UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO._____

T.R., BARBARA GALARZA, A.G., MARGARITA PERALTA, L.R., D.R., J.R., MADELINE PEREZ, R.H. AND MANQING LIN,

PLAINTIFFS-PETITIONERS,

v.

SCHOOL DISTRICT OF PHILADELPHIA,

DEFENDANT-RESPONDENT.

On Petition for Permission to Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania Denying Class Certification in Civil Action Docket No. 15-4782

PLAINTIFF-PETITIONERS L.R., D.R., J.R., MADELINE PEREZ, R.H., AND MANQING LIN'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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Plaintiff-Petitioners L.R., D.R. and J.R. and their mother, Madeline Perez, and R.H. and his mother, Manqing Lin (collectively, "Plaintiffs") respectfully petition the Court, pursuant to Rule 23(f) of the Federal Rules of Civil Procedure, for leave to appeal the April 18, 2019 Order of the United States District Court for the Eastern District of Pennsylvania (Goldberg, J.), denying Plaintiffs' motion to certify pursuant to Rules 23(a) and 23(b)(2) a "Parent Class" who have limited English proficiency and a "Student Class" who are eligible for special education services in the Defendant-Respondent School District of Philadelphia (the "District").

PRELIMINARY STATEMENT

The named Plaintiffs are limited English proficient ("LEP") parents and their children who seek narrow, systemic injunctive relief requiring the District to create a system to ensure the availability of interpretation and translation services for LEP parents of students with disabilities. Without certification of the proposed classes, the broader systemic issue raised in this action will not be remedied, even if the named Plaintiffs receive some individual relief. This would result in the denial of meaningful parent participation in the special education process and deprivation of a free and appropriate public education to hundreds of students with disabilities.

The District Court's April 18, 2019 Order is well suited for review under Rule 23(f) due to the possible case-ending effect of the challenged decision and the clear error in denying class certification. Specifically, the District Court adopted new

standards of numerosity and commonality that contravene governing case law and misconstrued the scope and nature of Plaintiffs' rights to language services in the educational setting. If the District Court's new standards are maintained, they would deprive (b)(2) classes, such as those proposed here, of their well-established role as "the vehicle for civil rights actions and other institutional reform cases." *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58–59 (3d Cir. 1994).

Plaintiffs moved for certification of two related (b)(2) classes: (1) a Parent Class, consisting of parents with limited English proficiency[1] whose children are enrolled in the District and are identified with a disability within the meaning of the Individuals with Disabilities Education Act ("IDEA"), and (2) a Student Class, consisting of the children of LEP parents who are enrolled in the District and are identified with a disability within the meaning of the IDEA. *See* A-65 (Am. Compl. ¶ 51). The District Court accepted Plaintiffs' proposed Parent Class and Student Class as defined, but it erred in finding that Plaintiffs had not met their burden to establish numerosity, and it relied on inaopposite case law. Unlike the general census data proferred in *Mielo v. Steak 'N Shake Operations, Inc.*, 897 F.3d 467 (3d Cir. 2018), which the District Court relied on, Plaintiffs here introduced concrete statistical evidence on class size from the District itself and, more specifically, its

[1] As the District Court found, the term "limited English proficient" refers to a person whose primary language is not English and who has limited ability to read, write, speak, or understand English. A-16 (Slip Op. at 16).

special education population. For example, in the 2016-2017 school year, there were 3,783 special education students in the District who lived in a household with a home language other than English.[2] Reasonable inferences from this and other evidence in the record, discussed below, provide definitive evidence of numerosity, extending far beyond the speculation of class size proffered by the plaintiffs in *Mielo*.

The District Court also erred in finding no commonality and insufficient cohesiveness to certify the two (b)(2) classes. This is ***not*** a case under the IDEA in which Plaintiffs are complaining about individualized aspects of their educational plans or are seeking individualized remedies. Instead, Plaintiffs have requested a new District-wide plan for language services to ensure compliance with applicable federal mandates. The systemic common remedies sought may include the hiring of more interpreters, mandatory translation of Notices of Recommended Placement

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[2] While there is a possibility, as the District Court observed (A-22 (Slip Op. at 22)), that some parents in households that identify a home language other than English may be fully proficient in English, we know this is a minority of households. In 2013, of the 25,990 families in the District whose primary home language was not English, 19,670 of them (or 75.7%) expressly requested documents in a language other than English. *See* A-68 (Am. Compl. ¶ 61). Based on this data, approximately 75% of households in the District with a home language other than English self-identified as requiring language assistance services, which is a uniformly recognized practice to identify LEPs. In other words, only about 25% of families fit into the category of being both non-native English speakers and bilingual. Therefore, it is reasonable to infer that only a quarter of the 3,783 students with disabilities who lived in a household with a home language other than English would be non-native English speaking families and also fully proficient in English. Accordingly, the number of parents who would qualify as class members would number over two thousand, far in excess of the 40-person threshold recognized in other cases.

("NOREPs") required by the IDEA for non-native speakers regardless of language proficiency,[3] and annual notification to LEP parents of their language rights so that these parents can participate meaningfully in their children's educational planning process. These issues are common to all class members regardless of the extent or circumstances of the deprivation of language services.

Although the District Court acknowledged that members of the Parent Class had a common right under the IDEA to "meaningful participation," it found a lack of commonality because Plaintiffs had not alleged the total absence of "*any* interpretation or translation services." A-33 (Slip Op. at 33). However, commonality does not require this or depend on a complete absence of *any* of the mandated services or that all plaintiffs suffer the same injury. In *Baby Neal*, for example, the plaintiffs' allegation was that the Department of Human Services ("DHS") lacked a *sufficient* number of trained case workers, a *sufficient* number of trained foster parents, and had a host of policies and procedures that were *deficient*.

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[3] Plaintiffs assert violations of the IDEA, which expressly requires that certain notices and information be provided to a parent in their "native language," without any regard to their English proficiency. *See, e.g.*, 20 U.S.C. § 1415(b)(4) ("the notice required by paragraph (3) is in the native language of the parents."); *id.* § 1415(d)(2) ("The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents."); 34 C.F.R. § 300.322(e) (requiring that District "arrang[e] for an interpreter for parents with deafness or whose native language is other than English."); 34 C.F.R. § 300.503(c) (1)(ii) (mandating that notice "required under paragraph (a) of this section must be" in parent's "native language").

43 F.3d at 53. Similarly, Plaintiffs here have satisfied the element of commonality and the cohesiveness necessary for a (b)(2) class because the request for systemic relief regarding language services, described below, would benefit the two proposed classes as a whole and would not depend on analyzing the "circumstances" of individual class members.

QUESTIONS PRESENTED

1. Whether the District Court erred in finding that Plaintiffs had not established, by a preponderance of the evidence, which included records maintained by the District, that the Parent Class and the Student Class were so numerous that joinder of all members was impracticable?

2. Whether the District Court erred in finding that there were no questions of law or fact relevant to the District's provision of language services that were common to members of the Parent Class and Student Class?

3. Whether the District Court erred in finding that none of the relief requested by the Plaintiffs, including the hiring of more interpreters to attend IEP meetings and translation of documents, would benefit the Parent Class and the Student Class as a whole?

FACTUAL AND PROCEDURAL BACKGROUND

The original Parent Plaintiffs in this putative class action, Barbara Galarza and Margarita Peralta, filed two administrative proceedings in June 2014 against the

District. After a nine-month hearing process, the Hearing Officer found that the District did not provide Individualized Education Programs ("IEPs") in "an accessible form" to the Plaintiffs and that, as a result, each was denied her right to meaningfully participate in the IEP process as required by the IDEA, 20 U.S.C. § 1400 *et seq.* The Hearing Officer also concluded, however, that he had no authority to order systemic relief of language services.

On August 21, 2015, Ms. Galarza and her daughter, T.R., and Ms. Peralta and her son, A.G., filed their complaint in the District Court, appealing the Hearing Officer's decision to deny their request for systemic relief; asserting seven counts on behalf of themselves and similarly situated parents and students, including violations of the IDEA; and seeking declaratory and injunctive relief. The District Court denied the District's motion to dismiss in its entirety, and Plaintiffs subsequently filed their First Amended Complaint, adding six (6) class representatives: L.R., D.R., J.R., Ms. Perez, R.H., and Ms. Lin, alleging the same legal violations and seeking the same relief.[4] *See generally* A-55–127 (Am. Compl.).

On August 3, 2018, Plaintiffs moved for certification of the "Parent Class" and the "Student Class" pursuant to Rules 23(a) and 23(b)(2). On April 18, 2019,

[4] After the filing of the First Amended Complaint, the claims of the original Plaintiffs became moot, when one of the students dropped out of school and the other graduated. Those two sets of Plaintiffs were dismissed by stipulation.

after briefing was complete and without a hearing, the District Court denied Plaintiffs' class certification motion. It found that the proposed class definitions were "neither ambiguous nor unworkable" (A-16 (Slip Op. at 16)) and that Plaintiffs were typical, but held that Plaintiffs had failed to establish the elements of numerosity and commonality under Rule 23(a) and failed to meet the requirements of a (b)(2) class.

STANDARD OF REVIEW

Recognizing that denying or granting class certification is often the defining moment in class actions, Rule 23(f) provides this Court with broad discretion to review certification decisions on an interlocutory basis. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001). The non-exhaustive list of relevant factors for the Court to consider are: (1) the possible case-ending effect of the decision; (2) an erroneous ruling; and (3) development of the law on class certification. *Id.* at 165.

ARGUMENT

I. The District Court's Class Certification Decision Raises Issues of Critical Importance to this Case and to Civil Rights Litigation Generally.

A. The Denial of Class Certification Is Likely Dispositive of Any Claim for Systemic Relief.

As noted above, this litigation began five years ago, when the original Parent Plaintiffs, Barbara Galarza and Margarita Peralta, filed administrative actions

against the District and established in each case that they were denied meaningful participation under the IDEA because the District had policies and practices that failed to provide adequate language services. The Hearing Officer declined to order system-wide changes in the District's policies or practices based on his lack of authority. *See* A-124–25 (Am. Compl., Ex. C at 5-6 (October 22, 2014 Pre-Hearing Order)).

Unless the April 18, 2019 Order is reversed, Plaintiffs will likely be denied any systemic relief from the District Court as well. At trial, if Plaintiffs are successful on one or more of their claims, the District will argue that only individual relief is warranted. Given its previous statements about the individualized nature of Plaintiffs' claims, the District Court will likely accept that argument. Likewise, any other LEP parents and their children who seek system-wide changes at the administrative level will confront lengthy due process hearings and the same limitation on the Hearing Officer's remedial authority.

B. The District Court's Decision Also Deprives Rule 23(b)(2) of Its Proper Role in Remedying Systematic Violations of Civil Rights.

Class actions under Rule 23(b)(2) have played a vital role in protecting the civil rights of similarly-situated persons. Indeed, as this Court observed in *Baby Neal*, "the proper role of (b)(2) class actions [is] remedying systemic violations of basic rights of large and often amorphous classes." 43 F.3d at 64. Accordingly, "(b)(2) classes have been certified in a legion of civil rights cases where

commonality findings were based primarily on the fact that defendant's conduct is central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct." *Id.* at 57. There can be no doubt that the ability of parents to participate in the IEP process is a central part of the civil rights protected by the IDEA. *See Winkelman v. Parma City School District*, 550 U.S. 516, 524 (2007).

The District Court's finding of ***no*** commonality among the two proposed classes, because of "differing circumstances" (A-33 (Slip Op. at 33)), is at odds with the holding in *Baby Neal* that the "individualized circumstances of the children" did not preclude a (b)(2) class when the requested relief benefitted the class as a whole. Likewise, because classes in civil rights cases are based on classification and data maintained by the defendants, the District Court's unreasonable limitations on the inferences that may be drawn from circumstantial evidence would drastically curtail plaintiffs' ability in such cases to establish the element of numerosity.

While there have been significant developments in class certification law since the *Baby Neal* decision, including the 2003 amendments to Rule 23 and the seminal decision in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008), this Circuit and other federal appellate courts have recognized the importance of *Baby Neal* and the vital role of (b)(2) classes in protecting civil rights while applying a rigorous class analysis. *See, e.g., Gayle v. Warden Monmouth Cty.*

Corr. Inst., 838 F.3d 297, 311 (3d Cir. 2016). A review of the District Court's Order would serve a useful purpose in reconciling the post-2003 developments in class certification law and the traditional role (b)(2) classes have played in civil rights litigation.

II. Plaintiffs Presented Sufficient Evidence from the District's Records and from the Testimony of Its Staff to Establish the Element of Numerosity.

Rule 23(a)(1) does not "require a plaintiff to offer direct evidence of the exact number and identities of the class members." *Mielo*, 897 F.3d at 484 (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 596 (3d Cir. 2012)). Rather, "sufficient circumstantial evidence specific to the . . . problems, parties, and geographic areas actually covered by the class definition" can be used, and, once such evidence is provided, the court may "rely on 'common sense' to forgo precise calculations and exact numbers" and find that numerosity is established. *Id.* at 484–85. If the class size exceeds 40, the element of numerosity is generally satisfied. *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 426 (3d Cir. 2016).

Here, Plaintiffs' ability to discover direct evidence on class size is foreclosed by the District's choice not to track how many special education students have parents who are LEP. A-133 (Hess Dep. 80:14–16, Jan. 25, 2018, Pls.' Mot. Ex. 7 and Def.'s Opp'n Ex I ("We don't keep track of the parents of what you are describing as limited English proficient.")). The class certification record, however,

is replete with circumstantial evidence from which reasonable inferences can be drawn about the large size of the two classes. According to the record, including data maintained by the District:

- In the 2016-2017 school year, there were 3,783 special education students who lived in a household with a home language other than English. A-135 (Nov. 21, 2017 Ltr. from M. Obod to P. Saint-Antoine, Pls.' Mot. Ex. 6 at 1);[5]
- As of November 2013, the District reported that there were approximately 25,990 *families* whose primary home language was not English. A-68 (Am. Compl. ¶ 61); A-145 (Def.'s Answer to Am. Compl. ¶ 61);
- As of November 2013, 19,670 *families* of students in the District expressly requested documents in a language other than English. A-68 (Am. Compl. ¶ 61; A-145 (Def.'s Answer to Am. Compl. ¶ 61);[6]

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[5] The statistics on which special education students live in a home with a primary language other than English come from the District's home language survey. Notably, at least some of the District's witnesses, including the District's head of Special Education, treat the survey results as a proxy for a parent's LEP status. *See, e.g.,* A-132 (Hess Dep. at 53:10–12); A-133 (Hess Dep. at 80:2–6) ("[H]ow would the school building staff know that the parent is limited English proficient? A. By reviewing the school language survey the parent filled out at registration."). Moreover, the IDEA entitles ***all*** of these parents, regardless of their English proficiency, to a fully translated NOREP in their native language. *See* 20 U.S.C. §§ 1415(b)(3)-(4).

[6] As noted above, the high percentage of families speaking a primary home language other than English who expressly requested documents in a language other than English (75.6%) is one indication that only a minority of the 25,990 families reported by the District as of November 2013 identified as being proficient in English. The application of common sense to such statistical evidence is permissible in finding numerosity. *See, e.g., Walter v. Palisades Collection, LLC*, No. 06-378, 2010 WL 308978, at *5 (E.D. Pa. Jan. 26, 2010) ("Even if only two percent of the [2,298] Pennsylvania Cases fit within the proposed class, numerosity would be satisfied.").

- As of November 2013, there were more than 1,500 English Language Learners receiving special education services across the District. A-68 (Am. Compl. ¶ 62); A-145 (Def.'s Answer to First Am. Compl. ¶ 62);[7]

- An October 31, 2018 Complaint Investigation Report issued by the Pennsylvania Department of Education found that in twenty-three out of a random sample of twenty-five files reviewed, parents did not receive the required forms in their native language as required under the IDEA. A-157-58 (Oct. 31, 2018 Ltr. from Pa. Dep't of Ed., Pls.' Mot. to Supplement Ex. A);

- One of the District's witnesses testified that "it's reasonable to assume that there are a large number" of LEP parents in the District "given the large number of students in" the District. A-167 (Still Dep. 96:6–13, Jan. 23, 2018, Def.'s Sur-Reply in Opp'n to Mot. Ex. 3);

- In 2017, one District office alone received 50 requests for translation of IEP process documents. A-136 (Nov. 21, 2017 Ltr. from M. Obod to P. Saint-Antoine at 2).

Furthermore, implicit in the District's repeated objections to the financial burden of providing additional language services to LEP parents is the acknowledgement that the size of the two proposed classes is large. For example, Marie Capitolo testified that she could not even calculate "what the cost would be to the school district if every IEP for a special ed student whose parent was limited English proficient was translated," though she did concede that "that number would be very high" and likely over one million dollars. A-177–79 (Capitolo Dep. 147:9–16, 148:23–149:17).

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[7] At least some of the District's witnesses observed a high correlation between the students' and the parents' primary language. *See, e.g.*, A-174 (Capitolo Dep. 20:2–17, Feb. 21, 2018, Def.'s Opp'n to Mot. Ex. D) (testifying that "the students' primary language [is] a hundred percent of the time . . . also the language of the parent").

This plethora of circumstantial evidence distinguishes this case from *Mielo*, *Marcus*, and *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013), which relied on speculative reasoning. The plaintiffs in *Mielo*, who were customers of only one of defendant's restaurants, relied on the total number of people with mobility disabilities *nation-wide* and a "single off-hand comment" by one of defendant's executives. 897 F.3d at 486. In *Marcus*, there was a "complete lack of evidence" as to the number of cars purchased or leased within a specific state that defined one of the classes plaintiff sought to certify. 687 F.3d at 597. Likewise, in *Hayes*, the plaintiff only provided evidence to show that the "putative class [was] some subset of a larger pool" because the plaintiff only identified a total number of transactions without evidence of how many might relate to the specific problem he was challenging. 725 F.3d at 358.

Here, in addition to providing the above statistical evidence from within the District itself, Plaintiffs also provided concrete evidence "specific to the problems . . . involved in the litigation," *id.*, such as the number of translations requested by families in the District. For example, as explained above, in 2017, one District office alone received 50 requests for translation of IEP process documents. A-136 (Nov. 21, 2017 Ltr. at 2).

In addition, the District Court ignored other impracticability factors relied upon by courts that weigh in favor of certifying the proposed classes, such as the

financial resources of class members and the ability of class members to institute individual lawsuits. *See Anderson v. Dep't of Pub. Welfare*, 1 F. Supp. 2d 456, 461 (E.D. Pa. 1998).[8]

III. Plaintiffs' Statutory and Regulatory Claims that the District Deprived Them of Legally Mandated Language Services Present Multiple Issues of Law and Fact Common to the Two Putative Classes.

Rule 23(a)(2) requires that the Plaintiffs identify at least one question of law or fact common to the class. *Baby Neal*, 43 F.3d at 56. The District Court erred in finding ***no*** commonality among the proposed class members with regard to any of the statutory or regulatory mandates for language services. However, as discussed below, the Plaintiffs identified several such mandates.

First, as the District Court itself noted in denying the District's Motion to Dismiss, "the IDEA does include a general mandate that certain documents be provided to LEP parents in writing and in their native language, and also that evaluations be conducted in the student's native language." *T.R. v. Sch. Dist. of Phila.*, 223 F. Supp. 3d 321, 332 (E.D. Pa. 2016). For example, the IDEA requires that the District provide parents (without regard to English proficiency) prior written

[8] Also, the proposed classes include both present and future members and, thus, the number of class members will invariably increase, making their joinder to litigation impracticable. *See In re Mondafinil Antitrust Litig.*, 837 F.3d 238, 253 (3d Cir. 2016). Further, the putative class members are limited English proficient, some are immigrants, and many are indigent. As such, they face significant obstacles to asserting their rights and filing individual cases.

notice in their native language when it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of a student under 20 U.S.C. §§ 1415(b)(3)-(4) and a written explanation of procedural safeguards in the native language of the parents (unless it clearly is not feasible to do so). *Id.* § 1415(d)(2). Plaintiffs have alleged and submitted evidence that the District has systematically failed to translate such documents, including NOREPs. *See, e.g.*, A-69 (Am. Compl. ¶ 65); A-184–87 (Bustamante Dep. 113:12–21, 117:18–24, 126:15–22, 133:13–20, Feb. 22, 2018, Pls.' Mot. Ex. 12); A-157–61 (Oct. 31, 2018 Ltr. from Pa. Dep't of Ed., Pls.' Mot. to Supplement Ex. A).

Plaintiffs also challenge compliance with the IDEA's regulatory mandate that the District "take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English." 34 C.F.R. § 300.322(e). In their Motion, Plaintiffs presented substantial proof that the District does not have enough qualified interpreters system-wide to attend IEP meetings. *See* A-209 (Pls.' Mem. in Supp. of Mot. at 17, n.14). The District Court's observation that "Plaintiffs do not allege that the School District failed to provide *any* interpretation or translation services," A-32 (Slip Op. at 32), does not negate the common issue of whether the District has failed to fulfill its regulatory mandate. Plaintiffs do not have to show that all potential class members have suffered an

actual injury in order to satisfy commonality; rather, "demonstrating that all class members are subject to the same harm will suffice." *Baby Neal,* 43 F.3d at 5; *see also In re Community Bank of Northern Va. Mortgage Lending Practices Litig.*, 795 F.3d 380, 398-99 (3d Cir. 2015) (affirming certification despite legal and factual differences among those challenging home equity lending scheme).

The IDEA also requires IEPs to be in writing, a mandate that is meaningless to LEP parents if an IEP is not translated into a language they understand. *See* 20 U.S.C. § 1415(d)(1)(A)(i); 34 C.F.R. §§ 300.320, 300.323; *see also* A-223–24 (Soderman Dep. 169:6–170:7, Dec. 6, 2017 Pls.' Mot. Ex. 10) (school official testifying that only form headings and "no individual information" of IEPs is translated, and that such limited translations are insufficient "for a parent to understand and participate").

The right of parents of special education students to participate meaningfully in their children's educational planning process is another common statutory mandate. *See* 20 U.S.C. § 1414(d)(1)(B) (requiring that parents serve as a member of the team that develops a child's IEP); *id.* § 1414(d)(3)(A)(ii) (requiring that "concerns" parents have "for enhancing the education of their child" must be considered by the IEP team); *id.* § 1414(d)(4)(A); § 1414(e) (requiring states to "ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child").

The District Court mistakenly concluded that meaningful participation is always an individualized, fact-based determination, precluding a finding of commonality due to the "varying circumstances" associated with a parent's experience. A-33 (Slip Op. at 33). Plaintiffs do not claim entitlement to particular scholastic programs or seek individual remedies based on the denial of meaningful participation. Rather, Plaintiffs claim that the District lacks an effective system for providing required language services essential for meaningful participation of all LEP parents. The fact that LEP parents and their children may be impacted differently by the District's systemic deficiencies in providing legally-mandated language services does not prevent a finding of commonality. *See Baby Neal*, 43 F.3d at 56 ("Challenges to a program's compliance with the mandates of its enabling legislation, ***even where plaintiff-beneficiaries are differently impacted by the violations***, have satisfied the commonality requirement." (emphasis added)).

Unlike the claimants in *Mielo*, Plaintiffs here are not attempting to tie together a myriad of different regulatory violations based on a common legal provision. In *Mielo*, a steeply graded parking lot was a source of the complaint, but the plaintiffs sought remedies under the ADA that went well beyond this to internal building improvement. 897 F.3d at 488–89. Here, the members of the Parent Class and the Student Class are all subject to the same potential harm caused by the same course of conduct from the District—i.e., its failure to provide a sufficient number of trained

interpreters and fully translated NOREPs, evaluations, and other IEP-related documents. *See NFL Players Concussion Injury Litig.*, 821 F.3d at 427.

Finally, the District Court erred in finding that the "decision as to which language-based services to provide is decentralized and varies from parent-to-parent and school-to-school, making the remedy not appropriate for class resolution." A-34–35 (Slip Op. at 34–35 (citing *Jones v. GPU, Inc.*, 234 F.R.D. 82, 92 (E.D. Pa. 2005) (finding a showing of purposeful discrimination required centralized decision-making)). The conduct that Plaintiffs complain about here—e.g., the failure to hire and train additional interpreters, the deficiencies in the translation of NOREPS, evaluations, and other IEP-related documents, and the lack of notice to parents of their language rights—all stem from policies and practices of the District's Multilingual Family Support Office and the Office of Specialized Services. Thus, the process is not "decentralized."

IV. The Two Putative Classes Are Sufficiently Cohesive, Because the Relief Sought, Including the Hiring of More Interpreters and the Translation of Required Notices, Would Benefit All Members of the Two Putative Classes.

For purposes of certifying a Rule 23(b)(2) class, "[w]hat is important is that the relief sought by the named plaintiffs should benefit the entire class." *Baby Neal*, 43 F.3d at 59. When it found a lack of cohesiveness for purposes of a (b)(2) class, the District Court again pointed to the fact that "Plaintiffs do not allege that the School District has failed to provide *any* language-based services, but rather that it

'has systematically failed to provide *sufficient* language services.'" A-45–46 (Slip Op. at 45–46).

The allegation of insufficient services is not a basis to deny certification of a (b)(2) class, as long as the remedy sought by the Plaintiffs would benefit the class as a whole. In *Baby Neal*, plaintiffs challenged the policies and practices impacting foster children in the care and custody of Philadelphia's DHS, including having an *insufficient and deficient* number of caseworkers, service providers, trained foster parents, and potential adoptive parents. 43 F.3d at 53 (emphasis added). On appeal, this Court rejected DHS's argument that Rule 23(b)(2) was not satisfied, finding that an order requiring DHS to create a system to comply with its statutory and constitutional mandates was relief that would benefit the class as a whole. *Id.* at 59; *see also P.V. ex rel. Valentin v. Sch. Dist. of Phila.*, 289 F.R.D. 227, 233–34 (E.D. Pa. 2013).

Here, Plaintiffs have requested an order requiring the District to provide qualified interpreters, translated NOREPs and other IEP process documents, and new District-wide policies for language services. A-216 (Pls.' Mem. of Law. in Supp. of Mot. at 24). This relief would benefit the two proposed classes as a whole and is sufficiently cohesive for Rule 23(b)(2) certification.[9]

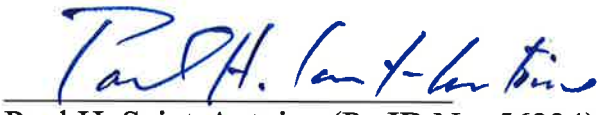
[9] The fact that some class members might have been fortunate enough in the past to have an IEP translated or an interpreter present at an IEP meeting does not mean that

RELIEF REQUESTED

Plaintiffs respectfully request the Court grant the petition for interlocutory review of the District Court's April 18, 2019 Order denying class certification and, after briefing and oral argument, reverse the Order.

Dated: May 2, 2019

Respectfully submitted,



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they will not be a beneficiary of such systematic relief in the future. Likewise, the fact that some members of the Parent Class might have chosen to proceed with an IEP meeting without an interpreter, rather than have it rescheduled, does not mean that they do not have a common interest in improved language services from the District. *See, e.g.,* A-175-76 (Capitolo Dep. at 124:20–125:11) (school official testifying that she could not think of any circumstance, other than a parent expressly declining an interpreter, in which a LEP parent could "meaningfully participate" in a IEP meeting without an interpreter present).

CERTIFICATE OF BAR MEMBERSHIP

I, Paul H. Saint-Antoine, hereby certify pursuant to 3d Cir. LAR 46.1(e) that I am a member of the bar of this Court.

Dated: May 2, 2019

Paul H. Saint-Antoine

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 5(c)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5105 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: May 2, 2019

Paul H. Saint-Antoine

CERTIFICATE OF SERVICE

I, Paul H. Saint-Antoine, hereby certify that a true and correct copy of Plaintiff-Petitioners L.R., D.R., J.R., Madeline Perez, R.H., and Manqing Lin's Petition to Appeal Pursuant to Federal Rule of Civil Procedure 23(f), with Appendix Volumes I and II, was filed with the Clerk of the Court for the Third Circuit Court of Appeals and served via electronic mail and hand delivery to:

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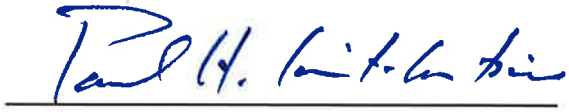

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