UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 20-2084

T.R., ET AL.,

PLAINTIFFS-APPELLANTS,

v.

SCHOOL DISTRICT OF PHILADELPHIA,

DEFENDANT-APPELLEE.

On Appeal from the United States District Court for the
Eastern District of Pennsylvania, Civil Action Docket No. 15-4782

REPLY BRIEF OF APPELLANTS L.R., D.R, MADELINE PEREZ, R.H., AND MANQING LIN

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Plaintiffs-Appellants submit this Reply to the Brief of Defendant-Appellee The School District of Philadelphia ("District's Br.").

INTRODUCTION

By denying class certification and granting summary judgment on the ground that Plaintiffs failed to exhaust administrative remedies, the District Court has deprived limited English proficient ("LEP") parents of students with disabilities of any effective remedy for the School District of Philadelphia's (the "District's") failure to provide interpretation and translation services in the special education context. The District Court's denial of class certification also severely impairs the long-established role of Rule 23(b)(2) as an essential vehicle for civil rights lawsuits.

In response to Plaintiffs' appeal, the District portrays the District Court as finding that the language services provided to LEP parents were sufficient to meet their needs. This assertion is not supported by the District Court's opinion or the factual record. On the contrary, when denying Plaintiffs' motion for class certification, the District Court was clear that it was not ruling "that individual class members do not have valid claims against the School District for failure to provide sufficient language services to permit them to meaningfully engage in the special education process." JA-40 (Class Cert. Op. at 36).

The District Court's error was in ignoring the overwhelming circumstantial evidence regarding the size of the proposed Parent Class and Student Class and by

misapprehending the commonality and cohesiveness of Plaintiffs' claims for injunctive relief. The Court also erred by granting summary judgment on exhaustion of administrative remedies grounds. Because of the nature of the claims here, administrative hearings are not the solution for LEP parents in need of language services. The original Named Plaintiffs learned that lesson the hard way; after nine months of proceedings, the Hearing Officer found that both Barbara Galarza and Margarita Peralta were denied meaningful participation, but his orders did not address any of the District's ongoing failures to provide language services, and he acknowledged that he lacked authority to remedy systemic deficiencies.

The District Court's two decisions should be reversed, and Plaintiffs should be permitted on remand to pursue their class claims for injunctive relief.

ARGUMENT

I. The District's Arguments on Class Certification Distort the Record Below and the District Court's Findings.

A. Plaintiffs Produced Sufficient Evidence to Satisfy Numerosity.

Plaintiffs are entitled to rely on circumstantial evidence that the size of the two classes exceeds the threshold for a presumption of numerosity. *Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 484 (3d Cir. 2018); Opening Br. at 16. Once sufficient circumstantial evidence is presented, a court may rely on "common sense" and "forgo precise calculations and exact numbers." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 596 (3d Cir. 2012). It cannot, however, ignore

circumstantial evidence and the only reasonable inferences that can be drawn from such evidence, as the District Court and the District's Brief have done.

1. The District's Reliance on *Hayes* Is Misplaced.

As discussed in Plaintiffs' Opening Brief, in the 2016-2017 school year, the District's home language survey demonstrated there were 3,783 special education students who lived in a household with a home language other than English. JA-449 (Nov. 21, 2017 Ltr. from M. Obod to P. Saint-Antoine at 1).[1] The District attempts to discredit the weight of this evidence—and the fact that the standard of numerosity would be met if only two percent of the 3,783 homes had LEP parents—by relying on *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013). But that case is distinguishable here.

In *Hayes*, plaintiffs brought a class action against Wal-Mart, which sold (through Sam's Club) third-party extended warranties on "as-is" items. *Id.* at 352.

[1] Remarkably, the District asserts that Plaintiffs' evidence of the home language survey is "inadmissible" because it was contained in a letter (signed on behalf of the District by the same attorney who signed the District's brief). District's Br. at 17. The District cites no relevant authority showing why this information is inadmissible. Moreover, as stated in the letter, the evidence was provided in that format because the parties agreed during discovery that the District would compile the requested information rather than review certain discovery search terms, which the District contended generated an "inordinate amount of hits/results to review." JA-449 (Nov. 21, 2017 Ltr. from M. Obod to P. Saint-Antoine at 1). Furthermore, this evidence was directly examined by the District Court. JA-25 (Class Cert. Op. at 21).

The *only* piece of numerical evidence offered by plaintiffs was that 3,500 customer transactions during the class period included a price override—a mechanism used by cashiers to input the price of as-is items *and* other discounted items that were not categorized as "as-is"—*and* the purchase of an extended warranty. *Id.* at 357. This evidence was deemed too speculative because there were numerous reasons why a price override could be performed *unrelated* to the sale of the as-is items at issue, and the numeric evidence did not distinguish between as-is items covered by the extended warranties compared to as-is items not covered. *Id.* at 358.

In sharp contrast, the home language survey evidence presented here relates to LEP status. Indeed, unlike the defendant in *Hayes*, the District itself relies on this same statistical evidence to identify parents who need interpretation and translation services:

> Q. [H]ow would the school building staff know that the parent is limited English proficient?
>
> A. By reviewing the school language survey the parent filled out at registration.

See JA-587 (Hess Dep. 80:2-6); *see also, e.g.*, JA-581 (*id.* at 53:10-12); Opening Br. at 17-18 & nn.6-7.

In addition, the District's expert identified the home language survey as a primary means of identifying LEP parents. Dr. Winterbottom explained:

> ***The first step in ensuring that LEP parents can participate and collaborate in the special education***

> ***process is to identify them.*** The School District's registration materials are available in eight languages other than English. ***The application form includes a question regarding a student's primary language, as well as a Home Language Survey that asks the enrollee a variety of questions, including what language the child's family speaks at home and what language the parent speaks to the child most of the time. Aside from identifying a parent's native language at the enrollment stage***, it is typical for teachers to ask their students and their students' parents which languages are spoken at home. Through the home language survey, as well as informal conversations between BCAs, teachers, students, and their parents, connections are made between school and home.

JA-1080 (Winterbottom Report at 7) (emphasis added) (citations omitted).

The District's reliance on the survey is also shown through its admission that in 2013, more than 75% of the 25,990 families in the District whose primary home language was not English expressly requested documents in a language other than English—a fact the District's Brief entirely ignores. *See also* Opening Br. at 17-22 (providing evidence specific to issues in this litigation).[2]

[2] The District's attempts to distinguish Plaintiffs' cases because they pre-date *Hayes*. Opening Br. at 11; District's Br. at 13, 15. *Hayes*, however, did not alter the Circuit's ability to use "common sense" when evaluating circumstantial evidence concerning numerosity. 725 F.3d at 357.

2. The District Fails to Address Plaintiffs' Evidence in Its Totality.

The District's arguments regarding class size are also flawed because they fail to consider Plaintiffs' evidence in its totality. *McDonough v. Toys "R" Us, Inc.*, 638 F. Supp. 2d 461, 472 (E.D. Pa. 2009).

First, the District argues that evidence that the District had over 1,500 English Language Learners receiving special education services in 2013 is irrelevant. District's Br. at 16. Although this statistic is not direct evidence of the number of LEP parents, it does add to the strong circumstantial evidence on numerosity because students who qualify for language instruction are often the children of LEP parents. *See, e.g.*, JA-864 (Capitolo Dep. 20:2-17) (testifying that "students' primary language [is] a hundred percent of the time…also the language of the parent").

Second, Plaintiffs' testimonial evidence is not akin to the testimonial evidence in *Mielo*. In *Mielo*, an executive speculated that it was "fair" to say that thousands of disabled patrons used the company's parking lots *across the country*. *Mielo*, 897 F.3d at 486. Here, Plaintiffs rely on testimony from a District employee who has experience in the District office that serves English Language Learner ("ELL") students and their parents, and she has direct knowledge of the number of ELLs in the District. JA-550-551 (Still Dep. 79:23-80:7); *see also* Opening Br. at 20.

Third, Plaintiffs present evidence that, in 2017, *one* District office alone recorded 50 requests for translations of IEP documents. While the District now

speculates that Plaintiff Manquin Lin must have requested a "significant" number of these requests and therefore this evidence is "flawed," District's Br. at 16, Ms. Lin's testimony does not support such speculation, *see* JA-719-20, JA-735 (Lin Dep.).

3. The District Ignores Third Circuit Precedent Regarding Whether Joinder Would Be Impractical.

Courts in the Third Circuit generally look to the number of class members first, and if that number is over 40, presume that numerosity and impracticability of joinder is satisfied. *See Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Plaintiffs are entitled to this presumption because an overwhelming amount of circumstantial evidence demonstrates that the 40-person threshold is met. Plaintiffs also sufficiently addressed and established that the impracticability factors weigh heavily in favor of finding that joinder is impractical here. Opening Br. at 22-23; JA-1173 (Class Cert. Mot. at 13). The District's arguments to the contrary are unavailing.

As discussed in Plaintiffs' Opening Brief, neither a due process hearing nor mediation can confer the remedy Plaintiffs seek and need. While the District describes the due process hearing and mediation processes as effective and efficient for this purpose, District's Br. at 19, this discounts the experience of the Named Plaintiffs, which demonstrates the exact opposite: after a 2015 due process hearing, the original Plaintiffs did not receive any order for language services, notwithstanding a finding that both parents were denied meaningful participation.

See JA-149 (T.R. Hr'g Officer Decision at 13); JA-162-163 (A.G. Hr'g Officer Decision at 12-13). Similarly, mediation and settlement respectively did not resolve Ms. Lin's and Ms. Perez's broader need for prospective translation and interpretation services.[3]

The District Court also ignored the substantial barriers LEP parents face in navigating due process hearings and the mediation process. *See* JA-1141-1142 (2018 Perng Decl. ¶¶ 7-8) (explaining that District does not provide sufficient information to enable LEP parents to understand their rights or know about the resources that would enable them to address disagreements with IEP teams); JA-1136 (McCabe Decl. ¶ 25) (explaining that the District routinely presents mediation agreements and settlement agreements to LEP parents in English, "even when the parent has affirmatively requested documents in their native language or when the District knows they cannot read English").

[3] For example, Ms. Lin's mediation agreement related specifically to her request for an independent educational evaluation ("IEE"). The District agreed to "fund an IEE" and furnish Ms. Lin with a copy of the "final" IEP and any reports and to provide competent language interpretation services to review those documents. JA-225-226 (Lin Mediation Agreement). The mediation agreement did not address the translation of all R.H.'s special education documents or provide translations in perpetuity. The District continues to refuse to provide translated versions of any proposed or draft IEPs or evaluations for R.H. JA-739 (Lin Dep. 190:5-13).

Last, the District argues that Plaintiffs' request for relief for future class members does not weigh in favor of finding joinder impractical.[4] Contrary to the District's assertion, Plaintiffs do not argue that the inclusion of future plaintiffs automatically satisfies numerosity, and the District's citations to *Marcus* and *Mielo* are therefore misplaced. District's Br. at 21. Nevertheless, because the District's policies will continue to impact future LEP students and parents, the necessity of obtaining relief for future class members does add strong weight in favor of finding numerosity. Opening Br. at 22-23; *see J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019) ("future claimants generally meet the numerosity requirement due to the impracticality of counting such class members, much less joining them" (citations and internal quotation marks omitted)).

[4] The District's argument that the Court should apply principles of waiver and not consider the inclusion of prospective class members when assessing impracticability of joinder should be squarely rejected. Plaintiffs raised impracticability of joinder during briefing on class certification, JA-1173-1174 (Class Cert. Mot. at 13-14), and have consistently defined their proposed classes as including future students and their parents. *See, e.g.*, JA-341 (Am. Compl. ¶ 51); JA-1163 (Class Cert. Mot. at 3). The District could hardly claim surprise by this argument, as it raises no new facts and is based on the same impracticability of joinder legal principle as the arguments below. *See, e.g.*, *Gen. Refractories Co. v. First State Ins. Co.*, 855 F.3d 152, 162 (3d Cir. 2017) ("[W]hile parties may not raise new arguments, they may 'place greater emphasis' on an argument or 'more fully explain an argument on appeal,'" or "even 'reframe' their argument 'within the bounds of reason.'" (citations omitted)); *Tri-M Group, LLC v. Sharp*, 638 F.3d 406, 415-18 (3d Cir. 2011) (noting that the Third Circuit has been "'reluctant to apply the waiver doctrine when'…no additional fact-finding is necessary" (citation omitted)).

B. The District's Arguments on Commonality Are Based on the Unfounded Premise that the System Is Working; the District Court Made No Such Finding.

Contrary to the District's assertions throughout its Brief, the District Court's opinions and the record below do not support a finding that the system is working for LEP parents who need translation and interpretation services. The District's policies and practices, including its so-called Procedural Safeguards developed during the course of this litigation, have given rise to a system in which mandatory Notices of Recommended Educational Placement ("NOREPs") are not consistently translated, draft Individualized Educational Programs ("IEPs") are not provided in a form that non-English-speaking parents can understand, only the headings of final IEPs are translated into parents' native languages, and IEP meetings with LEP parents go forward without qualified interpreters present. The District Court made no factual findings to the contrary. Its error was in holding that there is no legal mandate to provide interpretation and translation to LEP parents (which is clearly required pursuant to 34 C.F.R. § 300.322(e))[5] and, as discussed in the next section, that injunctive relief with respect to the District's policies and practices will have no class-wide benefits.

[5] Specifically, 34 C.F.R. § 300.322(e) states: "The public agency must take *whatever action is necessary* to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or *whose native language is other than English*." (emphasis added).

1. The District Court Did Not Find that the District Is Meeting the Translation and Interpretation Needs of LEP Parents.

Citing its Quick Reference Guide – Translation and Interpretation Services ("Quick Reference Guide"), the District asserts that its practices and procedures already require it to translate NOREPs and other IEP process documents into the native language of the parents. District's Br. at 3-4. The reality within the District is quite different.

A 2018 Complaint Investigation Report issued by the Pennsylvania Department of Education found that parents did not receive NOREPs in their native language as required in twenty-three out of a random sample of twenty-five files (92%) of young children with disabilities entering school. JA-1256-1260 (October 31, 2018 Ltr. from Pa. Dep't of Ed.). And witnesses for Plaintiffs testified to the widespread nature of these deficiencies. *See* JA-955 (Bustamante Dep. 117:1-24) ("Q. Is that NOREP fully translated or just the headings?; A: The headings only. Sometimes it is headings; sometimes it's not. Sometimes it's all in English, and they give it to the parents."); JA-958 (*id.* at 126:15-22); JA-1149-1150 (2018 Perng Decl. ¶ 27); JA-1136 (McCabe Decl. ¶¶ 23, 25) (explaining that District routinely provides evaluation reports, mediation agreements, NOREPs, and settlement agreements to LEP parents in English, even when parents requested documents in their native language and District knows they cannot read English"). Notably, regarding its

failure to translate NOREPs, the District points to no contrary finding by the District Court.

On the availability of Bilingual Counseling Assistants ("BCAs"), the District asserts that they are "usually" present to provide interpretation at IEP meetings. District's Br. at 5. But the record cites it provides do not actually support that factual assertion—only that BCAs can be *requested*. JA-578 (Hess Dep. 50:19-23). Nor did the District Court make any such finding. On the contrary, the testimony of school officials and school records reflect the scarcity of BCAs within the District. *See, e.g.*, JA-477-479 (Soderman Dep. 54:10-13, 56:24-57:4) (testifying that in 2011 the District employed 102 BCAs, but this number was reduced to 57 by 2013); JA-504, JA-508-509 (*id.* at 142:4-18, 149:14-150:15) (discussing documents recording that an interpreter was not available for IEP meetings). Moreover, while the District baldly asserts that Plaintiffs cannot point to any LEP parents who have been denied interpretation at IEP meetings, District's Br. at 30, both Ms. Lin and Ms. Perez attended IEP meetings without a BCA present. *See* JA-786-787 (Perez Dep. 59:15-60:2); JA-817-818 (*id.* at 108:1-109:4) (describing an IEP meeting for D.R. in which a principal acted as interpreter and only provided "gist" of what was said); JA-734-735, JA-738 (Lin Dep. 171:5-172:4, 181:10-17).

Similarly, without support in the record, the District claims that it has never denied a parent's request for a translated IEP. District's Br. at 31. Again, that was

not something the District Court found, and the testimony cited by the District from Natalie Hess, the former Deputy Chief of Specialized Services, was in the context of questions about denials *for financial reasons*. JA-600-601 (Hess Dep. 131:22-132:1). Moreover, the testimony of Marie Capitolo, also cited by the District, corroborates Plaintiffs' position on the common benefit of translated IEPs to LEP parents. At her deposition, Ms. Capitolo could not identify ***any*** circumstance when it would be appropriate for the District to deny translation requests by LEP parents who could read. JA-871 (Capitolo Dep. 35:1-10).

Nevertheless, despite the acknowledged benefits of translated IEPs, the District's stated policy is not to accept all parental requests for translations of IEPs and other IEP process documents. At best, if its policy was effectuated, LEP parents are subject to a series of questions about their translation requests, which go well beyond the issue of whether they can read in their native language. JA-1455-1458 (Quick Reference Guide at 1-4). And the District's practice is to translate only the IEP headings and *not* the student-specific information. *See, e.g.*, JA-511-512 (Soderman Dep. 169:6-170:7) ("no individual information" of IEPs is translated); JA-592 (Hess Dep. 94:2-15) ("the student-specific information is not translated"); JA-952, 955, 958, 962 (Bustamante Dep. 113:12-21, 117:18-24, 126:15-22, 133:13-20) (testifying that LEP parents routinely do not receive evaluations, IEPs, or NOREPs translated into their native language prior to IEP meetings, if at all).

District personnel have acknowledged that translated headings are not sufficient for a parent to understand and participate in an IEP meeting. JA-511-512 (Soderman Dep. 169:6-170:7); JA-549 (Still Dep. 51:10-14).

2. Commonality Stems from the Policies, Practices, and Procedures of the District, Not Individual Decisions Made by Individual Case Supervisors, School Principals, and Teachers.

While the District cites its Procedural Safeguards, including its Quick Reference Guide, as some kind of assurance that the system is working, it ignores their central role in the denial of translation and interpretation services to LEP parents as reflected in the record evidence. The Procedural Safeguards were first adopted after this lawsuit was filed in 2015, JA-637 (Hess Dep. 296:5-18); JA-973-981 (Caputo Dep. 106:1-112:16, 114:19-115:17), and they manifest a conscious decision on the District's part to maintain a system in which translation and interpretation services are *not* consistently provided to ensure the participation of LEP parents of students with disabilities. JA-1455-1458 (Quick Reference Guide). While the degree of harm may differ between LEP parents and students, the denial of language services stems from the central policies and practices of the District.

The District's Procedural Safeguards are not the only common source of prospective harm to LEP parents. The District's pattern of conduct that is common to the putative classes as a whole also includes:

The decision not to hire more BCAs in the schools. The ultimate decision about whether to assign a BCA to attend an IEP meeting may be made by an individual principal or teacher, but that decision-making is directly related to the District's hiring decisions regarding BCAs and the obligation imposed on its personnel to allocate those limited resources. In 2011, the District employed as many as 102 BCAs, but this number was reduced to 57 by 2013, limiting their availability. JA-477-479 (Soderman Dep. 54:10-13, 56:24-57:4).

The District is unpersuasive in its attempt to distinguish the "pattern of conduct" in *Baby Neal* from that in this case. *See* District's Br. at 25. In fact, this Court was clear that the pattern of conduct included the lack of adequate personnel to meet the needs of the class members. *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 62 (3d Cir. 1994). In both cases, the harms and prospective harms to class members stem from the failure of the defendant to hire or retain an adequate number of qualified personnel.[6]

[6] The Seventh Circuit's decision in *Jamie S.* is not, as the District contends, "[a] more apt comparison." District's Br. at 25 (citing *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 498 (7th Cir. 2012)). In *Jamie S.*, the court held that commonality was not satisfied by showing only that the claims of the class members involved the same legal provisions (Child Find rights under IDEA and Wisconsin law). In contrast, Plaintiffs here allege violations of the same provisions of IDEA and other statutory and regulatory mandates based on the same facts—denial of language services to LEP parents emanating from common District policies, procedures, and practices. *See, e.g.*, *DL v. Dist. of Columbia*, 302 F.R.D. 1, 16 (D.D.C. 2013), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017) (distinguishing *Jamie S.* because proposed classes

The decision to only provide draft IEPs in English to parents in advance of IEP meetings. To assist parents in preparation for their meetings, draft IEPs are provided by the District in advance, but in English only. JA-910-911 (Capitolo Dep. 98:17-99:3); District's Br. at 4. This is clearly an overt discriminatory practice in favor of English-speaking parents: the District has expended the additional resources necessary to provide advance copies of draft IEPs, but it has chosen to do so in a way that benefits only English-speaking parents and places LEP parents at a distinct disadvantage.

Rodriguez v. National City Bank, 726 F.3d 372 (3d Cir. 2013), which the District cites, involved discriminatory pricing alleged by African-American and Hispanic borrowers as the result of decisions by individual loan officers nation-wide. Here, in contrast, the deliberate indifference to LEP parents is manifested in the District's centralized policy to provide draft IEPs in a form accessible to English-speaking parents only but not LEP parents, among other practices. The prospect of harm common to LEP parents thus originates with a common discriminatory policy of the District, not the decision-making of individual principals and teachers.[7]

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were to "rectify the District's systemic failure to comply four specific statutory duties to all class members").

[7] The District has no basis to claim that Plaintiffs waived the argument that this alleged discrimination under Title VI and the EEOC also establishes commonality under Rule 23(a). Plaintiffs identified both statutes as a source of common issues in

The practice of not translating NOREPs. Even the District recognizes that the translation of Notices of Recommended Educational Placement and certain other IEP process documents are not the subject of discretion on the part any individual principals and teachers, the unrebutted record is clear that NOREPs are not uniformly provided to LEP parents in their native languages. *See supra*, at 11-12. This systemic failure has the prospect of harming all members of the putative classes.

The practice of translating only the headings of IEPs, not the substantive student-specific content. While there is a consensus among school personnel that the translation of IEP headings is not sufficient to allow for parents' meaningful participation in their children's IEP meetings, JA-511-512 (Soderman Dep. 169:6-170:7); JA-549 (Still Dep. 51:10-14), the District does not mandate full translations for LEP parents. It has thus adopted a default practice of translating only the headings of IEPs that is uniformly insufficient and impacts all LEP parents.

The absence of adequate notice to LEP parents of their rights to translations and interpretation services. While the District Court found that LEP parents were provided with a copy of the District's Procedural Safeguards, translated into eight

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their class certification briefs below. *See, e.g.*, JA-1177 (Class Cert. Mot. at 17 (common question of whether "the policies, procedures, and practices of the District with respect of language services…violates…the EEOA and Title VI")); JA-1239-1240 (Class Cert. Mot. Reply at 6-7 ("whether the District's policies, practices, and procedures…subject the Parent and Student Classes to discrimination on the basis of race and/or national origin")).

common languages, it made no finding that members of the putative classes are aware of their rights to translation and interpretation services. The evidence in the record on this issue is, at the very least, disputed. *See*, *e.g.*, JA-1149 (2018 Perng Decl. ¶ 26) ("Based on my experience, LEP parents are unaware of and not informed of their right or option to request that special education documents be translated into a language they can read or understand."); JA-952-954 (Bustamante Dep. 113:22-115:6) (testifying that LEP parents are generally not made aware of their right to receive translation and interpretation services); JA-1135 (McCabe Decl. ¶¶ 20-21) ("Parents are not informed of any right to ask for translated documents and therefore they do not request translated documents."). Whichever way the District Court might resolve the merits issue of whether notice to LEP parents is adequate, the commonality of the question stems from the centralized decision of the District about whether and when to provide notice of language services.

C. Injunctive Relief Will Benefit All Members of the Putative Classes by Providing LEP Parents with an Opportunity for Meaningful Participation.

The District makes two principal arguments that the proposed Parent Class and Student Class are not sufficiently cohesive. The first argument—that the class is defined to include members who have no need for language services "whatsoever"—is both without merit and without support in the District Court's findings. The District's second argument—which relies on the District Court's error

in holding that claims of insufficient language services are not susceptible to class-wide resolution—is contrary to a long line of (b)(2) cases.

1. Language Services for LEP Parents Is Not a "Parent-by-Parent" or a "Child-by-Child" Issue.

The District's argument that the need for translation and interpretation services is a "parent-by-parent" or "child-by-child" issue is based, in part, on its fundamental misunderstanding of the composition of the two putative classes. *See* District's Br. at 36. In particular, the District argues that the language abilities of parents vary and, therefore, it argues, the needs for language services vary. As an example, it cites parents who are proficient in English versus those who are not proficient in English. *See id.* at 34, 36 n.3 ("The putative class is arguably not entirely alike in even that sense, as bi- or multilingual parents who can write and/or speak English may not need any language services whatsoever to meaningfully participate in the process."). However, both the proposed Parent Class and Student Class are defined in terms of parents with limited English proficiency within the meaning of 34 C.F.R. § 300.30(a).

By definition, a parent who is bilingual or multilingual, with English proficiency, would not be a member of the Parent Class and the child of that parent

would not be a member of the Student Class.[8] Also, significantly, the District Court rejected the District's challenge to the two proposed class definitions, and it held that "persons with 'limited English proficiency' provides sufficient outer boundaries and defines a cohesive class of individuals on which the requested injunctive relief may be awarded." JA-20 (Class Cert. Op. at 16). In addition, the District Court rejected the argument that Ms. Lin has sufficient English proficiency to make her an inadequate class representative. *See* JA-45 (*id.* at 41) ("While Ms. Lin may indeed be more English proficient than other class members, that fact does not affect her capability as a class representative since she maintains the same interests and incentives.") (citing *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3rd Cir. 2012) ("The linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class.")).

In sum, the District's argument on varying levels of English proficiency is misguided and cannot be reconciled the District Court's findings of cohesiveness for purposes of both class definition and adequacy of representation.

[8] Even variance in terms of literacy does not mean that some members of the Parent Class do not need any languages services "whatsoever" to participate meaningfully in the IEP process. Members of the Parent Class who cannot read would still need interpretation services to contribute to the IEP meetings; moreover, they may also benefit from translated IEP documents if at least one member of their households reads the native language.

2. This Court Has Consistently Held that Certification of (b)(2) Classes Is Appropriate to Address the Need for Improved Policies and Procedures.

The District also seizes upon the District Court's observation that Plaintiffs' claims of "insufficient language services" are "highly fact-intensive" as an alternative basis to deny certification of the two (b)(2) classes. District's Br. at 37. As a preliminary matter, the Plaintiffs' allegations of insufficient translators and interpreters is not materially different from the allegations of insufficient case workers and foster parents in *Baby Neal*. *See supra*, at 15. The fact that some members of the class may not yet have been deprived of a translator or an interpreter at certain times is not a bar to (b)(2) certification. As this Court observed, "class members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are *subject* to the same harm will suffice." *Baby Neal*, 43 F.3d at 56; *see also NFL Players Concussion Injury Litig.*, 821 F.3d 410, 427 (3d Cir. 2016).

Furthermore, the injunctive relief that Plaintiffs seek is in keeping with the precedent in this Circuit that (b)(2) classes serve as a vehicle for civil rights cases, *Baby Neal*, 43 F3d at 58-59, and is faithful to the Supreme Court's instruction in *Wal-Mart* that a single injunction or declaratory judgment will provide relief to members of the class, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). The relief requested here, including the hiring of additional BCAs to ensure interpretation

services at all IEP meetings, requiring the translation of draft IEPs, and the full translation of final IEPs, can be provided for in a single injunction, and it will resolve the Plaintiffs' statutory claims in "one stroke." *Wal-Mart*, 564 U.S. at 350. While there may be some LEP parents who need more than translation and interpretation services to participate, the injunctive relief will put members of the two (b)(2) classes on par with their English-speaking counterparts with regard to meaningful parent participation, and it will end the discriminatory treatment. What is important for certification purposes is that the relief sought benefits the (b)(2) classes as a whole. *Baby Neal*, 43 F.3d at 58.

II. The District Court Wrongly Granted Summary Judgment.

A. The District Court Erroneously Dismissed the Case for Failure to Exhaust Administrative Remedies.

As explained by direct citations to record evidence in Plaintiffs' Opening Brief, the District made a centralized policy decision that it will not implement procedures to ensure—let alone provide for—translation and interpretation services. *See* Opening Br. at 23-44. For example, the District will not implement procedures to track LEP parents of students with disabilities. JA-587 (Hess Dep. 80:14-16). And it refuses to implement procedures to provide for the consistent and full translation of NOREPs, IEPs, and related documents; to allow for consistent interpretation of IEP meetings, translate draft IEPs, or have sufficient numbers of qualified interpreters available to participate in meetings; to notify LEP parents of

their rights to receive translation services and the process by which they can receive these services; and to track translation requests. *See* JA-1429-1430 (Perez Decl. ¶ 6); JA-952-954 (Bustamante Dep. 113:22-115:6); JA-1141-1143, JA-1149-1150 (2018 Perng Decl. ¶¶ 7-12, 26, 28); JA-1135 (McCabe Decl. ¶¶ 20-21); JA-938 (Capitolo Dep. 209:13-20); JA-494 (Soderman Dep. 105:1-17); JA-831-851 (Velez Dep. 188:24-192:16, 203:12-205:9, 216:14-222:1, 223:13-228:14).

In an effort to counter Plaintiffs' evidence of systemic failure, the District now argues that the record reflects that it has a "policy" of making individualized decisions at the school-level. *See* District's Br. at 39. The District has a legal obligation to ensure meaningful parent participation for all LEP parents. The fact that the District's central policies and practices have left some school-level personnel to make decisions about how to allocate scarce language services does not turn Plaintiffs' claims into individualized claims. Instead, it is an example of the disparities stemming from the District's failure to implement a system-wide policy.

The District Court also largely ignored the limitation on hearing officers' authority to order system-wide change. *See, e.g.*, 34 C.F.R. §§ 300.507(a), 300.503(a)(1), (2); *see also* JA-133-134 (Consolidated Pre-Hr'g Order at 5-6). Although the District made a passing reference to this limitation, it completely misapprehends its impact. The limitation leads only to one conclusion: the futility exception to exhaustion applies here because the relief Plaintiffs seek is not available

at the administrative level. It was error for the District Court to conclude otherwise with respect to Plaintiffs' IDEA-related claims, and nothing the District argues now alters this. *See, e.g.*, *Derrick Through Tina v. Glen Mills Schs.*, No. 19-1541, 2019 WL 7019633, at *18 (E.D. Pa. Dec. 19, 2019); *P.V. v. Sch. Dist. of Phila.*, No. 2:11-cv-04027, 2011 WL 5127850, at *7-8 (E.D. Pa. Oct. 31, 2011).

B. The Court Committed Legal Error by Dismissing Plaintiffs' Non-Disability Related Discrimination Claims Based on the IDEA's Exhaustion Requirement.

A claim that seeks "relief for simple discrimination, irrespective of the IDEA's FAPE obligation" is not subject to exhaustion. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 756 (2017). In *Fry*, the Supreme Court found that claims of disability discrimination in the school setting do not require exhaustion. *Id.* at 759. Here, Plaintiffs' Title VI and EEOA claims are more clearly distinct from those examined in *Fry* as they sound in discrimination on the basis of national origin that prevents equal access to educational programs and educational benefits. The gravamen of Plaintiffs' Title VI and EEOA claims "does not concern the appropriateness of an educational program" and it was error to conclude that they required exhaustion. *See, e.g.*, *Blunt v. Lower Merion Sch. Dist.*, 559 F. Supp. 2d 548, 561 (E.D. Pa. 2008), *aff'd*, 767 F.3d 247 (3d Cir. 2014) (excusing Title VI claims from exhaustion).

Without a viable merits argument on exhaustion, the District turns to an ill-founded waiver argument. In response to the District's two-sentence argument below that all of Plaintiffs' claims were exhausted, Plaintiffs asserted below that the District "wrongly argue[d] that all of Plaintiffs' claims must be exhausted" and explained, for example, why exhaustion of Plaintiffs' Title VI claim was not required. *See* JA-1342 (Pls.' Summ. J. Opp'n at 10 n.8). The District Court then expanded the parties' arguments in its opinion. Clearly, Plaintiffs' claims that this was a misapplication of the law was never waived.

Moreover, waiver "is only a rule of practice" that "may be relaxed whenever the public interest or justice so warrants." *Tri-M Group*, 638 F.3d at 416 (citation and internal quotation marks omitted). "The waiver rule serves two purposes: ensuring that the necessary evidentiary development occurs in the trial court, and preventing surprise to the parties when a case is decided on some basis on which they have not presented argument." *Id.* at 418 (citation and internal quotation marks omitted); *see also Huber v. Taylor*, 469 F.3d 67, 75 (3d Cir. 2006). This Court has been reluctant to find waiver when it is a question of law and no further factual development is necessary. *Tri-M*, 638 F.3d at 418.

A finding of waiver under the circumstances here would not advance these purposes. There is no further evidentiary record to develop on whether the *gravamen* of Plaintiffs' Title VI and EEOA claims rests on their IDEA-related claims; the

question stems from the District Court's misapplication of the law. Nor is there any surprise in Plaintiffs' positions that their Title VI and EEOA claims sound in discrimination and that they did not have to be administratively exhausted. Plaintiffs' positions on this has been consistent throughout the litigation. *See, e.g.*, JA-333 (Am. Compl. ¶ 19); JA-1342-1345 (Pls.' Opp'n to Summ. J. at 10-13 & n.8). For all of these reasons, the District's waiver argument is without merit.

C. The District's Standing Analysis Completely Ignores Essential Evidence of Record.

In making a standing argument that was *not* a basis for the District Court's summary judgment decision, the District ignores all of the relevant factual circumstances.[9] The record evidence demonstrates that the District discriminates against Ms. Lin and Ms. Perez on the basis of their national origin by denying access to the educational process that non-LEP parents have. *See* Opening Br. at 23-44, 48-50. As parents, they are entitled to participate in their children's federally funded educational program free from discrimination. *Cf. Rothschild v. Grottenthaler*, 907 F.2d 286, 292 (2d Cir. 1990) (rejecting school district's argument that parents are not eligible participants). The cases the District cites on this point are inapposite. *See, e.g.*, *Brown-Dickerson v. City of Phila.*, No. 15-4940, 2016 WL 1623438, at *8

[9] The "injury-in-fact-requirement is 'very generous' to claimants" and demands only "some specific, 'identifiable trifle' of injury. It is not Mount Everest." *Cottrell v. Alcon Labs.*, 874 F.3d 154, 162 (3d Cir. 2017) (internal citations omitted).

(E.D. Pa. Apr. 25, 2016) (Title VI claim failed because plaintiffs could not establish link between federal funding received by police department and any benefits intended for the plaintiff that caused her harm); *R.W. ex rel. Williams v. Del. Dep't of Educ.*, No. 05-662, 2008 WL 4330461 (D. Del. Sept. 22, 2008) (parent lacked standing to assert Title VI claim based on school's racially discriminatory action that injured her son).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Judgment of the District Court and its Order denying class certification be reversed, and the case should be remanded for further proceedings.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH F.R.A.P. 32

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,469 words, as counted by Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: October 22, 2020

/s/ Paul H. Saint-Antoine
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CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS

The undersigned certifies that the text of the brief transmitted to the court on this date is identical to the text of the hard copies of the Reply Brief of Appellants L.R., D.R., Madeline Perez, R.H., and Manqing Lin delivered to the Clerk.

Dated: October 22, 2020

/s/ Paul H. Saint-Antoine
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CERTIFICATION OF VIRUS CHECK

The undersigned certifies that a virus check was performed by Windows Defender, version 4.18.2009.7 on the Reply Brief of Appellants L.R., D.R., Madeline Perez, R.H., and Manqing Lin prior to transmitting it to the Clerk electronically.

Dated: October 22, 2020

/s/ Paul H. Saint-Antoine
Paul H. Saint-Antoine

CERTIFICATE OF SERVICE

I, Paul H. Saint-Antoine, certify that a true and correct copy of the Reply Brief of Appellants L.R., D.R., Madeline Perez, R.H., and Manqing Lin was filed electronically using the Court's CM/ECF System. This System sent a Notice of Docket Activity to Appellee's Counsel, who is a Filing User.

Dated: October 22, 2020

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