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

CHESTER UPLAND SCHOOL DISTRICT, et al.,	:	
Plaintiffs,	:	No. 12-cv-0132
v.	:	
COMMONWEALTH OF PENNSYLVANIA, et al.,	:	
Defendants.	:	(Baylson, J.)

PLAINTIFFS' RESPONSE TO COURT'S QUESTIONS FOR COUNSEL

This is Plaintiffs' Response to the Court's Questions for Counsel dated May 29, 2012.

I. INTRODUCTION

Plaintiffs have no guarantee, based upon the evidence adduced at trial, that a key component in their ability to receive a FAPE will occur – that is whether the CUSD schools will be open for the 2012-2013 school year. Indeed, the testimony at trial was that absent resolution of the financial situation, the CUSD may well not even open for the 2012-2013 school year or if it does may be broke by September, 2012. Bruchak, T. 73-74, P-4, P-5, P-9, P-56, P-57, P-58, P-59.[1] Despite this evidence, the Commonwealth Defendants, specifically the Pennsylvania

[1] State witnesses have not challenged testimony that the effort to keep the District's schools open this year was accomplished by deferring payment of bills. As a consequence, at the end of the school fiscal year on June 30, 2012 the District expects to owe vendors $9 million dollars and district staff $3.5 million dollars. Bruchak, T. 50, 52. In addition, the District has not paid charter schools $19 million dollars billed in accordance with state statute for the current and prior school years. Bruchak T. 51. The proposed operating budget for next year contains no funds for paying these amounts and still has a deficit of $8 million dollars, despite a local tax increase at the maximum rate allowed and no restoration of the cuts made last year except for full-day kindergarten. Bruchak, T. 58. Mr. Bruchak testified that because of the accumulated deficit of the District vendors are refusing to provide goods and services without payment up front, making it difficult for the District to obtain supplies for opening school and even fuel for the District's buses. Bruchak T. 49

Department of Education ("PDE" or "the State") attempts to hide its head in the sand, and admits to having no plan for the education services to the children with disabilities in the CUSD that would be consistent with the requirement to educate them in the Least Restrictive Environment. P-61A, Tomassini, T. 82, and PDE Ex. 4 (also P-8).

This is unconscionable in light of the indisputable reality that the PDE is the primary agency responsible for special education in this state to assure a single line of responsibility for special education. *See generally*, 20 U.S.C. §1411(a) and 20 U.S.C. §1412. It is the PDE that has assured the United States Department of Education ("USDOE") in writing, P-13, that it will provide special education services to all IDEIA[2] eligible children in Pennsylvania, in the Least Restrictive Environment, including children in CUSD, in return for its receipt of $423 million[3] from the USDOE (including $38 million dollars in completely discretionary funds). Hozella, T. 71-72; P-13; 20 U.S.C. §1412(a) and §1412(a)(11); *Kruelle v. New Castle Cnty Sch. Dist.t*, 642 F. 2d 687 (3rd Cir. 1981) (statute and regulations intended a single line of responsibility); *Cordero v. Pa. Dept. of Educ*., 795 F. Supp. 1352, 1362 (M.D. Pa. 1992) (finding State of Pennsylvania responsible for local school district's systematic failure to comply with provision of private schools, an IDEA mandate); *Honig v. Doe*, 484 U.S. 305 (1988), superseded on other grounds by 20 U.S.C. 1415(k). (requiring State of California to provide educational services directly to any individual children adversely affected by suspension policy then contrary to the federal law); *Mary O. v. Edgar*, 131 F. 3d 610, (7th Cir. Dec. 2, 1997) (State of Illinois'

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[2] The Individuals with Disabilities Education Improvement Act passed in 2004 will be referenced throughout as "IDEIA," 20 U.S.C. §1400, et seq. The prior version of the same law was known as the Individuals with Disabilities Education Act ("IDEA"). For purposes of this memorandum, the two versions of the law are indistinguishable and Courts frequently utilize IDEA when referring to today's act.

[3] Hozella, T. 84, funds from USDOE for 2012-2013 expected to be the same.

obligation to provide services is mandatory, nor precatory). The IDEIA requires the PDE to "ensure" or "to make certain" that the IDEA's statutory requirements are carried out. *Corey H. v. Bd. of Educ.* 995 F. Supp. 900 (N.D. Ill. 1998) (Illinois State Board of Education responsible for lack of LRE in City of Chicago schools). In fact, it is specifically the PDE that is directly responsible if a district is unable to provide FAPE. 20 U.S.C. §1413(g). The Commonwealth is legally obligated to provide the needed financial resources to CUSD, rather than to create an irrational and inequitable funding formula, including flat funding at 16% and requiring CUSD to pay special education dollars unrelated to their costs to charter schools. Baker, P-68. *Corey H.,* at 918 (State of Illinois should act "with all deliberate speed" to eliminate funding formula that was contrary to the mandate of the Least Restrictive Environment); *Kerr Center Parents Ass'n v. Charles*, 897 F.2d 1463, n.6, (9th Cir. 1990) (court has authority to order the State of Oregon to provide a local agency with the funds the agency needs to provide adequate services to disabled children).

The IDEIA, at 20 U.S.C. §1412(a) requires the PDE to have a state plan in place and submit updates to it, called assurances. The PDE Assurances to USDOE, P-13, explicitly promise that it has policies and procedures in place to: 1) assure a free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21; 2) assure that to the maximum extent appropriate, children with disabilities are educated with children who are not disabled and special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the child's disability is such that education in regular classes with the use of supplemental aids and services cannot be achieved. P-13. This single line of responsibility is completely consistent with the legislative history of the IDEA that the establishment of a single

agency on which to focus responsibility for assuring the right to education for children with disabilities was of paramount importance to Congress, and is statutorily mandated. 20 U.S.C. §1412(a)(1) (requiring submission of state plan); 20 U.S.C.§1412(a)(11) (requiring state supervision); 20 U.S.C. §1415(a)(15) (requiring goals for the performance of children with disabilities. *See* S. Rep. No. 168, 94th Cong., 1st Sess. 24 reprinted in (1975) U.S. Code Cong. & Ad. News 1425, 1448. Not a single word of the IDEIA requires that CUSD further decimate its already weak regular educational programming, or eliminate all discretionary programming, or spend all of its local resources in order to pay for special education services that are the responsibility of the state educational agency. That is why not a single state witness suggested that CUSD should eliminate or further reduce regular education programs in order to pay for its special education programs. Rather, the IDEIA system is designed so that if a local school district is 'unable' to provide special education services, the local district can and should turn to the state as CUSD did in December, 2011 when it wrote and requested financial assistance. P-24, P-25. The PDE has admitted that when it turned down CUSD's request it had made no analysis of whether CUSD had adequate funds to pay the cost of meeting the state and federal mandates imposed on it, nor did it even know the cost of meeting those mandates. In those circumstances, there is no reason the well-understood rule that the state has ultimate responsibility to ensure children with disabilities receive a free appropriate public education in the least restrictive environment should not apply. The PDE bears the responsibility and that is why the PDE has the $38 million dollars of discretionary funds. OSEP *Letter to Bass*, 102 LRP 11535 (Dec. 18, 2001), attached as Ex. A. Thus, notwithstanding what CUSD has done or not done, Plaintiffs maintain that the Commonwealth Defendants remain the primary agency responsible to ensure the provision of FAPE to students with disabilities in the CUSD.

Overwhelming evidence demonstrates that the CUSD is simply unable to implement its June 2011 Special Education Plan[4] found at P-21. IEPs are not being implemented as written. P-46, P-66. The CUSD is unable to provide necessary school psychology services. Currently, only one school psychologist services CUSD, leading to delays in initial evaluations, inability to re-evaluate students as required, and impossibility of rendering consultation services. Thurman, T. 31-34; Payne, T. 29; Walker, T. 6. The CUSD is also unable to provide necessary speech and language services. This academic year the CUSD experienced an interruption in speech and language services and still fails to provide these services to some students requiring them. P-37; Persing, T. 141-142; Payne, T. 50-51; Walker, T. 13; Brown, T. 164. The CUSD is also unable to provide necessary counseling services. Cuts in counseling staff, as well as the availability of only one school psychologist, have rendered counseling services virtually nonexistent. Payne, T. 31-32, 46-49; Thurman, T. 30-31. The lack of behavior liaisons has prevented behavior plans and behavior assessments from being timely provided. Payne, T. 31-32, 55-56; Mitchell, T. 35-36, 37; P-66, at 8. Additionally, the CUSD is currently unable to provide special education in the least restrictive environment. Plans for inclusion across the District have not been implemented because of staffing cuts. Payne, T. 109 – 110, Thurman, T. 48-50; Walker, T., 19-20; Mitchell, T. 33-34. Budget cutbacks have also had a significant impact on classroom function. Very large class size as well as the lack of substitutes and classroom aides prevent teachers from properly executing IEPs and behavior plans. Thurman, T. 50-52; Walker, T. 20; Mitchell, T. 33-34, 38-40. Additional special education staff was not available because of money. Payne, T. 152. There was also uncontested evidence that CUSD does not comply with Section 504. Thurman, P-66.

[4] The IDEIA requires local educational agencies to submit special education plans to the state. 20 U.S.C. §1413(a), but Pennsylvania dictates the content and format of the school district special education plans. *See*, reference from PDE website attached as Ex. B.

In light of the PDE's primary responsibility to ensure the provision of FAPE to plaintiff class members, including its responsibility to ensure that the district remains open so that it can provide special education students the opportunity to be educated with regular education students, this Court has the authority to require the state to use its federal discretionary funds to provide CUSD the resources to provide the necessary services and to either provide the funds to maintain sufficient regular education classes for education in a least restrictive environment or provide a plan as to how that will be done if the CUSD does not have the ability to keep the school doors open and continue paying instructional staff for regular education students.

II. RESPONSE TO QUESTIONS

Question 1. Does a local district have an obligation to prioritize funding special education, as may be necessary to provide a free and appropriate public education ("FAPE")?

Brief Answer 1. No, because the PDE has the responsibility to ensure FAPE to children in the CUSD. Nothing in IDEIA imposes an obligation on the district to neglect or set aside its legal obligations to provide educational services to all students in accordance with state and federal law. The local district's only obligation is to not reduce funding pursuant to the IDEIA's maintenance of effort. 20 U.S.C. §1413(a)(2)(A)(iii). The State has not asserted that CUSD has reduced its funding in violation of the maintenance of effort.

Statutory and Regulatory References

20 U.S.C. §1412 (State Eligibility) describes the grant application process by which states receive federal funds and explains various requirements of the IDEA at the state level. A state is eligible for assistance under this part for a fiscal year if the state submits a plan that provides assurances to the secretary that the State has in effect policies and procedures to ensure that the state meets certain conditions, including at §1412(a), the following: (1) Free Appropriate Public Education, (FAPE); (5) Least Restrictive Environment, (LRE); (11) State's General

Supervision Responsibility, (15) State Performance Goals and Indicators for the performance of children with disabilities in the state; and (17) Maintenance of Effort.[5]

20 U.S.C. §1411 (Authorization; Allotment; Use of Funds; Authorization of Appropriations) This section of the IDEA describes the federal funding formula and the manner in which the state may use its IDEA funds. 20 U.S.C. §1411(a) explains that IDEA funds are made to States to "assist them to provide special education and related services to children with disabilities," not school districts. 20 U.S.C. §1411(e) explains that a state may reserve a certain amount of its IDEA allocation for purposes of administering the IDEA. 20 U.S.C. §1411(e)(2)(B) states that the required activities including monitoring, enforcement, complaint investigation and a mediation process. 20 U.S.C. §1411(e)(2)(C) explains that reserved funds may be used to carry out support and direct services, including but not limited to, mental health services, use of technology, and assist in meeting personnel shortages. The regulations for Section 1411 are found at 34 C.F.R. §§300.700 – 300.717.

20 U.S.C. §1413(g) provides that where a school district is unable to provide a free appropriate public education to students, the state must do so.

Pennsylvania has state special education regulations which are found at 22 Pa Code Chapter 14. The state regulations incorporate and must be consistent with the federal statute and regulations and cannot have a regulation or process that would be contrary to the Federal Statute and regulations. Hozella, T. 63; 22 Pa Code §14.102(a)(1).

[5] IDEA funds are designed to supplement the level of, state and local funds. Congress designed the IDEA (originally referred to as the Education for All Handicapped Children Act of 1975, Pub. L. 94-142) as part of an effort to help "States" provide educational services to children with disabilities. *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982), the first Supreme Court case on the matter, consistently referred to the Act as one placing responsibility upon the "States."

Factual Summary

The PDE received $423 million from the USDOE for 2011-2012 and the same amount is anticipated for 2012-2013. Hozella, T. 83-84, 101. Of the $423 million, PDE reserves $7 million for state administration and has an additional $36-38 million as "set aside funds." Hozella, T. 101-105. The State's $36-38 million could be used to provide direct services to students with disabilities and the use of these funds is at the state's discretion and it is "totally up to the state." Hozella, T. 102.

The State submits a grant application to the USDOE and is eligible for federal financial assistance by an update and submission of assurances to continue its plan to educate students with disabilities. P-13, Hozella, T. 70-71. In addition, since 2004, the State must report to the USDOE annually on 20 special education indicators. One of those assurances and indicators is LRE. Hozella, T. 26. The State's applications to the USDOE for grants assure that children with disabilities are educated with non-disabled children to maximum degree possible, (LRE) and this is one of the targets of the state's annual performance plan. Hozella, T. 71-74. If the state did not give this assurance, PDE would not be receiving the federal financial assistance. Hozella, T. 72-73. PDE does not believe CUSD met LRE targets as set forth in the state's performance plan. Hozella, T. 82-83.

Question 2. Does a school district have any minimum standards to apply in providing a FAPE? If so, what are the standards and where can they be found in writing? Is there any statute or regulation, state or federal, which provides such a standard? What Third Circuit precedential opinions provide standards for evaluating whether a FAPE has been provided?

Brief Answer 2. Yes, both the PDE and CUSD have standards to apply in providing a FAPE.

Statutory and Regulatory References:

20 U.S.C. §1401(9) defines a Free Appropriate Public Education as meaning special education and related services that have been provided at public expense, under public supervision and direction and without charge, services that meet the standards of the state educational agency, services that includes an appropriate preschool, elementary school or secondary school education in the state, and an education that is provided in conformity with the IEP required under Section 1414(d).

20 U.S.C. §1414(d)(1)(A)(i)(IV)(bb) requires that all students with disabilities who are on IEPs are provided special education, related services and supplementary aids and services to allow the child to be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities.

20 U.S.C. §1412(a)(11) requires the PDE to ensure that the IDEA is met and that includes ensuring that the programs for children with disabilities in the State, including all programs administered by any other state or local agency are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities and meet the educational standards of the state educational agency.

In Pennsylvania, there are two standards that apply to determine educational standards that must be relied upon to determine if FAPE is being provided. First, the State of Pennsylvania requires that CUSD meet the Common Core Standards set forth in 20 Pa Code Chapter 4. Students must be provided instruction in certain areas, including English, Math, Science, and Social Studies. By statute, CUSD must write IEPs that ensure children with disabilities receive instruction in the Common Core Standards as appropriate to their needs and disabilities. 22 Pa Code Chapter 14. A FAPE must include a student meeting the Common Core Standards of the

state. *D.S. v. Bayonne Bd. of Educ., 602 F. 3d 553, ___ (3d Cir. 2010)*. And, state standards not inconsistent with the IDEA are enforceable in federal court. *N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008).

In addition to the IDEA and Chapter 14, the CUSD must ensure a FAPE to children consistent with Section 504 of the Rehabilitation Act. The Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq., applies to those with "a physical or mental impairment which substantially limits one or more of such person's major life activities" 29 U.S.C. § 705(20)(B)(i). All students with mental or physical impairments, regardless of whether they are covered by the IDEA, have rights under Section 504. 29 U.S.C. § 794(a). 34 CFR 104.34(a) specifies that "[a] recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily."

Factual Summary

There is a district-wide special education implementation problem. Ms. Payne, who had previously served as the secondary school level special education supervisor, three special education teachers who taught at a total of four of the six K-8 programs, and one parent all testified that students were not receiving their education based on the IEPs as written, that there is a district-wide special education implementation problem and the students are not receiving a FAPE. Payne, T 31-32, 50; Friend, T. 8; Brown, T. 156.

Expert Dr. Ken Thurman opined both through his report and his testimony, that he had interviewed principals of both elementary and secondary schools and concluded that the CUSD was not providing children with a FAPE. Thurman, T. 28, 32-35, 39, 55. Thurman explained the roles that inclusion and least restrictive environment play in special education: "Inclusion means that children are included and get their educational programming with typically developing peers. An LRE or least restrictive environment means that that's done to the degree that's feasible and reasonable given the child's needs and developmental level." Thurman, T. 45. Thurman reported that some students in Chester Upland did not receive language services or counseling as specified in their IEPs, and classified this, as well as all denial of services detailed in IEPs, as a violation of FAPE. Thurman, T. 43-44.

The district's special education supervisor, Mary Payne, testified that the district was unable to implement a district-wide inclusion program as prescribed in the district's special education plan due to lack of funding for the teaching staff and development training necessary. Payne, T. 109 - 110.

Anita Brown, a special education teacher for 22 years, testified that she was developing IEPs that she knew she could not implement because of lack of resources: "I feel like I'm lying. I'm doing something and cannot implement it. . . Because what they need, they're not getting. I'm putting down what their needs are and I'm telling the parents what they're needing. I'm sitting here with a group of team members and we're saying these children need this and we're not providing it . . . [because] I don't have the resources." Brown, T. 167.

Ms. Payne and Dr. Thurman both describe the District's inability to implement its June 2011 special education plan. They site lack of staff as the reason the District was not able to implement special education services as planned. Thurman, T. 48 – 52, Payne, T. 110.

Section 504 is not being implemented within the CUSD. Ms. Payne, the District's single special education supervisor, reported that previously guidance counselors had been responsible for identifying students requiring Section 504 services. However, Ms. Payne also explained that in the past year the CUSD has cut its number of guidance counselors from five to two. Payne, T. 46-47. Principals told Dr. Thurman that 504 plans were not being made because of the reduction in guidance counselors. Thurman described the implementation of Section 504 plans throughout the district as "chaotic" and referenced at least one principal who said that Section 504 was essentially not being implemented at certain schools. Thurman, T. 53, 87.

Additional Argument

Caselaw holds that PDE is responsible as the single line of responsibility to provide FAPE and generally looks to four factors as to whether a state has met that responsibility.

Generally, in individual cases, and on review of an administrative decision, courts employ a two-prong inquiry which is whether the state has complied with the Act's procedures and whether a child's IEP is reasonably calculated to confer educational benefits. *Board of Education v. Rowley* case, 458 U.S. 176 (1982). Determination of an individual loss of a free appropriate public education has long rested on the concept that a student must receive a program that results in educational benefit and significant learning. *Ridgewood Bd. of Educ. v. N.E.,* 172 F. 3d 238 (3rd Cir. 1999)[6]. With the recent adoption of state educational standards, the Third Circuit has also concluded, citing to 20 U.S.C. §1401(9), that FAPE means meeting state educational standards and those include, in Pennsylvania, the core standards. *D.S. v. Bayonne Bd. of Educ.,* 602 F.3d 553 (3rd Cir. 2010). Thus, while there is no "bright line" test of what

[6] *Polk v. Cent. Susquehanna Intermediate Unit*, 853 F. 2d 171 (3rd Cir. 1988) (a program resulting in trivial progress does not provide a FAPE). If a child's IEP is not implemented, it is not necessary even to inquire whether meaningful progress has occurred.

constitutes a FAPE to an individual student, the Third Circuit has repeatedly relied upon a determination that an individual student receives a FAPE when the student receives meaningful benefit and significant learning, that it must be more than "a trivial education" and that it must include the state educational standards.

However, courts, including the Third Circuit and federal district courts within Pennsylvania examining the specific actions of a state educational agency, have recognized that where the suit is not an individual determination about the efficacy of an IEP as applied to one child, but instead challenges the structures of the system itself and the state's action within system, a different test applies, essentially the statutory language defining the role of the state and the facts involved in the alleged systemic deficiency based on the state's single line of responsibility and general supervisory requirements. *Cordero v. Pa. Dept. of Educ*., 795 F. Supp. 1352, 1357 n.4 (M.D. Pa. 1992) (finding that usual standard for review of individual administrative decisions not relevant where the suit challenges structures of an overall system and the state's actions within that system); *Battle v. Pennsylvania*, 629 F. 2d 629 (3d Cir. 1980) (invalidating state policy about extended school year services invalidated).

This test is: First, are children being denied a FAPE or FAPE in the LRE? Second, is the state educational agency aware of the deprivation? Third, what action has the state educational agency taken to correct the deprivation or what action has the state failed to take? And fourth, what is necessary to correct the systemic problems so that children's IEPs are implemented and meaningful educational benefit achieved? *Cordero v. Pa. Dept. of Educ.*, 795 F. Supp. 1352, 1362 (M.D. Pa. 1992) (State of Pennsylvania responsibility for private placement problems of special education students); *Kruelle v. New Castle Cnty Sch. Dist.*, 642 F. 2d 687 (3rd Cir. 1981) (statute intends a single line of responsibility to avoid an abdication of state responsibility for the

education of children with disabilities); *Corey H. v. Bd. of Edu.*, 995 F. Supp. 900 (N.D. Ill. 1998) (State of Illinois Board of Education responsible for lack of LRE in City of Chicago public schools, where school district was not following the LRE requirement and the state did nothing to ensure compliance).

In this instance, Plaintiffs have alleged and the trial evidence has shown that there is a widespread inability of the CUSD to ensure the doors will be open, and to provide a free appropriate public education and fully implement IEPs in the Least Restrictive Environment. A parent does not have to proceed through an administrative proceeding when the issue is the implementation of an IEP. The failure to implement an IEP is a specifically recognized exception to the exhaustion requirement. *Honig v. Doe,* 484 U.S. 305 (1988) (individual challenges to state suspension policy did not require exhaustion as they were "capable of repetition but evading review."); see also, 121 Cong. Rec. 37416 (1975) Nor do parents have to proceed through an administrative hearing process when the issue is one which is simply beyond the purview and authority of the state administrative hearing officer. Systemic reform is simply beyond the purview and authority of a state administrative hearing officer, particularly systemic relief that involves the necessity of addressing funding issues. *Beth V. ex rel. Yvonne V. v. Carroll*, 87 F3d 80, 89 (3d Cir. 1996). In *PV ex rel. v. Sch. Dist. of Phila.*, 2011 WL 5127850 (E.D. Oct. 31, 2011), individual plaintiffs requested a special education hearing concerning a district-wide transfer policy pertaining to children with autism; the hearing officer in two cases acknowledged his inability to address systemic claims districtwide and the Court excused exhaustion.

The Third Circuit has yet to specifically address the interplay of a widespread failure to implement IEPs with the traditional standard that a FAPE exists when there is a meaningful educational benefit, but it is likely the Court would find that a failure to implement must be a

denial of a meaningful education given its definition in *Ridgewood* and *Polk* that an IEP is a plan designed to yield meaningful educational benefit, and its specific finding in *D.S.,* that FAPE must include meeting the state educational standards. The Middle District of Pennsylvania, in *Cordero v. Pennsylvania Department of Education*, 795 F. Supp. 1352 (M.D. Pa 1992), commented on the implementation issue when that Court found that the Commonwealth failed to ensure the availability of appropriate private school placements for children whose IEPs called for programs which could not be provided by the public school; the inability to make such placements deprived class members of FAPE.

All of the children on IEPs in CUSD are protected by Section 504 as well as students without IEPs who have disabilities that qualify for Section 504 protection. To establish a violation of Section 504, a plaintiff must prove that he is disabled, is otherwise qualified to participate in school activities, the public entity receives federal financial assistance and the child was excluded from participation in, denied benefits of, or subject to discrimination at school. *Ridgewood Board of Education v. M.E.*, 172 F. 3d 238, 253 (3d Cir. 1999) (rev'd on other grounds by *P.P. v. W. Chester Area Sch. Dist*., 585 F.3d 727 (3d Cir. 2009). It is well settled in the Third Circuit that a child who has an IEP is also a qualified individual with a disability protected under Section 504. *Vicky M. v. Ne. Educ. Intermediate Unit,* 689 F. Supp. 721, 736 (M.D. Pa 2009) ("[T]here are few differences, if any, between IDEA…and Section 504 and Section 504 requires that school districts provide a free appropriate public education." Children with disabilities cannot be unnecessarily provided separate or unequal services, must receive accommodations, and must be educated with non-disabled students "to the maximum extent appropriate."). Thus, to the extent that inclusion is being impeded by lack of resources, in the CUSD, there is a violation of Section 504.

Question 3: When a school district is not able to provide a FAPE to some students due to lack of funds, does it have an obligation to terminate discretionary programs so that it provides the FAPE? Is this required by federal law? Should a school district terminate those programs even if such cuts would ultimately cost that district money – i.e. because students would leave the district for charter schools?

Brief Answer 3: No, a local educational agency is not required to terminate discretionary programs so that it provides a FAPE because the statutory scheme anticipates and expects that the state educational agency, here PDE, will be the final "overarching agency" responsible[7] to ensure a FAPE to children. The state is responsible both for funding and for delivery of services. *Kerr Center Ass'n, v. Charles*, 897 F. 2d 1463 (9th Cir. 1990); *Corey H. v. Ill. State Bd. of Educ.,* 995 F. Supp. 900 (N.D. Ill. 1998*) (*state reimbursement program encouraged segregated placements); *Lobato v. State of Colo.*, Case No. 2005CV4794, at 83, F. 18 (06/06/12, District Court, Denver County) (finding that state abdicated its responsibilities under special education law to provide FAPE by placing burden on local districts to fund majority of special education law). Termination of discretionary programs is not required because to do so would 1) unfairly impact innocent third parties – the nondisabled children of CUSD; 2) could actually reduce opportunities for LRE for special education students; and 3) because the IDEA was created with the view that it would provide supplemental funding to states to help them educate children with disabilities but not at the expense of nondisabled students. There is no reason to construe state law as intended to give a preference to charter schools; consequently there is no reason to believe state law requires a school district to terminate programs such as full-day kindergarten while it requires a district to fund the identical program when run by a charter school.

Ordinarily in a suit by a parent against a district the issue of how a district finds the funds for the services is not addressed by the court but is left to the educational policies and decisions

[7] *Cordero v. Pa. Dep't. of Educ.*, 795 F. Supp. 1352, at 1362.

of the district. Moreover, this is not a suit against the district but against the state for not enabling the district to provide the services and for not providing the services directly when the district does not do so. See the answer to Question 5 for further discussion of this point.

Factual Summary

Chester Upland has already made substantial cuts to discretionary programs in response to its funding problems. Last year, the district cut 28% of its workforce, reducing teaching staff, administrative staff, and support stuff, while also cutting music, art, and foreign language programs. Persing, T. 149, P-1, Harmelin, 12. When Dumaresq and Hozella, both high level administrators in the Pennsylvania Department of Education, were asked which other cuts they would suggest the district make, they were unable to identify any. Dumaresq, T. 80; Hozella, T. 112-113. This is consistent with the Secretary of Education Designee's own report by Harmelin which did not suggest any further cuts. P-1, Harmelin, 12.

Question 4. What other mandatory programs or priorities, if any, besides special education, are required under either federal or state law?

Brief Answer 4. The PDE has responsibility to ensure that children receive an adequate education as required by the No Child Left Behind Act. 20 U.S.C. §6301(1)-(4). Pennsylvania has adopted a process to ensure such compliance and these standards are consistent with the references to state educational standards in 20 U.S.C. §1401(9). Also, as mentioned previously, the CUSD must comply with Section 504. A district is required to provide 180 days of schooling consistent with state content standards to all students ages five to 21 (18 except for special education students) living in the district who choose to enroll, not just special education students. Finally, districts are required to fund charter schools enrolling district students in accordance with state law, and the state is authorized to make such payments directly from the district's appropriations if the district does not do so, irrespective of any other obligations. As a

consequence, from July through December the State prioritized payments from the appropriations for CUSD of $21.5 million to charters while transferring only $5 million to the District for its operating expenses. P-15.

Factual Summary

CUSD has six elementary schools and three high schools. The state uses the PSSA, an annual set of exams, given to Pennsylvania students at various grade levels to measure academic progress for purposes of determining whether CUSD and each of its schools is making Adequate Yearly Progress (AYP) in accordance with the No Child Left Behind Act. AYP is determined by how successful districts and schools are in meeting state goals for attendance, graduation rates, test participation and academic progress. To make AYP, a school must meet the state goals for the student body as a whole as well as for each subgroup of students. A subgroup consists of 40 or more students in a school in any of the following categories: ethnicity, socio-economic status, Individual education Plan (IEP) – Special Education and English Language Learner (ELL) status. The number of subgroups that a school has determines the number of "targets" that it must meet to make AYP.

CUSD did not make AYP overall for 2010-2011.[8] For school year 2010-2011, none of the CUSD's three high schools met AYP. Four of the six elementary schools did not meet AY. PDE's website shows that for students in grades 3-5, CUSD had fewer students advanced and proficient (on grade level or above) than all except two other districts (out of 500 in the state) in

[8] Each year, school districts post report cards and AYP letters on their websites. The CUSD 2010-2011 Report Card is found at aayp.emetric.net/content/reportscards/RC11D125231232.pdf. The school's website at www.chesteruplandsd.org contains AYP letters on the first page of each school's section of the website. Full tables of results for all districts are on the PDE website at http://paayp.emetric.net/StateReport#file, including a file with test results by the grade levels reported here in reading and math. The percentage of all CUSD students proficient or above in Math and Reading for grades 3-5 was 45.3% and 36.4% respectively; at grades 6-8, 37.2% in Math and 38% in Reading; and at grades 9-12 at 16.5% in Math and 24.8% in Reading.

Math, and all except 4 districts in Reading; that for grades 6-8, CUSD had fewer students advanced and proficient than any other district in the state in both Reading and Math; and that in grades 9-12, CUSD had fewer students advanced and proficient than all except one district in Math and fewer than any other district in Reading. For the subgroup "students with IEPs" CUSD students scored lowest in the state for the percentage on grade level in reading and math in each age group except they were 4th lowest in grades 3-5 Reading, and 2nd lowest in grades 9-12 Math. Students with IEPs in CUSD were also far below the state average for attendance and graduation.

Argument

A.Federal Law Mandatory Programs or Priorities

CUSD must comply with the No Child Left Behind Act. 20 U.S.C. §6301(1)-(4). The purpose of NCLB is to ensure that all children have access to a high quality education and, at a minimum, are proficient on state academic achievement standards and state academic assessments, meet the educational needs of low achieving children, closing the achievement gap between minority and non minority children, holding schools accountable for failure to provide a high quality education or turn around low performing schools. In allocating funds under this Act, States are mandated to give priority to local educational agencies that serve the lowest achieving schools and demonstrate the greatest need for such funds and the strongest commitment to meet the goals of the Act. 20 U.S.C. §6303 (c)(1)-(3) Each state must require that each public school attain "adequate yearly progress," as defined by the state, but based upon state-wide assessments in mathematics, reading or language arts, and science. 20 U.S.C. §6311(b)(2), (3). In 2011, in accordance with NCLB section 6311(b)(2)(G), the Commonwealth requires that schools have a 90% attendance rate and 82.5% graduation rate. In addition, the 2011 AYP standards require

that 95% of students participate in state-wide assessments and 67% of those tested achieve a score of proficient in mathematics and 72% in reading.

B. State Law Requirements

Pennsylvania state law mandates public education, length of school year, as well as the teaching of certain subjects with certain curriculum, and targets for proficiency in certain subjects. All children under the age of 21 shall be admitted to public schools. 24 P.S. § 16-1603. Every school district, except those of the first class, shall employee a sufficient number of teachers for each subject. 24 P.S. § 16-1604. School districts are required to have one hundred eighty (180) days of school and twenty (20) days of actual teaching per month. 24 P.S. § 15-1501. Basic elementary requirements compel CUSD to teach English, including spelling, reading, and writing, arithmetic, geography, the history of the United States and Pennsylvania, civics, safety education, health, including physical education, physiology, music and art. 24 P.S. § 15-1511, 24 P.S. § 15-1512.1. All high schools must teach social studies. During grades seven (7) through twelve (12) students must receive at least four (4) semesters of U.S. history and government. 24 § 16-1605. In addition to the "basic" requirements described above, state law requires any other subjects as required by the State Board, 24 P.S. § 15-1511. This includes (1) remedial programs for students whose performance fall below state tests, 24 P.S. §15-1511.1; (2) physical education, and hygiene, including drug and alcohol education, 24 P.S. §15-1512.1, and 24 P.S. §§15-1513,15-1547; (3) humane education up to grade 4, 24 P.S. §15-1514; and 4) special instruction related to various holidays and topics specific to Pennsylvania. 24 P.S. §§15-1514; 15-1541; 15-1542; 15-1543; 15-1544;15-1545. 22 Pa. Code Chapter 4, §4.12, sets forth specific academic standards for the content areas of science and technology, environment and ecology, social studies (including history, geography, civics and government, economics), arts

and humanities, including music, career education and work, health, safety and physical education, and family and consumer science.

Question 5. Does the record show what extracurricular activities are still being provided by CUSD? Are any of these mandated by federal or state law? Before this Court grants any relief to the Plaintiffs, does CUSD have a burden of showing that it has terminated all extracurricular programs, but still does not have funds to meet accepted standards for mandatory programs or basic education subjects (English, math)? A) It appears that certain concepts, such as class size and teacher salary, are not mandated and are subject to a change by a local district. Should a federal court intervene and order relief when a local school board has the power to increase class size of decrease the number of teachers, e.g., and to provide extra money to special education through those means?

Brief Answer 5. It is well settled that local school districts do have the right to make reasonable decisions about educational programming, especially where, as here, there has been no abuse of discretion and where the state educational agency witnesses have not been able to point to any particular recommendations of more cuts.

Factual Summary.

The Secretary's Designee Stephen Harmelin in his report, P-1, recommended that no more cuts in district programs be made. Dr. Persing reported that band and chorus have been cut. Persing, T. 149. The only extracurricular activities in CUSD testified about are bare bone athletics, specifically, basketball, football, track and baseball. Elimination of all sports would save CUSD only $194,000 per year. Dr. Persing testified that children with disabilities participate on all of the teams, including the state championship basketball team. Persing, T., Friend, T. 16-17. Neither Dumaresq nor Hozella had recommendations for cuts. Dumaresq, T. 80. Hozella, T. 112-113.

The record also shows that class size in CUSD is already one of the highest in the state and that this is not conducive to education for general education students and make including students with disabilities more difficult. P-55, Enrollment Report by Steve Vaughn. Teachers

across the district reported very large class sizes. Ms. Brown reported over 30 students in the average class at Main Street Elementary. Brown, T. 157. Walker reported 38 to 40 students in the regular education classes at his school. Walker, T. 19-20. Mitchell testified that there were 35 students per class at Toby Farms Middle School. Mitchell, T. 39. These teachers noted that the large class sizes made it difficult to administer special education services. The lack of aides made it impossible to provide itinerant special education services in the regular education classroom, while the large class sizes overwhelmed special education students attempting mainstreaming. Brown, T. 157. Walker, T. 19-20.

Additional Argument.

Further cuts would only increase class size and reduce opportunities for children with disabilities to be included with their non-disabled peers. The IDEA, at 20 U.S.C. §1414(d) ,anticipates participation of students with disabilities in extracurricular activities. Indeed, some courts have held that if a child's IEP includes extracurricular activities, it is contrary to the IDEA to prohibit the child from playing such sports. Class size must be reasonable in order for children with disabilities to be included with their non-disabled peers, which is the presumption under the IDEA. *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3rd Cir. 1993). It would constitute a violation of Section 504 to impose a class size on a special education teacher that is unreasonable. *Conecuh County (AL) Sch. Dist.*, 21 IDELR 805 (OCR 1994) attached as Ex. C. (finding that the regulations implicitly presume that the number of students with disabilities that can be instructed by one teacher at one time must be reasonable). Because many of the students in CUSD attend regular education classes, the regular education class size must be reasonable.

Ordinarily, in a suit against a district for denial of special education services a court defers to the district to determine on the basis of educational expertise what other program

should be cut in order to provide funds for the additional service, if that is required. But this is not a suit against the District; it is a suit against the State for not providing the services when the District is not (or alternatively for not providing the funds so that the District can provide those services). It is parallel to *Cordero*, where the allegation was that the State was not providing resources necessary to make out of district placements feasible. In this situation the Court does not have to make a finding whether or not the District has exhausted its options—that is an issue between the District and State under state law. Under federal law, because of the primacy of the obligation on the state under IDEIA, the Court needs to determine whether the state is responsible to provide the services. Furthermore, the evidence in this case is overwhelming that the District simply does not have sufficient other resources given the scale of its $12.5 million deferred liabilities this year - not even counting its debt to charter schools.[9] Any savings available from discontinuing extra-curricular activities or other programs may not be available to special education students given the financial crisis facing the District. This Court has recognized that similar issues concerning the priority between charters and other district expenses is a matter of state law. Given that federal law firmly places IDEIA responsibility upon the State, this court need determine only whether the State has responsibility for fixing the problem in a manner consistent with IDEIA, including its LRE requirements. If the Court decides the state has the responsibility, then the Court need not reach the issue of whether or not the CUSD has exhausted its financial options.

[9] The State's expert David Sallack admitted he was not familiar with cost-cutting the District had undertaken already such as class size and that he had not made any estimate of what the amount of savings was actually possible from his list of recommended "hard choices." Sallack T. 163, 180, 188-190. His testimony can be regarded only as speculative and totally inadequate to overcome the District's extensive proof of insufficient funds and looming insolvency.

Question 6. Do federal or state regulations provide any kind of framework to determine whether the special education services provided by an individual school, an entire school district, or an entire state are inadequate?

Brief Answer 6. The IDEA's framework provides PDE $423 million per year, including $38 million in discretionary funds and in return, the PDE promises to ensure adequate special education services in the LRE to all children with disabilities in the state, including CUSD. The IDEA demands that PDE have a plan to ensure adequacy of the programming, and such plan must include general supervision and direct services, to ensure FAPE in the LRE. There is no private right of action by a parent to bring a claim against an individual school; claims are brought either against a school district or a state or both. Adequacy of provision of services would be based upon the same factors as described in Question 1.

Factual Summary

Whether viewed at the school or the district level, the facts illustrate a lack of funding for special education services. Payne testified that reductions in staffing prevented the district from implementing its June 2011 Special Education Plan. Payne, T. 106. The three special education teachers who testified all confirmed delayed evaluations, lack of ability to provide instruction to students and inability to fully implement IEPs. Brown, T. 156-157, 162-163; Mitchell, T. 35-36, 38, 41-43; Walker, T. 11, 15.

Argument

Question 7. To what extent is Defendants' position correct, that a school district is expected to use all revenues, including local tax revenues as well as other funds provided by the state, to provide special education services? Are there any regulations on this point?

Brief Answer 7. While it is true that CUSD may be anticipated to use local, state and federal dollars, the real issue is that the State has the responsibility to maintain fiscal efforts to ensure special education services.

Statutes and Regulatory References.

20 U.S.C. §1412(a)(18) prohibits a state from reducing the amount of state financial support for special education and related services for children with disabilities or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year. 34 C.F.R. 300.163 is the accompanying federal regulation. This is referred to as the State's "maintenance of effort" requirement under IDEIA.

Factual Summary.

The evidence at trial was that the State reduced Basic Education Funding, and eliminated the charter school reimbursement funding to CUSD. Both of these are state financial support that could be used or would be otherwise available funds for local school districts to use to educate special education students.

Additional Argument.

School districts must use all unrestricted funds for their obligations to special education students just as they must do so for regular education students. The IDEA anticipates that both states and local districts will use all resources; local, state and federal funds. But there is no regulation requiring that a local district must use all of its funds to provide special education services. The problem in CUSD remains keeping the doors open – or there will be no services and no LRE - and the financial issue is far greater than just the lack of special education funding.

The real problem is the state level funding. While the State contends it has continued to fund at the same level, $990 million statewide, the State has also conceded reductions in funding that would otherwise be available for special education. The IDEA requires that states comply

with maintenance of effort. 20 U.S.C. §1412(a)(18); 34 C.F.R. §300.163. This limits reduction of local and state funds, so that federal funds do not replace state and local funds, but in doing so it sets a base contribution to special education services and does not dictate how additional mandated services will be paid for. States cannot reduce the amount of funding in 2011-2012 from what it was in 2010-2011 if to do so violates MOE.

The USDOE, through the Office of Special Education Programs (OSEP) has explained that states are not allowed to reduce funding that would be "otherwise made available" for school districts to use to educate children with disabilities. *Memorandum of Chief State School Officers*, OSEP 10-5, 53 IDELR 302 (OSEP 2009), attached as Ex. D. In that memo, OSEP was asked whether the only funds at issue were those funds from the state special education agency. OSEP replied that the reference to "State financial support" is not limited to only the financial support provided to or through the SEA, but encompasses the financial support of all state agencies, citing payments to vocational rehabilitation agencies or mental health agencies. Similarly, in a letter to the state of Missouri which was contemplating reducing its funding for preschool students, OSEP cautioned that this could be a violation of the maintenance of effort requirement. *Letter to Atkins-Lieberman*, 56 IDELR 109 (OSEP 2010); attached as Ex. E. Clearly, where, as here, the State has admitted reducing funds that would be "otherwise made available" for students with disabilities, the State has violated the maintenance of effort requirement.

Question 8. What effect does the Pennsylvania method of distributing the 15% federal poverty supplement have on Chester Upland? Is this improper under federal or state law? Is it discriminatory under federal or state law? If so, what is the remedy? Have Plaintiffs alleged a claim that this particular funding structure violates the law?

Brief Answer 8. The State's distribution of the IDEA funds is contrary to the federal funding formula, including the provision requiring that 15% poverty enhancement.

Statutory and Regulatory References.

20 U.S.C. §1411 governs distribution of the IDEIA funds from the state to the local educational agencies. 20 U.S.C. §1411(f)(1) provides that states "shall" distribute the relevant funds "to local educational agencies…that have established their eligibility under Section 1413." 20 U.S.C. §1411(f)(2) requires that states "shall allocate" those funds "as follows:…(A) …the state shall award **each** local educational agency described in paragraph (1)….(B)…After making allocations under subparagraph (A), the state shall--…(ii)allocate 15 percent of those remaining funds to **those** local educational agencies in accordance with **their** relative numbers of children living in poverty…." (emphase added).

Factual Summary.

The State's witness at trial, Ms. Hozella, testified about the Pennsylvania distribution of the $423M in IDEIA funds. Pennsylvania distributes the grant made available pursuant to 20 U.S.C. §1411 by allocating the funds to the twenty-nine Intermediate Units in accordance with what the state called the federal formula: 85% based on the number of children enrolled in public and private schools in the jurisdiction and 15% based on the relative number of children living in poverty. The Intermediate Units then distribute the funds to their school districts (and charter schools) pro rata based on their number of children enrolled in public and private schools. Hozella, T. 9-11.

Additional Argument.

Pennsylvania distributes the grant made available pursuant to 20 U.S.C. Section 1411 by allocating the funds to the twenty-nine Intermediate Units in accordance with what the state

called the federal formula: 85% based on the number of children enrolled in public and private schools in the jurisdiction and 15% based on the relative number of children living in poverty. The Intermediate Units then distribute the funds to their school districts (and charter schools) pro rata based on their number of children in their jurisdictions. Hozella, T. 9-11. The state claimed this was authorized because the Intermediate Units are LEAs (Local Educational Agencies). As a result, districts like CUSD with higher poverty populations than the average in their IU face a dilution of the dollars they would otherwise receive if the 15% were distributed directly to every LEA in proportion to the number of children living in poverty.

Pennsylvania's methodology is without support in the statute and is inconsistent with a guidance letter issued by the USDOE's Office of Special Education Programs (OSEP). Section §1411(f)(1) provides that states "shall" distribute the relevant funds "to local educational agencies…that have established their eligibility under Section 1413." It then provides in §1411(f)(2) that states "shall allocate" those funds "as follows:…(A) …the state shall award **each** local educational agency described in paragraph (1)….(B)…After making allocations under subparagraph (A), the state shall--…(ii)allocate 15 percent of those remaining funds to **those** local educational agencies in accordance with **their** relative numbers of children living in poverty…." (emphasis added). LEAs that have established their eligibility under Section 1413, are not just IUs but are also school districts which have submitted acceptable local special education plans (like P-21 for CUSD) providing the assurances contained in the act. There is no authorization in the IDEIA or regulations to provide funding to only some of the LEAs, i.e., to the Intermediate Units that qualify as LEAs. Indeed the act says to "each" eligible LEA.

In 2009 OSEP told the State of Minnesota that it was not proper for that State to subgrant to co-ops made up of member districts, much like Pennsylvania's Intermediate Units, and for the

co-ops to then "sub-grant" to the LEAs. *Letter to Hokenson* 53 IDELR 96 at 2 (OSEP 2009), attached as Ex. F. The basic reasoning was that the State's sub-grantees must be responsible for the assurances to comply with the Act. OSEP concluded: "Under IDEA, the subgrantee is responsible for providing FAPE to children with disabilities within its jurisdiction and ensuring that Part B funds are expended in accordance with the applicable provisions of IDEA." It goes on to say "Nothing in either the IDEA or EDGAR [Education Department General Administrative Regulations] allows a subgrantee …to further subgrant funds to other entities, including member or participating districts of a co-op". *Id*, at 2-3. Yet, this is precisely what Pennsylvania is improperly doing.

While the Pennsylvania system violates IDEIA, it appears to discriminate on the basis of poverty, which does not appear to violate any other applicable provision of federal or state law.

The appropriate remedy is to enjoin violation of IDEIA and direct future allocations to Chester be in accordance with the statutory formula. Count V of the CUSD Amended Complaint, Dkt. 67, is basically directed to complaints about the way federal special education funds are utilized by the state. Although the 15% distribution is not specifically mentioned, the State was on notice that plaintiffs believed the state was utilizing federal funds inappropriately. The State cannot complain about surprise since it was state witnesses who testified to the methodology used and asserted that it was "in accordance with" or "pursuant to" non-existent federal regulations. Because it is a fair inference that the issue was raised in the pleadings, this court can proceed to decide the matter. Issues tried by express or implied consent of parties are treated in all respects as if they had been raised in pleadings. *Charpentier v. Godsil*, 937 F.2d 859, 864 (3d Cir. 1991)(finding that defendant did not waive affirmative defense since he raised the issue at pragmatically sufficient time and plaintiff was not prejudiced in tis ability to respond.) See also

Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3d. Cir. 1993). Furthermore, Federal Rule of Civil Procedure 15(b) concerned with Amendments [of Pleadings] During and After Trial provides:

> "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue."

Since the parties did try the issue without objection, Rule 15(b) authorizes this court to proceed with deciding the issue.

Question 9. What evidence is in the record showing that the CUSD has already made so many cuts in regular education or discretionary programs that it is not offering FAPE to many students? A) have Plaintiffs demonstrated that any denial of FAPE is due to forces beyond their control as opposed to the District's unwillingness to make even more "hard choices?" b) What does the record allow the Court to find in regards to FAPE in the LRE for the 2012-2013 school year? What evidence exists in the record to suggest that students currently not receiving a FAPE in the LRE will be unlikely to receive a FAPE in the LRE for the 2012-2013 school year? C) do these questions correctly describe Plaintiffs' burden of proof? If not, what is Plaintiffs' burden? If the Court finds that Plaintiffs' burden, however described, is not met, what is Plaintiffs' position?

Brief Answer 9. There is substantial evidence that cuts to regular education have already impeded FAPE, especially as to inclusion of children with disabilities in regular education settings with supplementary aids and services which is the presumption of the IDEIA. *Oberti v. Bd. of Educ.*, 995 F. 2d 1204 (3rd Cir. 1993); *Gaskin v. Commonwealth*, No. 94-cv-4048, 1995 WL 154801 (E.D. Pa March 30, 1995).

Statutes and Regulations

20 U.S.C. §1412(a)(5)(A) requires that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled and special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when

the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The State's own Basic Education Circular on the LRE, P-33, establishes that the IDEIA presumes that children with disabilities will be in the regular education setting unless that is not possible due to the severity or nature of their disability and if not, then they will still be mainstreamed with their non-disabled peers to the maximum extent appropriate.

Factual Summary

Ms. Payne, the three special education teachers, Ms. Friend, and Dr. Thurman all testified about the inability of the CUSD to provide children with disabilities a FAPE in the LRE. Payne, T. 72; Brown, T. 156; Thurman, T. 55. When discussing the LRE, the witnesses frequently used the phrase "inclusion" or "mainstreaming" or the acronym "LRE." Defense witness Pat Hozella acknowledged that the draft plan for the DCIU to provide services to Chester's special education students in the event of a closure would not provide students with disabilities a FAPE in the LRE. Hozella, T. 52. Defense witness BSE Director Tommasini testified in his deposition that complying with LRE requirements was not his concern. P-61A, Tommasini, T. 72. The extensive cuts made at the beginning and during the 2011-12 school year were testified to by Deputy Superintendent Dr. Persing, May 16 T. At 149-150, 153-154; Bruchak, May 9 T. 36-7, 62-64, 139-140

Ms. Payne, the lone supervisor of special education in the District, testified that students designated as learning disabled typically attend some regular education classes, and then may be pulled our to receive special education help or a special education teacher may push into the regular education classroom to assist. Payne, T. 40-41. The majority of the 739 students are in learning support setting which includes students in regular education for some part of the day.

Payne, T. 100; P-45. But, Ms. Payne explained that the CUSD's Special Education Plan, P. Ex. 21, was designed with an emphasis on a district wide effort to increase inclusion during 2010-2011 but due to funding constraints the project did not proceed forward. Payne, T. 109-110.

Ms. Mitchell, Ms. Brown and Mr. Walker, three special education teachers, all testified that children were not receiving services in the least restrictive setting because of the lack of special education aides, class sizes and the lack of classroom aides. Brown, T. 157-158, 167; Mitchell, T. 33-34, 39, 41-43, 45-46; Walker, T. 6, 11, 18, 20.

Ms. Friend testified that her son, who is classified as having a specific learning disability, attends regular education classes but did not receive the special education supports he needed due to Ms. Mitchell's caseload size and lack of special education aide, and Ms. Mitchell corroborated that difficulty. Friend, T. 4-20; Mitchell, T. 31-34. Dr. Thurman's report and testimony verified the inability of the CUSD to provide children with disabilities a FAPE in the LRE. P-66, T. 43-44, 48-52.

Additional Argument

The seminal case on the provision of services to children with disabilities in the LRE in the Third Circuit is *Oberti v. Board of Education*, 995 F. 2d 1204 (3rd Cir. 1993).[10] The starting point in *Oberti* is the regular education classroom, and only if the child's needs cannot be met there should the child be educated in a more restrictive setting. But the standards in *Oberti* cannot be met in the CUSD because of the funding problem. The State has previously consented to improve the provision of services in the LRE in Pennsylvania through the *Gaskin v.*

[10] Nearly all circuits have adopted some version of the *Oberti* two-part test. See, *Daniel R.R. v. State Bd. of Education*, 874 F.2d 1036, 1046 (5th Cir. 1989); *see also L.B. v. Nebo Sch. Dist*., 379 F.3d 966, 976 (10th Cir. 2004); *Sacramento City Unified Sch. Dist. v. Rachel H*., 14 F.3d 1398, 1403-04 (9th Cir. 1994) (slightly modified version); *Greer v. Rome City Sch. Dist*., 950 F.2d 688, 696 (11th Cir. 1991); *P. v. Newington Bd. of Ed*, 546 F. 3d 111 (2d Cir. 2008) (adopting *Oberti* and collecting cases0.

Commonwealth settlement decree: See, *Gaskin v. Commonwealth*, 1995 WL 154801 (E.D.Pa March 30, 1995); (denial of motion to dismiss); and see Settlement Decree at 389 F. Supp.2d 628, 632 (E.D.Pa 2005). Although the *Gaskin* decree expired in September 2010, the State incorporates within Chapter 14 significant requirements as to LRE, including that students must be provided the opportunity to participate in the LRE as a presumption. *See*, 22 Pa Code §14.102(a)(1)(ii), (iii), (iv) (requiring that students with disabilities have access to the general curriculum, participate in state and local assessments as required by Chapter 4, are educated to the maximum extent appropriate with their nondisabled peers and are provided with supplementary aids and services in regular education classrooms, and are provided access to a full continuum of placement options. In addition, at §14.145, the State details the requirements of LRE. This includes that students be educated with nondisabled peers to the maximum extent appropriate and as provided in the IEP, prohibits special classes or separate schooling or other removal unless the nature or severity of the child's disability requires it, and only if "education in the regular education class with the use of appropriate supplementary aids and services cannot be achieved satisfactorily." A student cannot be excluded because of lack of skills unless the child has been provided the 'full range of supplementary aids and services. A student cannot be removed from or determined to be ineligible for regular education solely because of "additional cost or for administrative convenience." And school entities must provide access to a full continuum of placement options.

Several teachers testified that the cuts at the beginning of 2011-12 causing increased class size had made it more difficult to provide LRE for special education students because the large class size has made it too difficult to add special ed students to those classes. The difficulty is compounded, they testified, because the cuts removed classroom aides and other support

services which would make the transition easier for the special education student. The cuts have also prevented middle-school children from being able to go from a resource room to a regular education classroom because there are no aides to take the students between classroom and the teachers cannot leave their classrooms unattended to accompany the students, so many students are not getting scheduled special education services. Mitchell, T. 33-34, Thurman, P-66, at 8. Ms. Payne also testified that the District had not done the high-school inclusion originally intended in the District's Special Ed Plan (P-21) because of lack of funds for training regular education teachers. Ms. Payne also testified that in several schools the District was unable to offer a continuum of services necessary to provide LRE to some students. Finally, Ms. Payne noted that the areas that normally provided many opportunities for mainstreaming with regular education students were in the electives such as music and art which were eliminated by the cuts, making mainstreaming more difficult to achieve. None of the cuts which led to these decreased opportunities for LRE are scheduled to be restored in the 2012-13 budget.

In addition to the impact of those regular education cuts on the ability to provide LRE, there was substantial evidence in the record that CUSD is not offering FAPE due to cuts in special education teachers and paraprofessionals. Three teachers, Ms. Payne, and Dr. Thurman testified about the impact of the cuts on the ability to provide FAPE. Even the head of PTS was unable to claim that all of the speech and occupational services which were supposed to be delivered had been, and there was considerable testimony that services had been disrupted for a longer period than acknowledged by PTS. There was also considerable evidence that the behavioral support services had been substantially cut back and teachers and students had only very limited access to assistance for students with behavioral and emotional problems. Even a teacher such as Ms. Brown, who in theory split between two schools, actually only had part of

one day at one school to provide instructional services to students because the other day was taken up with the time consuming process of scheduling meetings, attending meetings and paperwork. Brown, T. 158; P-46.

From the students' perspective, CUSD has been unable to provide mandated services. From the CUSD perspective, it has made more "hard choices" than any other district in the State. The state cuts to its appropriations were among the highest as a percentage in the State, particularly when the cuts had to be absorbed entirely by the portion of the budget spent on District students and none of the cuts could be passed on to the 45 percent of the budget sent to the charter schools, which are funded on the basis of the prior year's budget. (P-9 and 24 P.S. §17-1725-A (a)(2)-(3)). Bruchak May 9 T. 22; , T. 146; Sallack, T. 164. Faced with an inability to meet its obligations to both regular education students and special education students, the CUSD wrote to the state in December 2011 and the state refused to help[11] despite the provision of IDEIA which says if a district is unable to provide required services the state shall do so. P-24, P-25. No federal law requires CUSD to use its discretionary funds only for special education. But, federal law does require the state to assure that the services are provided and the federal government does provide Defendant PDE with a discretionary fund of $38M which it can use to provide direct services, or which it can use to provide funds to needy districts like Chester.[12] A

[11] Notably, the State turned down help to CUSD without any determination of the actual cost for Chester to provide the mandated services P-61 A, Tomassini, T. 11. .. Carolyn Dumaresq, Deputy Secretary in charge of K-12 education, testified in her deposition that she was notasked to do any analysis of the reduction of subsidies to school districts for charter schools or whether the level of funding is sufficient to meet statutory mandates. P-62 A, Dumaresq, T. 12, 92

[12] *See Letter to Bass,* 102 LRP 11535, (OSEP 2001), attached as Exhibit A which states: "The State may choose to distribute funds it has set aside for other State-level activities to LEAs for direct services or other allowable activities specified at 20 U.S.C. §1411(f)(3) and 1419(f). The State may use these funds directly or distribute them to LEAs on a competitive, targeted, or formula basis. 34 CFR §300.370(c). This is a way in which an SEA may provide additional

court order to use such funds to provide Chester with the resources needed to provide LRE and FAPE would not pose any of the issues of dictating legislative choices raised by the defendants. In a similar case about funding, *Kerr Center*, supra, at n. 6, the court ordered the state to provide funds to the district rather than the services required by 20 U.S.C. §1413(g).

Burden of Proof. The parents' burden of proof is simply to show that the services required by 20 U.S.C. §1411 and 1413(a) are not being provided. The failure to provide required programs and services triggers the obligations of the state. *Honig v. Doe*, 484 U.S. 305, (1988) (affirming that a court may order a state to provide services directly to a disabled child where the local agency has failed to do so). Pursuant to *Kruelle*, 642 F. 2d 687, it is then the state's responsibility. *See also*, *Hill v. Laurel School District*, et al., 22 IDELR 489 (S.D. Miss., 1995), attached as Ex. G. ("…the State Defendants ultimately have the burden of providing a free appropriate public education to handicapped students where there is a failure of the local educational agency to do so."). At the most parent plaintiffs' burden would be to show that there was a systemic problem, not simply a single individual with an isolated problem who otherwise would have an adequate remedy against the District. The proof has gone well beyond that, as the District's representatives have themselves admitted.

The burden for the District cannot be any different for in this regard it is simply asserting the needs of its students. Moreover, if the standard were "unable" as set forth in §1413(g), if the state were seeking to step in and exercise its rights under §1413(g) it would not countenance a defense from the district that it could act only after the district had shown it had no other source of funding or that the district must default on all other obligations before it can be found 'unable' to provide the services required by 20 U.S.C. § 1413(a). In this context, "unable" means the

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funds to LEAs experiencing the difficulties described in [ ] letter."

state can fairly determine that if the District received the special education funds it would not in fact deliver a program meeting the requirements of the act, whether for financial or other reasons. CUSD therefore does not have to show that it has eliminated every non-IDEIA mandated use of funds, nor even every discretionary use of funds in support of mandated services before it is able to prove that it is not able to deliver the required services. In December the District foresaw that it had a problem complying with its obligations to students under state and federal law and asked the State for its assistance to provide the services for the CUSD. P-24. Instead of assistance the State turned the District down. P-25. Critically, it refused that assistance without making any analysis of whether Chester had the resources to meet its state and federal mandates or what the cost of those mandates were. Tomassini, T. 90. By doing so, the State failed to take the steps necessary for it to accurately assess whether or not it could simply blame the District for mismanaging its funds or whether there was a fundamental resource problem. In either case, however, parents can turn to the State to provide the services or resources necessary, and need not become hostage to resolving the issue of which governmental agency is more to blame for the failure to provide the mandated services.

Finally, because of the funding cuts, and the restructuring as a result, the increase in special education teacher case loads is unreasonable. All three teachers testified about their inability to provide the services their students need due to the increase in case loads. The Office of Civil Rights has addressed this specific issue in *Conecuh County (AL) School District*, 21 IDELR 805 (OCR 1994), attached as Ex. C., in which a complainant alleged that the district denied FAPE to students where a teacher had a teaching load of 33 students, even though not all students were in the same classroom at the same time. Noting that although Section 504 and Title II of the ADA do not set forth requirements for teachers or a maximum number of students with

disabilities that a teacher may instruct at one time or in a school day, the regulations implicitly presume that the number of students with disabilities that can be instructed by one teacher at one time must be reasonable. While the case loads "technically" purportedly met the letter of Pennsylvania law,[13] the reality was, as Ms. Brown explained, she was unable to serve her students because she was split between two schools, Ms. Mitchell could not serve her 27 students due to the lack of an aide to assist, and Mr. Walker testified similarly that the case loads were unreasonable and prevented him from assisting students in the regular education classroom. Brown, T. 156; Mitchell, T. 33-34: and Walker, T. 8-9. Ms. Payne testified about the need for more special education teachers in the CUSD and that she was told by Dr. Watson in January 2012 that there was no money available. Payne, T. 152.

Question 10. Have plaintiffs proven enough facts to come under the Third Circuit's holding in Beth V. ex rel. Yvonne V. v. Carroll, 87 F. 3d 80, 89 (3d Cir. 19996) that plaintiffs who "allege systemic legal deficiencies, and correspondingly request system wide relief are excused from the IDEA's exhaustion requirement, as well as Judge Robreno's opinion in Gaskin v. Pennsylvania, No. 94-cv-4048, 1995 WL 154801 (E.D. Pa March 30, 1995) and Judge Davis' decision in P.V. ex rel. Valentin v. Sch. Dist. of Philadelphia, No. 11-cv-4027, 2011 WL 5127850 (E.D. Pa. Oct. 31, 2011) regarding exceptions to the IDEA exhaustion requirement? If yes, what is the proper remedy?

Brief Answer 10. Yes. Like the plaintiffs in the cited cases, the relief sought is of a systemic nature. Specifically, plaintiffs are alleging the lack of implementation of IEPs and impeding of the provision of services in the LRE. Lack of implementation of IEPs is always excused from the IDEA's exhaustion requirement. *Honig v. Doe,* 484 U.S. 305 (1988). That is even more the case when it is a matter of systemic relief for districtwide failure to implement IEPs in the Least Restrictive Environment. *Corey H. v. Bd. of Educ.*, 995 F. Supp. 900 (N.D. Ill. 1998) (holding state of Illinois responsible for Chicago's failure to comply with LRE). Here, the systemic failure is of both a lack of implementation of IEPs and the provision of FAPE in the LRE and therefore,

[13] Intervenor Plaintiff Exhibit 101 sets forth the case load requirements for Pennsylvania.

individual exhaustion is not required. 20 U.S.C. §1412(a)(5) places the LRE requirement squarely on the state.[14]

Specifically, in the Third Circuit, claimants may bypass the administrative process: (1) where exhaustion would be futile or inadequate; (2) where the issue presented is purely a legal question; (3) where the administrative agency cannot grant relief; and (4) when exhaustion would work severe or irreparable harm upon a litigant. *Beth V. v. Carroll*, 87 F. 3d 80, 88-89 (3d Cir. 1996). Here, the parents, by their teachers, school staff, and other witnesses have established that there is a broken educational system in CUSD as to the receipt of FAPE for the 2011-2012 school year due to funding and resource issues. They need not have exhausted their administrative remedies because they clearly have alleged systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process. This exhaustion exception flows implicitly from, or is in fact subsumed by, the futility and no-administrative-relief exceptions. Hearing officers simply do not have authority to address structural relief that is wide-spread. As Judge Davis noted in *P.V. v. School District of Philadelphia*, "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 remedies would undoubtedly be futile." 2011 WL 5127850, *7 (E.D Pa 2011) The remedy, as discussed below, is for the Court to order the State to ensure funding to keep the CUSD's doors open and to ensure FAPE to children with disabilities in the LRE.

[14] Indeed, states are strictly prohibited from using funding mechanisms that would violate the requirement of the LRE. *See*, 20 U.S.C. §1412(a)(5)(B).

Factual Summary

Tamika Friend, parent of a student with disabilities who is on an IEP, testified that she understood she could go to due process but that she had not because "why sue the school district when they have no money." Friend, T. 20. Hozella received reports from Mr. Moore, the PDE advisor assigned to work in Chester Upland reporting widespread IEP non-compliance in the district. P-43, Hozella, T. 69. Dr. Thurman reported a lack of psychological services to support compliance with special education services. Thurman, T. 33-34. Lack of psychologists makes it difficult to administer initial special education evaluations and to perform IEP re-evaluations as required. Across the District, IEPs are routinely not implemented. The three teachers who testified represent four of the district's nine schools. Each reported non-compliance with IEPs and failure to evaluate children. Brown, T. 175; Mitchell, T. 35-38, 41-43; Walker, T. 11-14, 17. Speaking about the district in general, Thurman explained that inclusion, a method of educating students in the least restrictive environment, was not being implemented. Thurman, T. 48-50. These widespread problems requiring funding solutions and systemic overhaul are not ones which can be resolved through special education due process hearings.

Question 11. In enacting the IDEA, did Congress envision that as a student who was entitled to special education services but was not receiving them, that the sole remedy is to institute a "due process" claim or other administrative claim, and if denied to pursue the claim in federal district court? Does the statute require individual actions because the Individual Education Plan ("IEP") has to be individualized and tailored to the specific student?

Brief Answer 11. The complaint is not seeking redress for past violations. Individualized relief is not necessary because plaintiffs are not seeking creation of new IEPs which would require determinations of the appropriateness of existing IEPs. Plaintiffs are seeking a systemic relief which will deal with the lack of resources (financial and personnel) preventing the district from being able to implement its own Special Education Plan and existing IEPs. *Kruelle v. New Castle*

Cnty Sch. Dist.t, 642 F. 2d 687 (3rd Cir. 1981) (requiring single line of state authority); *Cordero v. Pa. Dept. of Educ*., 795 F. Supp. 1352, 1362 (M.D. Pa. 1992) (requiring State of Pennsylvania to ensure private schools for children with disabilities); *Honig v. Doe*, 484 U.S. 305 (1988), superseded on other grounds by 20 U.S.C. 1415(k) (requiring State of California to provide educational services directly to any individual children adversely affected by suspension policy then contrary to the federal law); *Mary O. v. Edgar*, 131 F. 3d 610, (7th Cir. Dec. 2, 1997) (State of Illinois' obligation to provide services is mandatory, nor precatory). *Corey H. v. Bd. of Educ.* 995 F. Supp. 900 (N.D. Ill. 1998) (Illinois State Board of Education responsible for lack of LRE in City of Chicago schools).

Question 12. As part of any remedy in this case, should this Court institute any procedures to facilitate the filing of complains or due process claims under IDEA? Is there any evidence in the record as to how many such actions have been filed in recent years by parents of Chester Upland? If none, why not?

Brief Answer 12. No, the Court need not institute any specific procedures for individual relief. Individuals who seek relief for past loss of IDEA services have two years (or more depending on their ability to meet certain exceptions) to bring such individual claims for compensatory relief. *Steven I. v. Central Bucks Sch. Dist.*, 618 F. 3d 411 (3rd Cir. 2010). The class certification is for prospective and declaratory relief only, so the Court could determine that any claims for individual relief are not part of this case. Nevertheless, as part of its prospective relief, the Court could assign a special master as proposed by the Intervenor Plaintiffs to avoid overwhelming the state special education hearing system as to hearings about compensatory education claims for 2011-2012. To date there have been about 15-20 special education hearings in CUSD involving the 2011-2012 school year. Because parents have two years from the date when the services were improperly provided, parents have until fall of 2013 to bring any such claims.

Question 13. Can the evidence be fairly construed to establish that Chester Upland is undergoing a cost squeeze, i.e., revenues are decreasing largely because of students shifting to charter schools, there is no opportunity to raise taxes yet expenses, both fixed and variable, are much higher than revenue, and special education services have been cut? Is the state ultimately responsible for this since the legislature dictated the charter school scheme? Or, is this purely the School District's problem to fix?

Brief Answer 13. Yes, CUSD is in dire financial distress currently and for the 2012-2013 school year. Bruchak, T. 74.

Additional Argument

Despite the PDE's commitment to the USDOE under the IDEIA, children with disabilities in CUSD are not receiving a FAPE due to the cost squeeze that is, in large part the result of three factors that created a perfect storm. First, the state reduced funding to CUSD this past year by $ 12.5 million, which had to be taken exclusively from the 55% of the budget spent on the District's students and not from the portion paid to the charter schools Bruchak T. 18-19 Second, the State's special education funding formula is based on an artificial figure of 16% in special education while CUSD and CCCS experience 22% in special education. Third, the problem is exacerbated by the State's charter school law which requires CUSD to pay $24,000 to CCCS while its own special education students receive much less. Baker T. 24; P-74.[15] By unfortunate circumstances, CUSD was hit harder by each of these factors than most other districts: it had the third-highest per student reductions in the State last year, it is well above average in percentage of students with special education needs, and it has the highest percentage of students in charters in the State. Sallack T. 164; Persing at May 16, T. 166.

[15] In addition, the District has been burdened with carry over deficits from prior years. For example this year the District was forced to repay $8.5 million to the state ($3.5 to repay loans and $5 for payments to charters on account of 2010-11 invoices. See P-15.

As a consequence the District with 3,350 students received only $5 million from the state in the first six months of 2011-12, while the charter schools with 8,300 students received $21.5 million. Hanft T. 81-89, P-15; Persing May 9 at T. 137 In addition, the Department of Education recouped for itself $8.5 million in the Fall of 2011 from School District subsidies and "reappropriated" School District subsidies back to itself to pay to the Delaware County Intermediate Unit a state-created agency.

Even if PDE could have any formula it wanted as long as the net result is that children receive FAPE, CUSD students are not receiving FAPE[16]. The *Cordero* case clearly rejects the claim that insufficient resources is solely the school district's problem to fix.[17] In *Cordero* the court heard the same defense-- it is the District's responsibility. And in the *Kerr* case the Ninth Circuit not only affirmed an order directing the state to be responsible for providing the services, it found the legislative appropriation insufficient and directed the state department of education to reimburse the district for the full cost of the placement. *Kerr Center Parents Assoc. v. Charles*, 897 F.2d 1463, 1469 n.6 (9th Cir. 1990) ("Since a court has the authority to order the state to provide services directly to disabled children, we conclude that a court also has the authority to order the state to provide a local agency with the funds the agency needs to provide adequate services to disabled children.")

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[16] Plaintiffs do not concede that federal law imposes no limit on state funding formulas that may be used to pay for IDEIA services, but recognize that this court has reserved those issues for later.

[17] The *Cordero* principle is particularly appropriate now, because at the time of the *Cordero* decision there were no restrictions on local funding, but as testified at trial, the state now prevents districts from increasing local funding at a rate greater than an inflation index except in every limited circumstances. Bruchak T. 58.

Relief in this case does not need to involve the issue confronted in *Kerr* concerning appropriations since the PDE has available a $38 million discretionary fund which it decides how to use and which is available exactly for the purposes identified here, to enable the state to provide resources to the district so the state does not have to provide the services directly. See *Letter to Bass*, 102 LRP 11535 (OSEP 2001), attached as Exhibit A which states: "The State may choose to distribute funds it has set aside for other State-level activities to LEAs for direct services or other allowable activities specified at 20 U.S.C. §1411(f)(3) and 1419(f). The State may use these funds directly or distribute them to LEAs on a competitive, targeted, or formula basis. 34 CFR §300.370(c). This is a way in which an SEA may provide additional funds to LEAs experiencing the difficulties described in [ ] letter."

Question 14. The evidence shows IEPs are not in compliance. Is there sufficient evidence to show FAPE lacking for many? Even if not a fault of the state, does the Court have responsibility under federal law to remedy this? Is this the basis of PILCOP's claims against Chester Upland School District?

Brief Answer 14. Yes, there is sufficient evidence to show FAPE is lacking as discussed above. Given the testimony of parent, teachers, Ms. Payne, Dr. Persing, and Dr. Thurman, the depleted special education system in the District for providing programs and services to create and implement IEPs is significantly interfering with the District's ability to deliver FAPE. The testimony shows IEPs are not being implemented, not just that they are procedurally defective or delayed. That is the definition of a denial of FAPE. The testimony shows IEPs are not being implemented, not just that they are procedurally defective or delayed. That is the definition of a denial of FAPE. The Court has responsibility under federal law to remedy this by an order requiring the Commonwealth Defendants to use their discretionary federal funding and other resources to ensure FAPE to the children in CUSD, irrespective of "fault" by the State. *See*

Kruelle and other cases previously cited on state responsibility. The Court can and must remedy this matter on a systemic basis. That will require procedures (similar in concept to those set up by this Court for the expenditure of state advances to assure they were directed to keeping the schools open) to ensure that the additional resources are directed to implementation of changes in the District's special education staffing consistent with remedying the denial of FAPE found by this Court. The parents' claim against the CUSD asserted a need for systemic relief to financially and programmatically ensure FAPE. That is why Plaintiff-Intervnors requested a Special Master to determine the financial needs and to ensure FAPE. *See Emma C. v. Delaine Eastin*, 2009 U.S. Dist. LEXIS 20074 (N. D. Cal. 2009) where the remedial order appointed a Court Monitor who issued Compliance Trends, and percentages of students who did not receive all of the services they needed and allowed the Court Monitor to resolve corrective action procedures.

CONCLUSION

Based on the evidence to date, the Court must order the PDE, as the agency with primary responsibility to financially and otherwise ensure that the CUSD's doors are open for the 2012-2013 school year and that the children with disabilities in CUSD receive a free appropriate public education in the Least Restrictive Environment.

Respectfully Submitted June 11, 2012:

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

Chester Upland School District, et al.	:	
Plaintiffs	:	
v.	:	Civil File No. 2:12-cv-00132 (MMB)
Commonwealth of Pennsylvania, et al.	:	
Defendants	:	

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing Plaintiffs' Response to Court's Questions for Counsel to be served upon the following parties via the Court's Electronic Case Filing (ECF) System:

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