evidence that Ms. Lin has been less than candid, particularly as it pertains to her ability to speak and understand the English language, which goes to the core of her claims and renders her an inadequate class representative.

At her deposition, Ms. Lin stated that she does not understand English. Ex. K (Lin dep.) at 8:21-23. However, there is documentary evidence that Ms. Lin: 1) "speaks terrific English[;]" 2) served as a "bilingual parent leader" at a PILCOP workshop soliciting plaintiffs for this case; 3) has declined the services of a District interpreter on numerous occasions; 4) communicates with District personnel both in person and via email in English on a near daily basis; [14] and 5) has held herself out to the McCall school community as a liaison between English-speaking teachers

[14] Ms. Lin claims that her emails with District personnel were written using a combination of translation from her sixteen-year-old daughter and Google translate, which raises further credibility concerns given the sophisticated special education terminology used in the correspondence. *See, e.g.* Ex. K (Lin dep. at 47:6-48:13).

and Mandarin-speaking parents. Ex. P at 2; Ex. Q at 7; Ex. R; Ex. D (Capitolo dep.) at 61:20-63:10, 70:2-71:12, 121:19-122:20; Ex. S at 7.[15]

2. Plaintiff Perez is an inadequate class representative.

Ms. Perez's deficiency as a class representative lies in her failure to fulfill her obligation to "protect the interests of the class." Rule 23(a)(4). First and foremost, Ms. Perez does not know what a class action is and is only interested in individual relief. Ex. L (Perez dep.) at 53:8-13, 52:2-13.[16] Significantly, Ms. Perez received documents from counsel that were translated into Spanish but never reviewed them, had no understanding of what stage of the litigation the case was in at the time of her deposition, and did not review any of the documents produced by the District in discovery, despite the fact that some of them were specifically about her children and were in Spanish. Ex. L (Perez dep.) at 49:6-50:19, 51:22-52:1, 56:21-58:4. The responsibility of a class representative is to keep an eye on the attorneys litigating the case and stay informed about the litigation, which Ms. Perez simply has not done. *Byes v. Telecheck Recovery Servs., Inc.*, 173 F.R.D. 421, 426 (E.D. La. 1997) (denying class certification, in part, on adequacy grounds where proposed class representative had no knowledge of the status of this case, had not reviewed most of the pleadings, was unaware of prior settlement negotiations, and was unaware of her duties as proposed class representative, *inter alia*). This is not a high bar, yet Ms. Perez cannot meet it as she has totally abdicated her responsibilities as a class representative.

3. There are significant issues regarding the adequacy of counsel.

Issues regarding the adequacy of the Ms. Lin and Ms. Perez as class representatives overlap with concerns regarding the adequacy of counsel. While the District has no doubt that

[15] "It is axiomatic that the lead plaintiff must fit the class definition…[a]lthough different courts have asserted different origins for this axiom, they arrive at the same conclusion: where the lead plaintiff does not fit the class definition, the class may not be certified." *Hayes*, 725 F.3d at 360 (citing *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962)).

[16] Similarly, Ms. Lin does not appreciate the scope of the class she purports to represent and is interested only in individual relief. Ex. K (Lin dep.) at 103:2-9, 110:23-111:4.

class counsel has significant experience litigating class actions, the District is nevertheless troubled by counsel's pursuit of this matter with little to no involvement of the Named Plaintiffs and notwithstanding their credibility issues. First, neither Ms. Perez nor Ms. Galarza were aware that a settlement conference had occurred, nor were they aware of what the District had offered to settle the case, despite a Court Order to attend. (Doc. No. 61); Ex. L (Perez dep. at 58:5-13); Ex. B (Galarza dep.) at 150:7-14.[17] All of the Named Plaintiffs were confused about their discovery obligations and had not adequately searched for relevant documents. Ex. K (Lin dep.) at 11:12-12:7, 14:3-22, 78:1-19; Ex. L (Perez dep.) at 76:1-22. For example, Ms. Perez never searched her email for responsive documents and did not produce progress reports that had been translated into Spanish; and Ms. Lin failed to produce relevant handwritten notes that the District incidentally learned of when she was reviewing them prior to her deposition. *Id*. The District obtained a trove of relevant documents from non-party Ms. Perng, many of which should have been produced months prior by Ms. Lin as she was either a sender or recipient. Curiously, Ms. Perng pointed out this very issue to Plaintiffs' counsel and asked why she was being required to "resubmit" the same information again when she had already provided it to Plaintiffs' counsel. Ex. T.

Neither Ms. Lin nor Ms. Perez was familiar with the Amended Complaint, which was never translated for them. Ex. K (Lin dep.) at 160:17-24; Ex. L (Perez dep.) at 49:6-50:19. Similarly, both Ms. Lin and Ms. Perez signed Verifications under oath for interrogatory responses that they were unfamiliar with, had not been translated, and, in Ms. Perez's case, contained incorrect information. Ex. L (Perez dep.) at 91:8-93:23, 110:17-112:22; Ex. K (Lin dep.) at 163:17-24. Interpretation services for Ms. Lin were provided via telephonic

[17] Perhaps even more troubling is that Ms. Galarza had a misimpression of what this case was even about, expressing the belief at her deposition that this litigation was about the identification of students for special education services. Ex. B (Galarza dep.) at 145:10-19.

interpretation, despite Plaintiffs' insistence in this suit that the District's use of Language Line is insufficient, particularly where documents are being discussed. Ex. K (Lin dep.) at 75:6-18; Ex. Z. Plaintiffs' counsels' failure to ensure that the Named Plaintiffs understood the nature of their claims and key documents, such as the Amended Complaint and Verifications signed under oath, raises concerns regarding the resources that counsel are able to devote to the litigation.[18] F.R.C.P. 23(g)(1)(A).

H. The Relief Sought By Plaintiffs is Not Appropriate as to the Class as a Whole

In addition to satisfying each of the requirements of Rule 23(a), Plaintiffs must additionally satisfy one of the subparts of Rule 23(b). Plaintiffs seek to proceed under Rule 23(b)(2), which permits certification only where: "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Dukes*, 564 U.S. at 360 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L.Rev. 97, 132 (2009)).

Plaintiffs again fail to meet their burden. Looking to the relief sought by Plaintiffs, it simply is not of the sort that can be "declared unlawful as to all of the class members or as to none of them." *Id.* For example, Plaintiffs seek an order requiring the District to translate all IEP plans and evaluations, without regard to need. Pl. Br. at 24. There is no statutory requirement that these documents be translated as of right, so the District provides translated documents

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[18] As District personnel have testified, translation of documents can be very expensive, especially if those documents contain technical terminology. Ex. D (Capitolo dep.) at 148:23-150:4.

where necessary to effectuate meaningful participation.[19] The District's practice simply cannot be declared unlawful as to the entire class, because the Parent Class, as defined, includes people who are illiterate and cannot read in either English or their native language.[20] Ex. D (Capitolo dep.) at 33:7-34:4; *Cf.* Ex. U (Flores dep.) at 41:5-12. It would be an absurd result to require the District to translate documents for a parent who cannot read them or for a parent who is bilingual or multilingual and can read English.

Similarly, Plaintiffs seek an order requiring the District to provide qualified interpreters and take issue with the District's use of bilingual teachers, principals, or other staff as interpreters.[21] To be clear, Plaintiffs' fixation on the BCAs as the only appropriate interpreters at IEP meetings is a red herring. Many other District personnel receive training on interpretation and are fully capable of ensuring meaningful parental participation, and are sometimes even preferred by the parent. Ex. F (Soderman dep.) at 23:3-24:16; *see, e.g.*, Ex. B (Galarza dep.) at 14:8-15:20; Ex. L (Perez dep.) at 33:8-34:4, 78:3-10. Such a case-by-case assessment of both the parents' needs and the available District resources is simply not capable of being declared unlawful as to the entire class.[22]

"The 'disparate factual circumstances of class members' may prevent a class from being cohesive and, therefore, make the class unable to be certified under Rule 23(b)(2)." *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 264 (3d Cir. 2011) (denying class certification where there

[19] As discussed with regard to commonality, "meaningful participation" is itself a fact-intensive consideration incapable of disposition on a classwide basis.

[20] A class definition limited to LEP parents who are literate would suffer from the same reliability and administrative concerns as the present definition. *See supra* II.C.

[21] Plaintiffs do not provide a definition of what they mean by "qualified" or "quality" interpretation. Plaintiffs' expert, Dr. Flores, agreed that interpretation provided by the District was quality. Ex. U (Flores dep.) at 41:18-42:11.

[22] Plaintiffs seek a number of other remedies which are only referred to in passing in their brief, including a request that Plaintiffs' counsel be appointed to monitor the Order, fees for the underlying due process administrative hearings, despite the fact that none of those plaintiffs remain in the litigation and the District has an active appeal of those decisions, and that the District "develop a method and written protocol to proactively identify all LEP parents who may need translation and interpretation services." *See* Amended Complaint. This last request is particularly problematic given that there is no workable definition of "LEP" for application to parents, as discussed *supra* II.C.

were "individual issues that would eclipse common issues"). As discussed above, the IDEA requires that parents be able to "meaningfully participate" in the IEP process for their child. This requirement is not defined in the IDEA and the Third Circuit has addressed it with a case-by-case analysis of individual circumstances, which are highly varied. Not only do the language abilities of the parent vary (proficient in English as a second language vs. no English proficiency; literate in a native language vs. unable to read any language; etc.) but so do the individual parent's capacity for understanding the special education terminology and desired levels of involvement in the process, all of which are even *further* influenced by the complexity of services required by the child. As such, the individual issues that are considered in determining whether a parent has meaningfully participated are multi-layered and would require in-depth consideration on an individual level, wholly undermining the purpose of class treatment.

III. CONCLUSION

For the foregoing reasons, the District respectfully requests that this Court deny Plaintiffs' Motion for Class Certification in its entirety.

Dated: August 31, 2018

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CERTIFICATE OF SERVICE

I, Marjorie M. Obod, Esquire, hereby certify that on this 31st day of August, 2018, I caused to be filed and made available for viewing and downloading from the CM/ECF System, a true and correct copy of the foregoing Defendant's Response in Opposition to Plaintiffs' Motion for Class Certification as follows:

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