EXHIBIT 1

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

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

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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I. INTRODUCTION

Plaintiffs bring this class action litigation in an attempt to coerce a financially burdened school district into adopting special education translation policies that are far more stringent than required by law. Defendant, the School District of Philadelphia (the "School District"), submits this Reply to rebut Plaintiffs' and the United States of America's mistaken positions that: 1) Plaintiffs have adequately pled systemic claims; 2) that this Court can lawfully expand the IDEA to require full translation of IEPs and IEP process documents; 3) that the United States can similarly expand the IDEA; 4) that *K.A.B. ex rel. Susan B. v. Downingtown Area School District*, No. 11-1158, 2013 WL 3742413 (E.D. Pa. July 16, 2013) was wrongly decided; and 5) that Plaintiffs have sufficiently alleged claims under the Americans with Disabilities Act (the "ADA") and Section 504 of the Rehabilitation Act (the "RA"). For the reasons explained below, and in the School District's Motion to Dismiss, the Court should dismiss the Complaint.

II. ARGUMENT

A. Plaintiffs Cannot Point to Any Factual Support for their Systemic Claims.

Plaintiffs argue that the Class Members are excused from exhausting the normally required administrative remedies because: 1) the named Plaintiffs have exhausted their administrative remedies (Plaint. Opp. at 4-5); and 2) the Complaint seeks systemic relief (Plaint. Opp. at 6-8).[1] While the School District does not dispute that the *named* Plaintiffs have exhausted their administrative remedies, and have the right to appeal the Hearing Officer's decisions, "simply [] styling a case as a putative class action should not excuse compliance with

[1] Plaintiffs also briefly argue that the School Board's jurisdictional challenge fails because it is tantamount to "a premature objection to class certification." Plaint. Opp. at 9. This is not true. Rather, as in *Grieco v. New Jersey Dep't of Educ.*, No. 06-cv-4077, 2007 WL 1876498, at *9 (D.N.J. June 27, 2007) and *Mrs. M v. Bridgeport Bd. of Educ.*, 96 F. Supp. 2d 24, 135 (D. Conn. 2000), this Court lacks subject matter jurisdiction as the Class Members have not satisfied any exception to the administrative exhaustion requirement of the IDEA.

the required exhaustion of administrative procedures under the IDEA" as to the *Class Members*. *Grieco v. New Jersey Dep't of Educ.*, No. 06-cv-4077, 2007 WL 1876498, at *9 (D.N.J. June 27, 2007) (quoting *Mrs. M v. Bridgeport Bd. of Educ.*, 96 F. Supp. 2d 24, 135 (D. Conn. 2000)).

Plaintiffs fail to show any support in the pleadings for their allegation that a School District policy or practice violates the IDEA or other asserted statute on a system-wide basis. Rather, Plaintiffs can only point to vague and conclusory allegations of some unnamed and allegedly unlawful policy or practice. For example, Plaintiffs conclusorily allege that "the District's policy is that it will not provide fully translated IEPs or other IEP process documents." *See* Plaint. Opp. at 10 (citing Compl. ¶¶ 45, 55, 99). Regardless of how often this conclusory allegation is made in Plaintiffs' brief, this assertion is not enough to excuse the Class Members from exhausting their administrative remedies or to state a claim sufficient to survive the plausibility standard of *Iqbal/Twombly*. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Indeed, "[t]o permit plaintiffs to circumvent the exhaustion requirement by merely alleging a systematic failure, without any logical mechanism to draw reasonable conclusions about individual needs with respect to such a large category of students, would undermine the IDEA and rationale for the exhaustion requirement." *Grieco*, 2007 WL 1876498, at *9.

The only allegations that Plaintiffs claim allow the conclusion that all of the Class Members are harmed are: 1) the testimony regarding the individual circumstances of the two named Plaintiffs; 2) the fact that despite there being 1,500 students who are English Language Leaners receiving special education services and 1,887 students with IEPs with a home language other than English, the School District has allegedly reported that only 487 special education documents of any type had been ***orally*** interpreted; 3) the School District allegedly canceled its

arrangements with an outside translator; 4) the School District allegedly has never translated an IEP in its entirety[2]; and 5) the School District allegedly does not use the TransAct program. *See* Plaint. Opp. at 12 (citing Compl. at ¶¶ 51-54, 60).

Even taking these allegations as true, Plaintiffs' systemic claims do not allow the Court to draw a reasonable conclusion that the harms suffered by the named Plaintiffs extend to the individual Class Members. The experiences of two individuals are not indicative of the experiences of the nearly 2,000 other families that have children with IEPs. Further, nothing in the IDEA requires the School District to translate IEPs in full, orally translate all special education documents, retain an outside translator, or use the TransAct program. Plaintiffs argue that "[t]here is simply nothing in the allegations of the Complaint or the Hearing Officer decisions which would allow a reasonable inference that Ms. Galarza or Ms. Peralta were different from any other LEP parent in their need for written translated IEPs and other IEP process documents in order to participate meaningfully in the IEP development process." Plaint. Opp. at 15. It is Plaintiffs' burden, however, to affirmatively present factual averments from which the Court can make a reasonable inference that the circumstances of the named Plaintiffs are the *same* as the remaining Class Members—not that there is nothing to suggest they are different.[3]

Further, the Court should discount Plaintiffs' attempt to add unsubstantiated factual averments that are outside of the pleadings, such as "the District does not even make case-by-

[2] Contrary to the Hearing Officer's findings that on some occasions, "the District *fully* translated its evaluations, IEPs and NOREPs for the Parent." Exh. A to Compl. at 9 (emphasis added).

[3] Curiously, the named Plaintiffs have identified the unique fact that they were homeschooled. Certainly, LEP students who are homeschooled have limited access to the school and, therefore, are dissimilar in their access to available translation services. This supports differences between Plaintiffs and the putative Class Members that are identified only as LEP and not homeschooled students.

case assessments as to whether translation services are needed" (Plaint. Opp. at 10 n3) and "the District admits it does not fully translate IEPs as a rule, and it is not fully translating any IEP for any LEP parent" (Plaint. Opp. at 15).[4] *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) ("As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings."); *see also Angstadt v. Midd-W. Sch. Dist.*, 377 F.3d 338, 342 (3d Cir. 2004) ("[i]n determining whether a claim should be dismissed under Rule 12(b)(6), a court looks only to the facts alleged in the complaint and its attachments without reference to other parts of the record") (quoting *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994)).

In support of their position, Plaintiffs rely heavily on the misapplication of *P.V. v. Sch. Dist. Of Phila.*, No. 2:11-cv-04027, 2011 WL 5127859 (E.D. Pa. Oct. 21, 2011). *See* Plaint. Opp. at 7. Plaintiffs assert that, as in the *P.V.* case, the Class Members here have similar systemic grievances and that individual administrative consideration of each "could overwhelm the administrative docket and lead to inconsistent results." Plaint. Opp. at 7. The *P.V.* case, however, is readily distinguishable from the present matter. In *P.V.*, plaintiffs filed a class action alleging that the School District's supposed "Automatic Autism Transfer Policy" violated the IDEA. *P.V.*, 2011 WL 5127859, at *1. Under this policy, the School District allegedly automatically transferred disabled children to other schools within the district with little or no parental involvement or prior written notice and at a disproportionate rate as compared to non-

[4] Plaintiffs, in Footnote 3, also cite to a Due Process Hearing Transcript that is not part of the record and should therefore be discounted by the Court. Further, Plaintiffs conclusorily state that "the District's policy is that it will not provide fully translated IEPs or other IEP process documents" and that the "District's own Translation and Interpretation Center . . . has ***never*** translated an IEP in its entirety." Plaint. Opp. at 12 (emphasis in original). Plaintiffs fail to support this allegation with any factual assertion. Indeed, this statement misleads the Court as the findings of the Hearing Officer were to the contrary: "the District *fully* translated its evaluations, IEPs and NOREPs for the Parent." Exh. A to Compl. at 9 (emphasis added).

disabled students. *Id*. The Court denied the School District's motion to dismiss, concluding that exhaustion was not required as the questioned policy "implicate[d] the integrity or reliability of the IDEA dispute resolution procedures themselves, or require[d] restructuring the education system itself." *Id.* at 7 (quoting *Doe v. Ariz. Dep't of Educ.*, 111 F.3d 678, 682 (9th Cir. 1997).

P.V. is distinguishable from the present case for at least four major reasons. First, unlike here, where Plaintiffs request that the Court engage in judicial legislation by re-writing substantive portions of the IDEA, the Plaintiffs in *P.V.* sought declaratory relief ordering that the automatic transfer policy violated the notice provisions of the IDEA. *Id*. at 2. Plaintiffs here are asking the Court to expand the IDEA to require translation of more documents than explicitly required by the statute.

Second, the complaint in *P.V.* identified an affirmative School District policy that if true would systemically violate the explicit notice provisions of the IDEA as to the entire class. Here, however, Plaintiffs point to no affirmative policy at all—let alone one that violates any provision of the IDEA. In this case, there is no legal requirement for all IEP documents to be translated—only the requirement that the parents are able to "meaningfully participate" in the IEP process. But because there are many situations where full translation would not help parents meaningfully participate in the IEP process, the Court is unable to draw a reasonable conclusion that each Class Member's rights have been violated.

Third, defendants in *P.V.* questioned whether the named Plaintiffs themselves exhausted the administrative procedures, which the School District does not dispute here. Rather, the School District questions whether merely styling this case as a class action and including conclusory claims of systemic deficiencies based on some unnamed and non-existent policy

should exempt the *Class Members* from the administrative exhaustion requirements.[5] If other Class Members believe they have been denied meaningful participation in the IEP process, then they should pursue their claims at the administrative level. Plaintiffs argue that because there are administrative records for the named Plaintiffs, the "IDEA's policy goal of having a full administrative record" will not be frustrated. Plaint. Opp. at 8. This is not true because each Class Member's literacy and comprehension skills are unique, so it is important that administrative records are created for each to ensure that appropriate relief is efficiently allocated on an individual level. For example, named Plaintiff T.R. speaks a mixture of English and Spanish and has the learning disability ADHD, as well as a Mood Disorder. *See* Compl. at ¶ 16. For individuals like T.R., a one-to-one translation from English to Spanish may not be productive as he understands only portions of each language. Depending on the particular literacy and mental capabilities of each individual, unique translation and other IEP-related services need to be provided on a case-by-case basis.

Fourth, the Hearing Officer in *P.V.* "encouraged the District 'to alter its procedures on a broader scope, if only to avoid a plethora of identical claims from similarly situated students.'" *Id*. at 7. This is not the case here, where the same Hearing Officer merely remarked that he had "no authority to make such [systemic] findings." Exh. C. Compl. at 6. Indeed, the Hearing Officer commented that "[u]nlike the strict translation rules, ***meaningful participation requires inquiry into the Parent's ability*** to participate in meetings without translation" and concluded that "***[i]n this case***, is [was] not possible for the Parent to meaningfully participate. . . ." Exh. A to Compl. at 9 (emphasis added).

[5] Plaintiffs' attempt to distinguish *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 275 (3d Cir. 2014) and *J.T. Dumont Pub. Schs.*, 533 F. App'x 44, 53-54 (3d Cir. 2013) fails for the same reason.

Further, the Hearing Officer did not, as Plaintiffs claim, acknowledge that "the large number of LEP parents and their children with similar or identical claims could overwhelm the administrative docket and lead to inconsistent results." Plaint. Opp. at 7. This statement is found nowhere in the hearing orders. Plaintiffs point to no factual allegation that could lead the Court to believe that "thousands of LEP parents" are dissatisfied with the School District's IEP process and will file additional administrative complaints. *Id*.

Likewise, Plaintiffs fail to adequately distinguish *Mrs. M. v. Bridgeport Board. of Education*, 96 F. Supp. 2dd 124, 132 (D. Conn. 2000). Plaintiffs' sole attempt to distinguish this case is through a parenthetical inferring that *Mrs. M*. is different from this matter because here "the alleged systemic violations . . . could not be remedied by the due process hearing officers and were of a type that did not require an administrative record." Plaint. Opp. at 8. To the contrary, as explained above, individual administrative records for each Class Member are required to determine the appropriate level of translation and related services needed on a case-by-case basis, as the literacy and mental capabilities of each individual is unique.

In *Mrs. M.*, plaintiff petitioned for an administrative hearing complaining that the school board misidentified her daughter as mentally retarded. *Mrs. M.*, 96 F. Supp. 2d at 127. The plaintiff then filed a lawsuit seeking systemic relief, claiming that the school board engaged in a "pattern and practice of over-identifying minority school children as mentally retarded, at a rate of more than three times the state-wide average for such identification, while simultaneously failing to identify correctly the disabilities of such children and provide them with a proper education." *Id*. As here, only Mrs. M.—and not the rest of the purported class plaintiffs—exhausted her administrative remedies. Also as here, *Mrs. M.* did not involve a situation where a "challenged policy or practice of general applicability is incapable of being remedied through the

available administrative process." *Id.* Indeed, Plaintiffs fail to point to any School District policy or practice that is in contravention of the IDEA or any other statute.[6] In addition, the Hearing Officer in this case had the power to remedy the situation of the named Plaintiffs and did so via compensatory education. If the named Plaintiffs were dissatisfied with this relief, they could have sought individual relief from the Court, rather than the purely systemic relief that they are now requesting.

B. This Court cannot Re-Write the IDEA.

The IDEA does not mandate full translation of every IEP and IEP process document. Plaintiffs are attempting to take advantage of a financially destitute school district by requesting relief that changes the IDEA, making it require translation of all IEP and IEP process documents. Plaintiffs' goal is to bully the School District into entering a consent decree, knowing that the district has little funds to engage in extensive litigation. The relief that Plaintiffs are requesting, however, is beyond the authority of this Court to grant. *See, e.g.*, *Rancocas Valley Reg'l High Sch. Bd. of Educ. v. M.R.*, 380 F. Supp. 2d 490, 493-94 (D. N.J. 2005) (holding that "a United States District Court is an inappropriate instrument to effect" an overhaul of the IDEA). Throughout their briefing, Plaintiffs are unable to point to any provision of the IDEA that requires such extensive translation. Rather, Plaintiffs cite to provisions of the IDEA requiring only that IEPs be provided in writing and that certain notice provisions (NOREPs in Pennsylvania) be translated to the native language of the parents.[7] *See* Plaint. Opp. at 13; 13 n4.

[6] The United States of America fails to point to any authority for its assertion that it is not necessary to allege a pattern, policy, or practice for a *systemic* claim for relief under Title VI. *See* Statement of Interest at 16 ("Neither law requires evidence of a policy, pattern, or practice.")

[7] Moreover, the Hearing Officer recognized that "[t]he District is correct that the IDEA's regulations require translation of only the procedural safeguards notice and the prior written notices issues pursuant to 20 U.S.C. § 1415(b)(3) – NOREPs in Pennsylvania. The IDEA does not explicitly require translation of any other documents." *See* Exh. A to Complaint at 9.

The IDEA is an extensive statute, which explicitly outlines the situations when translation is required *per se*. Because the IDEA explicitly specifies which documents must be translated, well-established rules of statutory construction instruct that other documents do not necessarily need to be translated as a matter of law. *See Keeley v. Loomis Fargo & Co.*, 183 F.3d 257, 265-66 (3d Cir. 1999) ("Under the well-established principle of statutory construction, *expressio unius est exclusio alterius,* the legislature's explicit expression of one thing—here, certain exceptions to the overtime requirement—indicates its intention to exclude other exceptions from the broad coverage of the overtime requirement."). Plaintiffs' blatant attempt to use the Court to bypass the legislature should be rejected. Indeed, it is noteworthy that Plaintiffs fail to even address the School District's argument that the relief requested by Plaintiffs is impermissible judicial legislation. *See, e.g.*, Motion at 18-21. For this reason alone, the Court should dismiss Plaintiffs' systemic claims in their entirety.

Moreover, as explained in the Motion to Dismiss, the determination of whether a Class Member is able to meaningfully participate in the IEP process must be determined on a case-by-case basis.[8] Plaintiffs fail to rebut a clear example of one of many instances where translation of IEPs does not improve the parents ability to meaningfully participate in the IEP process. Namely, it does not make sense for the School District to expend resources for the translation of numerous documents for a parent that does not know how to read in *any* language.

C. The DOJ Cannot Re-Write the IDEA.

Plaintiffs next attempt to circumvent the legislature by asking the executive branch to help expand the translation requirements of the IDEA. The United States of America argues that

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[8] In their Opposition, Plaintiffs claim this argument is a "red herring" because the School District never evaluates whether students need IEPs documents translated. This conclusory allegation is not made, let alone supported, anywhere in the pleadings.

the School District misinterprets the DOJ's 2002 Guidelines for Title VI, ultimately concluding that the IDEA's IEPs and other IEP process documents are vital documents that require translation in every instance. *See* Statement of Interest at 12. But as Plaintiffs recognize, the DOJ guidelines "are not accorded any deference in interpreting the IDEA." *See* Plaint. Opp. at 10-11; *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (citation omitted) ("[A]n agency's interpretation of *its own regulation* is entitled to deference . . . only when the language of the regulation is ambiguous.") (emphasis added). The United States and the DOJ have no authority to re-write the clear and unambiguous provisions of the IDEA. Thus, the Court should disregard the United States of America's Statement of Interest to the extent that it is not interpreting the meaning of the DOJ's 2002 Guidelines for Title VI or the EEOA.

Further, the United States' conclusion that all IEP and IEP process documents are vital documents, thus requiring full translation in every situation, is inconsistent with its previous opinions.[9] For example, in *Kinney Kinmon Lau, et al., v. San Francisco Unified School District*, No. 70-cv-00627-CW, Dkt. No. 199-1 (N.D. Cal. June 24, 2015), after the United States intervened, the San Francisco School District ultimately entered into a consent decree. The consent decree did not require the full translation of every IEP and IEP process document. Rather, the consent decree required the district to provide a "translated copy of the IEP *template* at least five days before the IEP meeting" (emphasis added) and only required full translation of the IEP "[a]fter the IEP meeting, upon the request of a parent/guardian." *See* Exh. A, Modified

[9] The United States' reference to the Denver and San Francisco consent decrees is indicative of its litigation strategy to coerce school districts into expanding the requirements of the IDEA through settlement agreements. *See* Statement of Interest at 10 n.17. For the Court's convenience, these consent decrees are attached as Exhibits A and B to the Declaration of Mark W. Halderman.

Consent Decree at 29-30.[10] Moreover, the district was required to "translate other documents . . . about matters arising under the IDEA or Section 504 (*e.g.*, information regarding IEP or 504 meetings and procedural rights) into [only] the Major Languages," which included only English, Spanish, Chinese, Vietnamese, Filipino, and Arabic. *Id*. at 11, 30.

Similarly, in *Congress of Hispanic Educators v. Denver School District*, No. 1:95-cv-02313-RPM (D. Colo. Sept. 28, 2012), the Colorado school district entered into a consent decree that included far less onerous translation requirements. For example, the consent decree generally required written translation of "information about matters arising under the Individuals with Disabilities Education Act" for "languages spoken by 100 or more District students . . . who request communications in those languages or whose need for communications in such languages becomes otherwise apparent." *See* Exh. B, Consent Decree at 17. For IEPs, the consent decree required only that the Colorado school district translate "all IEP and 504 Plan *forms* (i.e., the *blank templates* into which student information is filled) into the four most common languages spoken" and need only translate the full IEP "[u]pon request by a LEP Parent." *Id*. at 40 ¶¶ I, J (emphasis added). Because the translation procedures agreed upon by the United States for other school districts were not as stringent as requested here, the Court should not permit the United States to now argue that full translation of all IEPs and IEP process documents is legally required under their interpretation of the laws.

D. Language-based Classifications, without More, are not National Origin Discrimination Under the Equal Education Opportunity Act or Title VI of the Civil Rights Act of 1964

1. This Court Correctly Decided *K.A.B. v. Downingtown Area School District.*[11]

[10] "Exh. __" refers to an exhibit of the accompanying Declaration of Mark W. Halderman.

[11] The United States further argues the *K.A.B.* should be afforded little deference because it is an unpublished decision. However, this Court has stated that while unpublished decision are not

Plaintiffs and the United States misread case law to reach their self-serving conclusion that policies (or the lack thereof) impacting people of limited English proficiency necessarily discriminate based on national origin under Title VI and the EEOA. *See, e.g.*, Plaint. Opp. at 22-23; *see also, e.g.*, Statement of Interest at 6-8. Specifically, Plaintiffs assert that the School District's alleged failure to provide fully translated IEPs and IEP process documents to LEP parents is national-origin discrimination. But this Court's and Third Circuit precedent clearly hold that language discrimination does not equate to national-origin discrimination. *See K.A.B. ex rel. Susan B. v. Downingtown Area School District*, No. 11-1158, 2013 WL 3742413, at *12 (E.D. Pa. July 16, 2013) (quoting *Mumid v. Abraham Lincoln High School*, 618 F.3d 789, 795 (8th Cir. 2010)); *see also Pemberthy v. Beyer*, 19 F.3d 857, 871 (3d Cir. 1994) (The Third Circuit is "not willing to hold as a matter of law that language-based classifications are always a proxy for race or ethnicity.").

Plaintiffs attempt to distinguish *K.A.B.* and *Mumid*, while the United States goes as far as to assert that they were wrongly decided. *See* Statement of Interest at 20-21. But the cases relied upon by both are either inapposite or distinguishable, as they generally involved policies that targeted or excluded one specific language, which served as a proxy for national origin discrimination.

The United States asserts that *K.A.B.*, as well as the *Mumid* case upon which *K.A.B.* relies, were incorrectly decided because they did not consider the Supreme Court's decisions in *Lau v. Nichols*, 414 U.S. 563 (1974) or *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*,

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binding precedent, they "may be persuasive for their reasoning." *See Howard v. Digital Equip. Corp.*, No. 95-905, 1998 WL 1745299, at *5 (E.D. Pa. Nov. 25, 1998) *aff'd*, 229 F.3d 1138 (3d Cir. 2000) (citing *Aetna Life & Casualty v. Maravich*, 824 F.2d 266, 269 (3d Cir. 1987)). Further, the Third Circuit's published opinion in *Pemberthy v. Beyer* is binding precedent. *See* 19 F.3d 857, 871 (3d Cir. 1994) (The Third Circuit is "not willing to hold as a matter of law that language-based classifications are always a proxy for race or ethnicity.").

429 U.S. 252 (1977). *See* Statement of Interest at 20-21. In *Lau*, a group of non-English speaking students of Chinese ancestry claimed they did not receive special help due to their inability to speak English. *Lau*, 414 U.S. at 564. The Court held that the San Francisco school district violated Title VI because "Chinese-speaking minority receive[d] fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program."[12] *Id*. at 568.

In contrast to *Lau*, which found that the Chinese language served as a proxy for people of Chinese national origin, when an alleged discriminatory policy targets all individuals categorized as ESL or LEP (as here and in *K.A.B.*), language cannot serve as a proxy for national origin discrimination. *See Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) ("[T]he Secretary's failure to provide forms and services in the Spanish language, does not on its face make any classification with respect to Hispanics as an ethnic group. A classification is implicitly made, but it is on the basis of language, i.e., English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin. Language, by itself, does not identify members of a suspect class."); *see also Moua v. City of Chico*, 324 F. Supp. 2d 1132, 1138-39 (E.D. Cal. 2004) ("The Ninth Circuit thus recognized that government actions . . . that have the effect of treating non-English speakers differently from English speakers do not have a tendency to target or isolate any particular language, hence ethnic, group and thus do not serve as a pretext for ethnic discrimination.") (quoting *Olagues v. Russoniello*, 797 F.2d 1511, 1521 (9th Cir. 1986) (*en banc*)).

[12] The Lau case expressly reached its conclusion under Title VI and not the EEOA. *See, e.g., Moua v. City of Chico*, 324 F. Supp. 2d 1132, 1138 n.10 (E.D. Cal. 2004) ("the *Lau* Court based its holding exclusively on Title VI of the Civil Rights Act of 1964 [and] . . . expressly did not reach the Equal Protection Clause arguments put forward by the plaintiffs in that case; *Lau* is thus inapposite to plaintiffs' equal protection arguments in this case.").

Here, Plaintiffs assert that the School District has a policy (without actually pointing to one) that impacts *all* LEP individuals regardless of their race or language. *See, e.g.*, Compl. at ¶ ¶ 46 ("The District's failure to provide sufficient interpretation services and to completely and timely translate IEP process documents extends to all foreign languages, including but not limited to Spanish."). Nowhere in the Complaint do Plaintiffs allege that the School District is targeting only a specific language, race, or national origin for which it refuses to translate IEPs or other IEP process documents. Rather, the only basis for Plaintiffs' allegation of national origin discrimination is that certain Class Members are LEP. Without more, these claims cannot withstand a motion to dismiss.

In *Arlington Heights*, the Supreme Court held that a zoning ordinance, which barred the construction of multi-family housing in the center of the neighborhood, was constitutional. *Arlington Heights*, 429 U.S. at 270. Plaintiffs argued that the zoning ordinance was discriminatory because it kept blacks and other minorities from moving into the neighborhood *Id*. at 252. The Court analyzed a list of non-exclusive considerations for whether discriminatory intent existed, including disparate impact, and concluded that the plaintiffs had failed to carry their burden of proving racially discriminatory intent or purpose under the Equal Protection Clause. *Id.* at 266-268.

While *K.A.B.* did not explicitly mention the *Arlington Heights* framework, that does not mean the court did not consider those factors in deciding whether there was discriminatory intent. Moreover, even if the *K.A.B.* court should have (but did not) consider the *Arlington Heights* factors, it still stands for the premise that "discrimination based on English proficiency is not the same as discrimination based on national origin." *K.A.B. ex rel. Susan B.*, 2013 WL 3742413 at *12. Perhaps the *K.A.B.* plaintiffs could have shown discriminatory intent after a

consideration of other factors in the *Arlington* framework, but regardless this Court and the Third Circuit's message is clear that discrimination based on English proficiency alone does not amount to national origin discrimination. Here, the Plaintiffs have not alleged any fact, other than that they are LEP, from which the Court can infer that the School District acted with discriminatory intent. *See* Compl. at ¶¶ 97-104.

2. Plaintiffs' EEOA Claims are Inadequate.

Plaintiffs incorrectly state, "[t]he District does not dispute that Plaintiffs have alleged: (1) language barriers; (2) defendant's failure to take appropriate action to overcome these barriers; and (3) a resulting impediment to students' equal participation in instructional programs." *See* Plaint. Opp. at 21. Indeed, the bulk of the School District's Motion to Dismiss argues that Plaintiffs have inadequately pled systemic claims under the asserted statutes. This includes a failure to sufficiently allege any of the EEOA elements as to the Class Members.

In addition, the School District asserts that Plaintiffs' EEOA claim fails in its entirety (*i.e.*, against both the named Plaintiffs and the Class Members) because the Plaintiffs did not allege discrimination based on "race, color, sex, or national origin." *See* Mot. at 23-24. Plaintiffs argue, citing *CG v. Pennsylvania Department of Education*, 547 F. Supp. 2d 422, 435 (M.D. Pa. 2008), that "numerous courts have found [that] language is an identifier of national origin and is often used as pretext for discrimination." Plaint. Opp. at 21. *CG*, a Middle District of Pennsylvania case, does not carry the weight of this Court and the Third Circuit's decisions in *K.A.B.* and *Pemberthy*. In addition, *CG* is distinguishable because it alleged discrimination against "*Spanish*-speaking special-education students"—not against all LEP individuals as is the case here. *Id*. (emphasis added). Plaintiffs' reliance on *Leslie v. Bd. of Educ. for Ill. Sch. Dist. U-46*, 379 F. Supp. 2d 952, 960 (N.D. Ill. July 25, 2005), a pre-*Iqbal/Twombly* and out-of-district case, should also be afforded little weight. In *Leslie*, the judge determined that Plaintiffs had

satisfied notice pleading standards for an EEOA claim. Notice pleading standards, however, have since been heightened by *Iqbal* and *Twombly*, so *Leslie* is inapposite.

Plaintiffs' attempt to distinguish *K.A.B.* also misses the mark. No. 11-1158, 2013 WL 3742413 (E.D. Pa. July 16, 2013). Plaintiffs claim that *K.A.B.* is distinguishable from the present matter because the *K.A.B.* plaintiffs "had not submitted any evidence from which a reasonable fact-finder could find that the school district had failed to take appropriate action on account of K.A.B's national origin," whereas Plaintiffs here "have alleged language barriers, the District's failure to take appropriate action to overcome those barriers, and a direct causal link to resulting injuries, including the denial of a FAPE." Plaint. Opp. at 23.

First, it is untrue that Plaintiffs asserted a "direct causal link to resulting injuries, including the denial of FAPE." *Id.* The only allegation of injury in Count Four does not even mention FAPE: "[t]his failure has impeded equal participation by Student Plaintiffs and the members of the Student Class in the District's special education and other instructional programs." Compl. at ¶ 95.

Further, "a defendant's failure to take appropriate action must be 'on account of ... race, color, sex, or national origin.'" *K.A.B. ex rel. Susan B.*, 2013 WL 3742413, at *11. However, the only possible support that Plaintiffs could provide for this factor is their allegation that "National origin discrimination . . . includ[es] limited English proficiency." Compl. at ¶ 95. But Plaintiffs make no attempt whatsoever to distinguish the fact that this Court in *K.A.B.* directly dismissed the sufficiency of such an allegation. *See K.A.B. ex rel. Susan B.*, 2013 WL 3742413, at *12 ("discrimination based on English proficiency is not the same as discrimination based on national origin"); *see also Pemberthy v. Beyer*, 19 F.3d 857, 871 (3d Cir. 1994); *Sandoval v. Hagan*, 197 F.3d 484, 509 n.26 (11th Cir. 1999), *rev'd on other grounds sub nom.*,

Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) ("The Supreme Court never has held that language may serve as a proxy for national origin for equal protection analysis."); *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980) ("Neither the statute nor common understanding equates national origin with the language that one chooses to speak."); *Paradoa v. Philadelphia Hous. Auth.*, No. 13-6012, 2014 WL 2476595, at *5 (E.D. Pa. June 2, 2014) *aff'd*, 610 F. App'x 163 (3d Cir. 2015) (dismissing Title VII case where plaintiff failed to "argue that her language and race were so closely intertwined that 'punishing her for speaking Spanish to her so-worker was equivalent to firing her on the basis of her race.'").

3. Plaintiffs' Title VI Claims are Inadequate.

As explained above, *K.A.B.* is distinguishable from *Lau*, primarily because *Lau* targeted a individuals of Chinese national origin. Plaintiffs now argue that the School District targeted Spanish-speaking individuals and "[d]espite this knowledge, the District made the intentional choice not to translate or ensure interpretation, thereby intentionally or with deliberate indifference depriving Plaintiffs from receiving the same services as their English-speaking peers." *See* Plaint. Opp. at 24. But the Complaint only refers to Spanish-speaking individuals in regard to the named Plaintiffs, while alleging discrimination against all LEP individuals. *See, e.g.*, Compl. at ¶ 1, 3, 7, 42, 46.

The United States argues that "questions of intent, such as those raised by the District, are inherently fact-based determinations and thus are generally inappropriate for resolution at the motion to dismiss stage." However, in support of its position, the United States cites to *Pryor v. NCAA*, 288 F.3d 548, 565 (3d Cir. 2002), which was decided pre-*Iqbal/Twombly*. Courts in this District have held that the "plausible" pleading standard of *Iqbal* and *Twombly* apply to allegations of state of mind. *See, e.g., Tucker v. Bernzomatic*, No. 09-05881, 2010 WL 1838704, at *3 (E.D. Pa. May 4, 2010) ("In other words, allegations of the defendants' knowledge must

satisfy the *Twombley* standard. *See Iqbal*, 129 S. Ct. at 1954 (rejecting the plaintiff's argument that *Twombley* does not apply to state of mind allegations)."); *see also Blassengale v. City of Philadelphia*, No. 11-3006, 2012 WL 4510875, at *6 (E.D. Pa. Sept. 28, 2012) ("Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative-strictures of Rule 8. And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss."). Thus, *Pryor* is inapposite and Plaintiffs' conclusory allegations of intent fail to state a plausible claim for relief. *See* Compl. at ¶¶ 98, 103.

E. Plaintiffs' Claims under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act are not Plausible.

Plaintiffs argue these claims are adequate because "failure to provide a FAPE, as required by the IDEA, is almost always a violation of Section 504 and the ADA." Plaint. Opp. at 17. However, Plaintiffs do not even mention the IDEA or a denial of FAPE as the basis for their claim in Count Three of the Complaint. Compl. at ¶¶ 89-92. Rather, the Plaintiffs conclusorily allege that "[b]y failing to translate regular education forms for the members of the Parent Class, including homebound forms and information about those services, the District has substantially undermined the ability of members of the Student Class to receive equal access to education services on the same basis as students without disabilities." *Id.* at ¶ 91. Even if this baseless allegation is true, translating "homebound forms and information about those services" is not explicitly required by the IDEA. For this reason, the Court should dismiss the Plaintiffs' ADA and RA claims in their entirety.

III. CONCLUSION

For the above stated reasons, and the reasons articulated in the School District's Motion to Dismiss, the School District respectfully requests the Court grant its Motion.

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Dated: February 16, 2016

CERTIFICATE OF SERVICE

I, Marjorie M. Obod, Esquire, hereby certify that on the 16th day of February, 2016, I caused a true and correct copy of the foregoing REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT to be served via first class mail, postage prepaid, upon the following:

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