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

T.R., a minor, individually, by and through her parent, Barbara Galarza, and on behalf of all others similarly situated, **Barbara Galarza**, individually, and on behalf of all others similarly situated, **A.G.**, a minor, individually, by and through his parent, Margarita Peralta, and on behalf of all others similarly situated, **Margarita Peralta**, individually, and on behalf of all others similarly situated, Plaintiffs, v. **The School District of Philadelphia**, Defendant.	Civil Action No. 15-04782-MSG

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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INTRODUCTION

Plaintiffs T.R. and her mother, Barbara Galarza, and A.G. and his guardian, Margarita Peralta (collectively, "Plaintiffs"), on behalf of themselves and others similarly situated, submit this Memorandum in Opposition to Defendant's Motion to Dismiss Plaintiffs' Complaint.

T.R. and A.G. ("Student Plaintiffs") are students in the School District of Philadelphia ("District"), have learning disabilities, are Hispanic, and do not speak fluent English. Ms. Galarza and Ms. Peralta ("Parent Plaintiffs") are Limited English Proficient (or "LEP"). Under the provisions of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, parents who have children with disabilities are entitled to participate meaningfully in the process of developing an Individualized Education Program ("IEP"). However, the District systematically fails to provide adequate translation and interpretation services to meet the needs of thousands of LEP parents, including during the IEP process, and has violated the rights of Plaintiffs and others similarly situated under the IDEA and under other federal and state laws.

Prior to commencing this action, Plaintiffs filed two administrative complaints against the District, which included requests for findings that the District has a system-wide policy and practice of not providing adequate translation and interpretation services during the IEP process. The Hearing Officer found in both cases that having IEP documents in "an accessible form" is critical to meaningful participation and that the District denied the Parent Plaintiffs' rights to meaningful parental participation in the IEP process, but he dismissed the requests for findings of systemic violations after expressly concluding that he lacked the authority to make such findings.

The District ignores almost entirely the limits of the Hearing Officer's authority to order the systemic relief requested by Plaintiffs in the administrative proceedings, and it argues that the

only procedural option available to similarly situated LEP parents and their children is to file potentially thousands of burdensome (and, ultimately, futile) individual administrative actions. The law is well-established, however, that exhaustion of administrative remedies is not required where the administrative agency cannot grant relief. The District also disputes that there is any statutory authority for the class claims. As discussed below, the source of the District's legal obligation to translate and interpret IEP documents and meetings is found in the provisions of the IDEA, among other laws, and is reflected in the Hearing Officer's findings that, without accessible IEP documents, the rights to meaningful parental participation are illegally denied.

Finally, the District asserts an assortment of arguments with respect to individual counts of the Complaint, including those under the Rehabilitation Act, the Americans with Disabilities Act, the Equal Education Opportunity Act, and Title VI of the Civil Rights Act. Plaintiffs have, in addition to their IDEA claims, alleged the essential elements of each of those statutory claims, and the District's motion as to those individual counts should be denied as well.

PROCEDURAL HISTORY

In June 2014, Plaintiffs filed separate administrative complaints against the District, based on its failure to comply with the IDEA, Section 504 of the Rehabilitation Act ("RA"), and the Americans with Disabilities Act ("ADA"). Plaintiffs' administrative claims stemmed, in part, from the District's systemic failure to translate or interpret documents and meetings mandated by the IDEA and Section 504. As a result of Plaintiffs' inability to understand or meaningfully participate in the District's development of their IEPs, Student Plaintiffs were deprived of the educational benefits they are entitled to under state and federal law.

Among other forms of relief, Plaintiffs requested that the Hearing Officer find that the District systemically denied the rights of Plaintiffs and others similarly situated to translation and

interpretation services. In a Pre-Hearing Order, the Hearing Officer concluded that he did not have the authority to order changes to the District's policies or practices and, therefore, granted the District's motion to dismiss the claims of systemic violations. *See* Ex. C to Compl.

The combined due process hearings lasted almost nine months, with the Hearing Officer rendering a decision on May 26, 2015. In both decisions, the Hearing Officer found that the Plaintiffs were denied meaningful participation in the IEP process due to the District's failure to provide timely and complete translations of IEP documents:

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

Ex. B. to Compl. at 11 (citations omitted); *see also* Ex. A to Compl. at 9-10. Based on the Pre-Trial Order that he had limited authority, the Hearing Officer awarded only limited compensatory education and no form of systemic relief to Plaintiffs.

This Complaint is a timely appeal by the Plaintiffs from the May 26, 2015 decisions of the Hearing Officer, and it includes class claims on behalf of others similarly situated.

STANDARD OF REVIEW

In a challenge to subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the plaintiff has the burden of persuasion to convince the court that it has jurisdiction. *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000). When the defendant makes a facial challenge to jurisdiction, relying on the complaint and the documents

attached thereto, the allegations are accepted as true and considered in the light most favorable to the plaintiff. *Id.* at 176.

Under Rule 12(b)(6), "the court evaluates the merits of the claims by accepting all allegations in the complaint as true, viewing them in the light most favorable to the plaintiffs, and determining whether they state a claim as a matter of law." *Id.* at 178. A motion to dismiss should be granted only if the plaintiff does not plead sufficient facts to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

ARGUMENT

I. THE DISTRICT'S CHALLENGE TO THIS COURT'S SUBJECT MATTER JURISDICTION LACKS MERIT

The District has challenged the Court's subject matter jurisdiction over the class claims on the basis that the putative class members, in contrast to Plaintiffs, have not exhausted their administrative remedies.[1] As explained below, however, this is precisely the type of case which should be subject to review under well-established exceptions to the exhaustion requirement, as individual claims will never address the underlying systemic deficiencies and may result in inconsistent individual rulings. In particular, the Complaint's allegations of systemic violations, coupled with the Hearing Officer's admitted lack of authority to provide an adequate remedy, provide this Court with the requisite jurisdiction over the class claims.

A. Plaintiffs Have Exhausted Their Administrative Remedies, and the Hearing Officer Expressly Disclaimed Any Authority to Provide Systemic Relief

Named Plaintiffs sought systemic relief for the District's failure to provide legally-mandated translation and interpretation services. In her administrative complaint, Ms. Galarza sought a finding that "the District systematically violates the rights of parents who do not speak

[1] The District does not dispute that the four Named Plaintiffs have exhausted their administrative remedies, nor has it challenged this Court's jurisdiction to hear their appeal from the Hearing Officer's May 26, 2015 decisions. Mot. to Dismiss at 11 n.3.

English as a first language." *See* Ex. C. to Compl. at 6. Likewise, Ms. Peralta sought a finding that the District denied her right to translation and interpretation services and denied "the rights of other parents within the District who do not speak English as a first language." *Id.* at 5-6; *see also* Ex. B to Compl. at 3 n.1. However, the requests for relief from the District's systemic violations of the IDEA were dismissed at the start of the hearing. Ex. C to Compl. at 8. The Hearing Officer held that he had "***no authority to find that a policy or practice results in violations per se, or results in violations for all similarly situated students or parents***." *Id.* at 6 (emphasis added). Moreover, the Hearing Officer found that he had "***no authority to order wholesale changes in the District's policies or practices***." *Id*. (emphasis added).

At the conclusion of the due process hearings, the Hearing Officer found that both Ms. Galarza and Ms. Peralta were denied meaningful parental participation in the IEP development process as a result of the District's failure to provide adequate translation and interpretation services. With respect to Ms. Galarza, the Hearing Officer found that: "The District put personnel in place so that the Parent could literally speak during that meeting, but did not make meaningful accommodations so that the Parent could prepare for it, or participate as it was happening." Ex. A to Compl. at 10. Likewise, the Hearing Officer found that meaningful participation was denied to Ms. Peralta because the IEP documents were not in an accessible form. Ex. B to Compl. at 11 ("having the documents in an accessible form either during the meetings, or prior to the meetings when mandated, is critical to meaningful participation"). Yet, in light of the Hearing Officer's limited authority, Plaintiffs were awarded only compensatory education – three hours for A.G. and one hour for T.R. Ex. B to Compl. at 13; Ex. A to Compl. at 14. The administrative process is simply not capable of providing adequate systemic relief, either for the benefit of Plaintiffs or for the other members of the putative classes.

B. There Is No Requirement That the Plaintiff Classes Undergo Thousands of Futile Due Process Hearings Prior to Seeking Judicial Relief

There are well-established exceptions to the administrative exhaustion requirement in IDEA cases. In *Honig v. Doe*, 484 U.S. 305, 327 (1988), the Supreme Court recognized that "parents may bypass the administrative process where exhaustion would be futile or inadequate." Similarly, exhaustion of administrative remedies is not required "where the administrative agency cannot grant relief." *Beth V. by Yvonne V. v. Carroll*, 87 F.3d 80, 88-89 (3d Cir. 1996). Subsumed within the "futility" and "no administrative relief" exceptions is the recognition that: "If an educational system is broken and requires a system-wide fix that an administrative hearing officer cannot provide, then requiring plaintiff after plaintiff to exhaust his or her administrative remedy before filing suit would undoubtedly be futile." *P.V. v. Sch. Dist. of Phila.*, No. 2:11-cv-04027, 2011 U.S. Dist. LEXIS 125370, at *22 (E.D. Pa. Oct. 31, 2011).

These exceptions to the exhaustion requirement apply to violations of the IDEA that cannot be remedied adequately at the administrative level. As stated by then-Senator Paul Simon, a co-sponsor of the acts forming the foundation for the IDEA: "It is important to note that there are certain situations in which it is not appropriate to require the exhaustion of [IDEA] administrative remedies before filing a civil law suit." *Joseph M. v. Se. Delco Sch. Dist.*, No. 99-4645, 2001 U.S. Dist. LEXIS 2994, at *24 (E.D. Pa. Mar. 19, 2001) (citing 131 Cong. Rec. § 10396 (1985)). Exhaustion is not required where "it would be futile to use the due process procedures." *Beth V.*, 87 F.3d at 88 (quoting H.R. Rep. No. 99-296, at 7 (1985)).

"In the IDEA § 1415 context, plaintiffs may . . . be excused from the pursuit of administrative remedies where they allege systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process." *Id.* at 89; *see also Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d

240 (2d Cir. 2008) (citing examples of successful systemic challenges, including to framework and procedures for assessing and placing students in appropriate educational programs); *N.J. Prot. & Advocacy, Inc. v. N.J. Dep't of Educ.*, 563 F. Supp. 2d 474, 485 (D.N.J. 2008) (exhaustion not necessary where plaintiffs challenged Department of Education's failure to monitor school districts who unnecessarily segregated disabled students from regular students).

In the *P.V.* case, for example, class plaintiffs challenged the District's transfers of students with autism from one school to another. This Court found exhaustion was not required based on two considerations: (1) the hearing officer's own concession that, despite the limited relief he was able to provide to the litigants who did exhaust, he was in no position to provide the system-wide relief; and (2) the notion that "if each autistic student with similar grievances is forced to assert his or her claims through the administrative process, there is a high probability that there will be inconsistent results and the alleged 'systemic deficiency' in the District's procedures regarding autistic students will likely remain unaddressed and unresolved." *P.V.*, 2011 U.S. Dist. LEXIS 125370, at *8 (quoting *N.J. Prot. & Advocacy, Inc.*, 563 F. Supp. 2d at 477-78). Both of these conditions are present here. The Hearing Officer acknowledged that he could only provide compensatory education and not the systemic relief sought by Plaintiffs, and the large number of LEP parents and their children with similar or identical claims could overwhelm the administrative docket and lead to inconsistent results.[2]

The District's proposed requirement that thousands of LEP parents file additional administrative complaints would result in an unduly burdensome and ultimately futile litigation

[2] The issues presented for determination by this Court relate to the legal rights of LEP parents and their children to have IEP documents and meetings translated or interpreted, and they do not require an inquiry into the circumstances of each individual child's case. In contrast, in *Greico v. New Jersey Department of Education*, the finding of an exhaustion of administrative remedies requirement was supported by the "factually intensive inquiry" into what was the appropriate placement for three minors with Down Syndrome. No. 06-cv-4077, 2007 U.S. Dist. LEXIS 46463, at *20-21 (D.N.J. June 27, 2007).

exercise, and also frustrates the rights of meaningful parental participation. *See, e.g.*, *Heldman v. Sobol*, 962 F.2d 148, 159 (2d Cir. 1992) (reversing dismissal of complaint and holding that "[t]o require a systemic challenge, such as [plaintiff's], to pursue administrative remedies would not further the purposes of IDEA"). The law on exhaustion of administrative remedies does not compel such a perverse result.

At the same time, exercising subject matter jurisdiction here does not frustrate IDEA's policy goal of having a full administrative record. By the District's calculation, the Court will have the benefit of 23 days of due process hearings for T.R. and her parent, and 30 days of due process hearings for A.G. and his guardian. *See* Mot. to Dismiss at 3. The Hearing Officer accepted evidence regarding the District's system-wide policies and practices to the extent they violated Plaintiffs' rights, *see* Ex. C to Compl. at 6, and the hearings provide an informative factual record elucidating the District's system-wide practices and policies governing translation and interpretation services to LEP parents and their children. In contrast, in several of the cases cited by the District, the plaintiffs either did not start or complete the administrative process, or there was no record, as there is here, that the hearing officer was without authority to provide the requested relief. *See, e.g.*, *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 275 (3d Cir. 2014) (observing that "exhaustion will be particularly helpful in developing a factual record"); *J.T. v. Dumont Pub. Schs.*, 533 F. App'x 44, 53-54 (3d Cir. 2013) (rejecting unsubstantiated allegation that administrative process would take too long); *Mrs. M. v. Bridgeport Bd. of Educ.*, 96 F. Supp. 2d 124, 132 (D. Conn. 2000) ("The situation here is different from Mrs. W., where the alleged systemic violations—inadequate staffing and failure to conduct evaluations—could not be remedied by the due process hearing officers and were of a type that did not require an administrative record for the district court to address the issues in an informed way.").

C. The District's Jurisdictional Challenge Is Tantamount to a Premature Objection to Class Certification

In its motion, the District is essentially contesting Plaintiffs' class allegations that their claims of systemic violations of the IDEA are typical of the claims of the other class members. As a preliminary matter, the District's arguments are wholly conclusory in nature; it has identified nothing in the Complaint or in the Hearing Officer's decisions that Plaintiffs are not capable of establishing pursuant to the requirements of Rule 23. Nevertheless, Plaintiffs do not brief the Rule 23(a) issues of typicality and commonality here, as they are premature and not a basis for dismissal at this juncture. Indeed, as observed in *P.V.*, "district courts in the Third Circuit typically deny as premature motions to strike class action allegations filed before the plaintiff moves for class certification." 2011 U.S. Dist. LEXIS 125370, at *10. Until a record is developed and a motion for class certification is filed, a court "very rarely" has the information necessary to conduct the rigorous analysis required at the class certification stage. *Id.* at *12.

II. PLAINTIFFS HAVE STATED A VALID CLAIM UNDER THE IDEA FOR SYSTEMIC RELIEF

The District's motion to dismiss Plaintiffs' IDEA and related claims are based on two untenable arguments: (1) Plaintiffs did not allege a policy or system-wide practice of the District with respect to the translation of IEPs and other vital documents; and (2) the District's policy and practice with respect to translation and interpretation services does not violate the IDEA or any other applicable law. As explained below, neither of these arguments withstands scrutiny.

A. Plaintiffs' Complaint Focuses on the District's System-Wide Practice of Failing to Provide Legally-Mandated Translation and Interpretation Services

In their Complaint, Plaintiffs focus on the specific policy and practices at issue here; the District's policy that it will not provide fully translated IEPs or other IEP process documents and its failure to ensure sufficient interpretation services. For example, Paragraph 55 of Plaintiffs'

Complaint summarizes the District's system-wide policy: "The District has adopted a policy in which it does not timely and completely translate IEPs, NOREPs, evaluations, re-evaluations, progress reports, assessments, and other IEP process documents outlining students' procedural and educational rights into the native languages spoken and/or read by LEP students and their parents." Compl. ¶ 55; *see also id.* ¶ 45 ("[T]he District has adopted a systemic policy of failing to provide sufficient interpretation services and to timely and completely translate IEP process documents and regular education forms."); *id.* ¶ 99 ("Instead, the District has adopted a policy and procedures which are ineffective to provide adequate support and which it knows does not fulfill its obligations or fails to meet the needs of LEP parents of disabled students, among others.").

Contrary to the District's implications otherwise, there is no requirement that the policy at issue be an "affirmative" policy – i.e., a policy of action. Further, it is misleading to say that "Rather than identifying any affirmative policy adopted by the School District, the Plaintiffs instead complain of the School District's refusal to adopt policies advocated by Plaintiffs." *See* Mot. to Dismiss at 16. As Plaintiffs clearly alleged, the District's policy is that it *will not* provide fully translated IEPs or other IEP process documents. *See, e.g.*, Compl. ¶¶ 45, 55, 99.[3]

Relying in part on Department of Justice ("DOJ") guidelines entitled "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons," 67 Fed. Reg. 117 41455, 41463 (June 18, 2002), the District asserts that the need for translation services must be made on a case-by-case basis. *See* Mot. to Dismiss at 17-18. This argument also does not withstand scrutiny,

[3] Plaintiffs' allegations regarding the District's policy of not providing fully translated IEPs and IEP process documents are amply supported by the administrative record. For example, Natalie Hess, the District's representative at the due process hearings, testified that in August 2014, the District started the practice of providing IEPs that are only partially translated, and that this is done by using a system called the EasyIEP system to translate only the headings of IEPs. *See* Due Process Hearing Tr. 166:1-22, 169:3-170:2 (Nov. 3, 2014).

and the guidelines are not accorded any deference in interpreting the IDEA. First, the guidelines interpret a DOJ regulation under Title VI, not the IDEA or an IDEA regulation, and were not promulgated by the Department of Education, which is the agency charged with promulgating to effectuate the IDEA. *See* 20 U.S.C. § 1406. Second, whether a governmental agency should translate documents on a case-by-case basis is a different question than the issue of whether the translation of documents is required for LEP parents to meaningfully participate in the IEP process as required by the IDEA. Furthermore, the District's argument that decisions regarding whether to translate IEP and IEP process documents should be made on a case-by-case basis is a red herring because the District does not even make case-by-case assessments as to whether translation services are needed; the result of the District's policy not to translate IEPs and other IEP process documents is a systemic failure to even make individualized determinations as to whether translation services are needed.

The District also asserts that Plaintiffs have only alleged "background" facts, and that these facts are not sufficient to permit an inference that the District's non-translation policy violates the IDEA or any other statute. That is not true. As explained above, Plaintiffs have alleged sufficient facts, which are supported by testimony in the underlying proceedings, to show that the District has adopted a non-translation policy. Plaintiffs also have alleged ample facts to demonstrate that the District is aware that the translation and interpretation needs of LEP parents and students are going unmet with respect to the provision of special education services and LEP parents' participation in those services. As Plaintiffs also alleged in their Complaint, "[a]s of November 2013, the District reported that there were approximately 25,990 families whose primary home language was not English and some 19,670 families of students in the District who had expressly requested documents in a language other than English." Compl. ¶ 51. As of that

time, there were more than 1,500 students who are English Language Learners ("ELL") receiving special education services in the District and 1,887 students with IEPs whose records indicated that their home language was not English. *Id.* ¶ 52. The District does not know or track whether 1,887 captures all of the students with IEPs with LEP ***parents*** who required oral interpretation and translated IEPs and IEP process documents. *Id.* Further, despite these numbers, the District reports that only 487 special education documents of *any type* had been ***orally*** interpreted – not translated. *Id.* ¶ 53. These facts establish that the District has no system in place for ensuring meaningful participation by LEP parents in the special education process.

In addition, and despite the known need for translation services, by the 2013-2014 school year, the District no longer had arrangements with an outside contractor to provide translation services. Further, the District's own Translation and Interpretation Center – the very center established to provide translation services throughout the District – has ***never*** translated an IEP in its entirety. *See id.* ¶ 54. Similarly, although the Commonwealth of Pennsylvania's TransAct program is available to translate documents, the District inexplicably refuses to use the system. *Id.* ¶ 60.

The experiences of Plaintiffs demonstrate how the District's non-translation policy bears out. For example, Ms. Peralta did not receive IEPs in Spanish before or even during the IEP meetings. Instead, during some meetings she received a copy of the IEP with only the generic headings translated into Spanish, with the remainder of the document – i.e., all of the substance regarding A.G.'s individual needs and goals – in English. *Id.* ¶ 75. Similarly, despite repeated requests for translated IEPs and other IEP-related documents, Ms. Galarza did not receive fully translated IEPs before or during IEP meetings. *See, e.g., id.* ¶¶ 64-69. The District's non-

translation policy has prejudiced and will continue to prejudice the rights of Plaintiffs and others similarly situated.

B. The District's Systemic Failure to Translate IEP Documents Violates the IDEA

The source of the District's legal obligation to translate IEP documents is found in the provisions of the IDEA and the reality, which was confirmed by the Hearing Officer's findings, that without translated IEP documents, LEP parents cannot meaningfully participate in the development of their children's IEP or engage in the requisite conversations about the children's needs and what program and placement will satisfy those needs. *See* Ex. A. to Compl. at 9-10; Ex. B to Compl. at 10-11.

Under the express provisions of the IDEA, the District must provide certain documents in writing. First, the District must provide an IEP ***in writing***. *See* 20 U.S.C. § 1415(d)(1)(A)(i); 34 C.F.R. §§ 300.320, 300.323. In addition, a parent is entitled to prior ***written*** notice when the district proposes or refuses to initiate or change a program. 20 U.S.C. § 1415(b)(3), (c).[4] A parent also is entitled to ***a copy*** of any evaluation or re-evaluation and copies of the evaluation report must be ***disseminated*** to the parents at least 10 school days prior to the meeting of the IEP team. 22 Pa. Code § 14.123(c), (d).

Further, the IDEA requires that parents have the opportunity to examine their children's records and "participate in meetings with respect to the identification, evaluation and education placement of the child, and the provision of [FAPE] to such child, and to obtain an independent education evaluation of the child." 20 U.S.C. § 1415(b)(1). Indeed, "[p]arental involvement is a

[4] The notice required by 20 U.S.C. § 1415(b)(3) must be provided "in the native language of the parents, unless it clearly is not feasible to do so." 20 U.S.C. § 1415(b)(4). The specific circumstance described in the regulations where the written notice does not have to be in the parent's native language is when the native language is not a written language, in which case other requirements must be met to ensure the notice is communicated to the parent. *See* 34 C.F.R. § 300.503(c)(2).

central feature of the IDEA." *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992); *see also Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524 (2007). As the Third Circuit observed in *G.L. v. Ligonier Valley Sch. Dist. Auth.*, "[p]arents are often in a position to be forceful advocates for their children and through their vigilance and perseverance to help fulfill the IDEA's promise of a free appropriate public education. That 'cooperative process . . . between parents and schools' that results from a parent's action, after all, is at the very 'core of the statute' itself." 802 F.3d 601, 625-26 (3d Cir. 2015) (quoting *Schaffer v. Weast*, 546 U.S. 49, 53 (2005)).

Here, the Hearing Officer explicitly found, and acknowledged that District witnesses agreed, that a parent having documents such as evaluations and IEPs either before or during IEP meetings is "critical to meaningful participation." *See* Ex. A to Compl. at 9; Ex. B. to Compl. at 11. When reaching this conclusion, the Hearing Officer further explained:

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

Ex. A to Compl. at 9; Ex. B. to Compl. at 11; *see also* Ex. A to Compl. at 10 ("The District put personnel in place so that the Parent could literally speak during that meeting, but did not make meaningful accommodations so that the Parent could prepare for it, or participate as it was happening. This is a violation of the Parent's rights."); Ex. B. to Compl. at 11. This analysis applies with equal force to all LEP parents, regardless of how this right is effectuated on a case-by-case basis.

At times, the District has attempted to orally interpret portions of IEPs and other documents during the course of the IEP meetings. As the Hearing Officer found in the cases of

T.R. and A.G., however, that process does not allow the LEP parent to engage in the requisite conversation regarding the child's needs. *See* Ex. A to Compl. at 9; Ex. B to Compl. at 11. And as demonstrated in A.G.'s case, providing a parent with an IEP by orally interpreting a portion of it during an IEP meeting is inefficient to the point of being futile. *See* Compl. ¶ 75.

The District's position that this Court cannot consider claims challenging the translation of IEP documents because that is too fact specific has no support in the mandatory provisions of the IDEA or the practical reality of the Hearing Officer's observations. As the Hearing Officer explained, without written translation of such planning documents LEP parents cannot participate meaningfully in the IEP process. There is simply nothing in the allegations of the Complaint or the Hearing Officer's decisions which would allow a reasonable inference that Ms. Galarza or Ms. Peralta were different from any other LEP parent in their need for written translated IEPs and other IEP process documents in order to participate meaningfully in the IEP development process.

The District's argument that the IDEA gives it discretion to determine whether any documents other than a notice and procedural safeguards must be translated also is not supported. The issue before the Court is whether an IEP and other IEP process documents must be written and available in a language the parent reads. The only discretionary component recognized by the IDEA involves whether translation is feasible (e.g., the parent's language is not a written language). Further, even if the District were correct that it has some discretion in deciding which IEP documents to translate on a case-by-case basis, there still would be a system-wide violation of the IDEA because the District is not exercising any discretion at all; the District admits it does not fully translate IEPs as a rule, and it is not fully translating any IEP for any LEP parent. This is not a case in which the majority of IEP documents have been translated and the

claim is based solely on the District's informed decision not to translate additional documents for a minority of the LEP parents. Contrary to the premise of the District's argument, there is no basis in the Complaint, the testimony of District personnel, or the Hearing Officer's decisions to infer that the District is making any informed decisions or has any protocol in place to determine which IEP documents need to be translated to ensure meaningful parent participation.

III. PLAINTIFFS HAVE ALLEGED THE ESSENTIAL ELEMENTS OF THEIR SECTION 504 AND ADA CLAIMS

As alleged in the Complaint, the District's failure to provide Plaintiffs with adequate language services necessary for meaningful participation in the IEP process also constitutes a violation of Section 504 of the RA and the ADA. Section 504 provides that:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794(a).[5] To establish a *prima facie* violation of Section 504, plaintiffs must prove: (1) they are disabled; (2) they are "otherwise qualified" to participate in school activities; (3) the District received federal financial assistance; and (4) they were excluded from participation in, denied the benefits of, or subject to discrimination at the school. *See, e.g.*, *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 253 (3d Cir. 1999).[6]

The District does not dispute that Plaintiffs have alleged the first three elements of a Section 504 claim; its challenge is to the fourth element. However, in that challenge, the District

[5] Department of Education regulations implementing Section 504 state that it is discriminatory to deny a qualified individual with disabilities "an opportunity to participate in or benefit from" a service "that is not equal to that afforded to others." 34 C.F.R. § 104.4(b)(ii). In addition, it is unlawful discrimination under Section 504 to provide an individual "with an aid, benefit or service that is not as effective as that provided to others." *Id.* § 104.4(b)(iii). For purposes of Section 504, an appropriate education is "the provision of regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." *Id.* § 104.33.

[6] The elements of ADA and RA claims are similar, except that in order to bring a claim under the RA, a plaintiff must show that the defendant receives federal funding. *CG v. Pa. Dep't of Educ.*, 734 F.3d 229, 235 n.10 (3d Cir. 2013). There is no dispute that the District receives federal funding.

has ignored the close relationship between Section 504 and denials of FAPE in violation of the IDEA. The IDEA requires parent participation in all meetings addressing a child's identification, evaluation, educational placement, and the provision of a FAPE. Plaintiffs allege that the District's pervasive denial of parent participation to LEP parents has denied them that right *and* resulted in a denial of educational opportunities and benefits to students, in violation of Section 504. The Third Circuit's consistent guidance is that the failure to provide a FAPE, as required by the IDEA, is almost always a violation of Section 504 and the ADA. *See, e.g.*, *CG v. Pa. Dep't of Educ.*, 734 F.3d 229, 235 (3d Cir. 2013) ("Failure to provide a FAPE violates Part B of the IDEA and generally violates the ADA and RA because it deprives disabled students of a benefit that non-disabled students receive simply by attending school in the normal course—a free, appropriate public education." (citations omitted)); *Andrew M. v. Del. Cnty. Office of Mental Health & Mental Retardation*, 490 F.3d 337, 349 (3d Cir. 2007) ("a party may use the same conduct as the basis for claims under both the IDEA and the RA"); *Ridgewood*, 172 F.3d at 253 ("But a plaintiff need not prove that defendants' discrimination was intentional. We have held that there are few differences, if any, between IDEA's affirmative duty and § 504's negative prohibition and have noted that the regulations implementing § 504 require that school districts 'provide a free appropriate education to each qualified handicapped person in its jurisdiction.'" (quoting *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir. 1995))).

Andrew M., which the District cites in its brief, explains:

> [I]t is clear why violations of Part B of the IDEA are almost always[7] violations of the RA. Under § 612 of the IDEA, states accepting federal funds must provide children of a certain age a free and appropriate public education. 20 U.S.C. § 1412. The regulations accompanying the RA adopt this requirement and

[7] The most likely situation in which a violation of the IDEA is not a violation of Section 504 is when one of the first three elements of a *prima facie* Section 504 claim is not satisfied. *See Lauren G. ex rel. Scott G. v. W. Chester Area Sch. Dist.*, 906 F. Supp. 2d 375, 389 (E.D. Pa. 2012) ("[A] denial of a FAPE is a denial of a guaranteed education to a disabled child and thus violates the RA so long as all other elements of a § 504 claim have been proven.").

> provide that a handicapped person is one "to whom a state is required to provide a free appropriate public education under section 612 . . . ." 34 C.F.R. § 104.3(*l*). Therefore, when a state fails to provide a disabled child with a free and appropriate education, it violates the IDEA. However, it also violates the RA because it is denying a disabled child a guaranteed education merely because of the child's disability. It is the denial of an education that is guaranteed to all children that forms the basis of the claim.

490 F.3d at 350.

As discussed above, the District's systemic failure to provide adequate language services to Plaintiffs has violated Part B of the IDEA, which also gives rise to claims under the ADA and RA because parental participation is essential to ensuring that a child with a disability receives a free appropriate public education. *See* Compl. ¶ 5. The "[s]ubstantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process." *See Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001). That is because the "modus operandi" or "centerpiece" of the IDEA's guarantee of a FAPE to students with disabilities is the IEP, which for Plaintiffs must be adequately translated or interpreted to allow for meaningful parental participation. *See Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985) ("The modus operandi of the Act is the already mentioned individualized education program."); *Honig*, 484 U.S. at 311 (IEPs are "the centerpiece of the [IDEA's] education delivery system").

Indeed, as alleged in the Complaint, the District's procedural violations of the IDEA have deprived the Student Plaintiffs of a range of special education services necessary to receive a FAPE. For example, the District failed to address the Student Plaintiffs' need for transition services (in the form of a transition assessment). *See* Compl. ¶¶ 68, 76. Also, under the IDEA, students with disabilities are entitled to a plan to facilitate their transition to postsecondary education that is "based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and . . . include[ ] instruction, related services, community

experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation." 20 U.S.C. § 1401(34)(A)-(C).[8] During the relevant time periods, no transition services documents were provided to Plaintiffs in Spanish.

Likewise, the District's failure to arrange for adequate home instruction during the IEP process is another example of an IDEA violation that deprived the Student Plaintiffs of "an opportunity to participate in or benefit from" a service that is "equal to that afforded to others" within the meaning of Section 504. This educational benefit was denied to both Student Plaintiffs and, as alleged, was part of a system-wide failure to translate or interpret IEP documents. In addition, the District's failure to translate homebound-related forms for A.G. resulted in a significant delay in services.[9]

The District also argues for dismissal of Plaintiffs' Section 504 claim on the theory that they have not alleged that their disability was the "sole cause" of the unlawful discrimination.[10] Mot. to Dismiss at 22. In making that argument, the District misconstrues the "sole cause" language in *CG v. Pennsylvania Department of Education* and the other Third Circuit case law addressing the elements of a Section 504 claim. As stated explicitly by the *CG* Court, "[f]ailure to provide a FAPE violates Part B of the IDEA and generally violates the ADA and RA because it deprives disabled students of a benefit that non-disabled students receive simply by attending

[8] Although a school district does not need to ensure successful completion of these transition goals, transition services must provide more than a de minimis benefit. *Dudley v. Lower Merion Sch. Dist.*, No. 10-2749, 2011 WL 5942120, at *5-6 (E.D. Pa. Nov. 29, 2011) (finding more than de minimis benefit for transition services where the District held an IEP meeting focused on transition planning with its transition coordinator, discussed work experience opportunities for the student, provided a job coach, and administered tests to assess the student's interest). In the case of Plaintiffs, the District failed to provide even a de minimis benefit.

[9] A.G. eventually received a homebound referral form in English on October 3, 2014, and he did not receive homebound instructions until after a third of the school year had passed.

[10] The District's "causation" argument applies only to the Section 504 claim in Count 3, not to the claim under 22 Pa. Code Chapter 15. *See* Mot. to Dismiss at 21. Accordingly, even if the District's causation argument were valid (and it is not), it would be a sufficient basis to dismiss only a part of Count 3.

school in the normal course—a free, appropriate public education." *CG*, 734 F.3d at 235. In other words, denial of FAPE violates the RA because a disabled child is being denied a guaranteed educational benefit because of his or her disability. *Andrew M*, 490 F.3d at 350. In *CG*, however, unlike the instant case, plaintiffs conceded that they received a FAPE and that no violation of the IDEA existed. 734 F.3d at 235 ("Plaintiffs take no exception to the District Court's finding that they received a FAPE or its conclusion that the funding scheme does not violate the IDEA."). Therefore, denial of FAPE was not offered as evidence of the defendant's discrimination and plaintiffs were forced to prove discrimination in another manner.[11]

The District points to no case law involving a situation where there was an alleged denial of FAPE and deprivation of educational opportunities ***and*** plaintiffs were required to plead additional facts establishing that their disability was the sole cause of their discrimination. On the contrary, district courts within the Third Circuit have routinely rejected that exact argument. *Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 489 (E.D. Pa. 2011) (rejecting defendant's argument that plaintiffs were required to plead additional facts demonstrating that disability was the sole cause of discrimination when they alleged that a denial of FAPE occurred); *Rayan R. v. Nw. Educ. Intermediate Unit No. 19*, Civ. No. 3:11-CV-1694, 2012 U.S. Dist. LEXIS 15164, at *14 (M.D. Pa. Feb. 7, 2012) (finding defendant's argument that plaintiff must demonstrate that services were denied "for the sole reason that the child is disabled . . . has been made, and rejected, before.").

For these reasons, the District's arguments as to Plaintiffs' Section 504 and ADA claims should be rejected.

[11] *Lamberson v. Pennsylvania*, also cited by the District, involved a suit for discrimination based on the revocation of a plaintiff's nursing license and is of no relevance. 561 F. App'x 201, 202 (3d Cir. 2014).

IV. THE DISTRICT'S SYSTEMIC FAILURE TO PROVIDE ADEQUATE TRANSLATION AND INTERPRETATION SERVICES IS PROSCRIBED BY BOTH THE EEOA AND TITLE VI

A. The District's Systemic Failure to Provide Adequate Translation and Interpretation Services Violates the EEOA

Under the EEOA, "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). As alleged in the Complaint, the District's failure to provide Plaintiffs with IEP documents (using the words of the Hearing Officer) "in an accessible form" also constitutes a violation of the EEOA. In particular, the District's refusal to translate critical school documents – such as IEPs, evaluations, NOREPS, re-evaluations, progress reports, assessments, and other IEP process documents outlining students procedural and educational rights – resulted in the denial of educational benefits that Plaintiffs were entitled to by law but were only provided to their English-speaking peers. Compl. ¶ 55.

The District does not dispute that Plaintiffs have alleged: (1) language barriers; (2) defendant's failure to take appropriate action to overcome these barriers; and (3) a resulting impediment to students' equal participation in instructional programs. *See, e.g.*, *CG v. Pa. Dep't of Educ.*, 547 F. Supp. 2d 422, 435 (M.D. Pa. 2008). Rather, it argues for dismissal of the EEOA claim on the basis that Plaintiffs have failed to allege national origin-based discrimination. *See* Mot. to Dismiss at 23. In making that argument, the District ignores the well-recognized interrelationship between limited English proficiency and national origin.

Indeed, as numerous courts have found, language is an identifier of national origin and is often used as pretext for discrimination. *See, e.g.*, *CG*, 547 F. Supp. 2d at 435 (denying defendant's motion to dismiss an EEOA claim where plaintiffs demonstrated the existence of a

"barrier that impedes the students' ability to participate in needed instructional programs."); *CG v. Pa. Dep't of Educ.*, No. 1:06-CV-1523, 2011 WL 318289, at *2 (M.D. Pa. Jan. 28, 2011) (denying defendant's motion for summary judgment in the same case where "there is evidence in the record from which a fact finder could conclude that the LEP special needs students are unable to participate fully in their special education programs"); *Leslie v. Bd. of Educ. for Ill. Sch. Dist. U-46*, 379 F. Supp. 2d 952, 960 (N.D. Ill. July 25, 2005) (finding that LEP students successfully pled a claim under the EEOA when they alleged "(1) language barriers; (2) defendant's failure to take appropriate action to overcome these barriers; and (3) a resulting impediment to students' equal participation in instructional programs"). As Chief Judge Kane explained in *CG*, failing to provide Spanish-speaking students with disabilities with requisite educational services puts them at a disadvantage compared to their English-speaking counterparts. 547 F. Supp. 2d 422 at 435 ("Critically, Plaintiffs' amended complaint alleges that Spanish-speaking special-education students have needs beyond those of Spanish-speaking regular-education students or those of English-speaking special-education students. Stated differently, the combination of speaking Spanish as a first language and having special-education needs, according to Plaintiffs, creates a language barrier that impedes the students' ability to participate in needed instructional programs."). Indeed, as the statutory provisions of the EEOA make clear, discrimination on the basis of national origin is demonstrated by showing "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." *See* 20 U.S.C. § 1703(f). Plaintiffs have adequately alleged such a failure by the District to take appropriate action to overcome language barriers. *See, e.g.*, *CG*, 547 F. Supp. 2d 435 (quoting *Leslie*, 379 F. Supp. 2d at 961).

The District's reliance on *K.A.B. ex rel. Susan B. v. Downingtown Area School District*, No. 11-1158, 2013 WL 3742413 (E.D. Pa. July 16, 2013), is misplaced. In *K.A.B.*, a Russian-born minor adopted by American-born parents brought suit against the Downingtown School District. K.A.B., who was categorized as an ELL student, received Instructional Support Team services, English as a Second Language services, and eventually, IEP services. *Id.* at *2-3. The plaintiffs raised EEOA and Title VI claims on the theory that the school district did not timely evaluate K.A.B. based on his limited English proficiency. *Id.* at *12. The district court granted summary judgment, concluding that the plaintiffs had not submitted any evidence from which a reasonable fact-finder could find that the school district had failed to take appropriate action on account of K.A.B's national origin. In contrast to *K.A.B.*, Plaintiffs here have alleged language barriers, the District's failure to take appropriate action to overcome those barriers, and a direct causal link to resulting injuries, including the denial of a FAPE.[12]

B. The District's Systemic Failure to Provide Adequate Translation and Interpretation Services Violates Title VI

The District makes an identical argument for dismissal of Plaintiffs' Title VI claim. Mot. to Dismiss at 24. Again, the District fails to recognize the well-established precedent that language-based discrimination constitutes a form of national origin discrimination under Title VI. Notably, the District ignores the United States Supreme Court's decision in *Lau v. Nichols*, 414 U.S. 563, 568 (1974). In *Lau*, the Supreme Court held that the San Francisco School District violated Section 601 of the Civil Rights Act when it refused to provide adequate language

[12] *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789 (8th Cir. 2010), which is cited by the District, also does not apply. First, the section of the *Mumid* opinion cited by the District analyzes Title VI, not the EEOA. *Id.* at 795. Moreover, the *Mumid* Court only addressed whether monetary or injunctive relief was available for plaintiffs under the EEOA. *Id.* at 796-800. Plaintiffs have not sought monetary damages in this case, and unlike the plaintiffs in *Mumid*, Plaintiffs here have standing to seek the injunctive relief requested. In conformance with EEOA provisions, Plaintiffs seek "only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712.

services to students of limited English proficiency. 414 U.S. at 568. The Court explained that providing instruction in a language that was inaccessible to Chinese-speaking students meant they received fewer benefits from the educational program than the English-speaking majority, and this had the "earmarks" of discrimination based on national origin. *Id.*[13]

As alleged in the Complaint, the District refused to provide Spanish-speaking Plaintiffs with special education documents in a format that could be understood or utilized to ensure parent and student participation in the special education process. Although the District was put on notice that Named Plaintiffs only spoke and read Spanish and is fully aware of the language needs of all LEP parents and students, the District made the affirmative decision not to translate documents or ensure the provision of adequate interpretation services. It is reasonable to assume that the District was aware of the consequences of its actions – that Plaintiffs would not be able to comprehend the untranslated documents provided and, therefore, were not capable of participating in the process of or obtaining the benefits these requirements were intended to confer – including the provision of a FAPE and equal educational opportunities. Despite this knowledge, the District made the intentional choice not to translate or ensure interpretation, thereby intentionally or with deliberate indifference depriving Plaintiffs from receiving the same services as their English-speaking peers.

The District also erroneously relies on *Abdullah v. Small Bus. Banking Dep't of Bank of Am.*, No. 13-305, 2013 WL 1389755, at *3 (E.D. Pa. Apr. 5, 2013), *aff'd* 532 F. App'x 89 (3d Cir. 2013) (citing the Eighth Circuit decision in *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 795 (8th Cir. 2010)) to support its arguments. The court in *Abdullah* and the Eighth Circuit

[13] Although the Supreme Court in *Alexander v. Sandoval*, 532 U.S. 275, 285-86 (2001), held that the disparate impact regulations promulgated under Section 602 were not enforceable through a private right of action, it did not abrogate the precedent in *Lau* that language-based discrimination was actionable under Section 601 as a form of national origin discrimination.

decision it cites do not address the Supreme Court's controlling authority in *Lau*. *See, e.g.*, *United States v. Maricopa Cnty.*, 915 F. Supp. 2d 1073 (D. Ariz. 2012) ("In light of the factual differences and the absence of any discussion of the Supreme Court's decision in *Lau*, the Court finds *Mumid* and *Franklin* distinguishable."). Further, *Abdullah* involved a *pro se* plaintiff who claimed he was denied a small business loan based on his race but who failed to identify his race or ethnicity or plead any plausible facts that suggested the defendant was aware of his race or ethnicity. 2013 WL 1389755, at *1-2.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendant's Motion to Dismiss in its entirety.

Dated: January 21, 2016

Respectfully submitted,

s/ Paul H. Saint-Antoine

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss Plaintiffs' Complaint has been filed electronically using the Court's Electronic Case Filing ("ECF") System, which sent a notice of filing activity to all attorneys of record. This document is available for viewing and downloading from the Court's ECF System.

Dated: January 21, 2016

s/ Paul H. Saint-Antoine
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