No. 20-2084

United States Court of Appeals for the Third Circuit

T.R. et al.,

Plaintiffs-Appellants,

v.

School District of Philadelphia,

Defendant-Appellee

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

BRIEF FOR MEMBERS AND ALLIES OF THE NATIONAL EDUCATION CIVIL RIGHTS ALLIANCE AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Amici certify that Amici Curiae are registered non-profits and have no parent corporations, nor does any publicly held corporation own 10% or more of their stock.

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STATEMENT OF IDENTIFICATION[1]

The Amici organizations are national and state organizations dedicated to advancing and protecting the civil rights of students who have been marginalized, including because of their race, national origin, disability, or sex. Amici organizations have extensive experience and nationally recognized expertise in the interpretation of the Individuals with Disabilities Education Act ("IDEA" or "Act") and other disability rights laws, and deep experience with class action procedures in the context of education rights. Each organization has given counsel permission to file this amicus brief on their behalf.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, non-profit civil rights organization founded in 1963 at the request of President John F. Kennedy to mobilize the private bar in vindicating the civil rights of African-Americans and other racial and ethnic minorities. The Lawyers' Committee is dedicated to, among other goals, eradicating all forms of inequity and racial discrimination in education. As a leading national racial justice organization, the Lawyers' Committee has a vested interest in challenging unconstitutional or statutorily unlawful practices that may disserve and discriminate against communities of color,

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution toward the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

including those students who also identify as low-income, students with disabilities, and English Learners, and preserving class actions as a vehicle to enact systemic change, when necessary. Consistent with these principles, the Lawyers' Committee has experience advocating for policies that promote greater racial integration across schools (e.g., *Silver v. Halifax County Board of Commissioners*, 371 N.C. 855 (N.C. 2018)) and enforcing antidiscrimination laws that ensure all students can access a meaningful education regardless of race and disability status (e.g., *Orleans Parish School Board v. Pastorek*, 2012-1174 (La. App. 1 Cir. 2013). The Lawyers' Committee is also counsel for intervenor underserved students and parents in the current remedial phase of a state adequacy challenge in *Hoke Cty. Bd. of Educ. v. State*, 95-CVS-1158 (Wake Cty., N.C.).

The National Center for Youth Law ("NCYL") is a private, non-profit law firm that uses the law to help children achieve their potential by transforming the public agencies that serve them. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. One of NCYL's priorities is to ensure that youth have access to appropriate education services to improve their educational outcomes and reduce the number of youth subjected to harmful and unnecessary incarceration. NCYL provides representation to children and youth in cases that have broad impact, and has represented many students in individual and class litigation and administrative complaints to ensure their access to adequate,

appropriate and non-discriminatory services. NCYL currently represents, and has represented, students in challenging the violation of their federal rights in special education by school districts in federal courts throughout the nation.

The Equal Justice Society ("EJS") is transforming the nation's consciousness on race through law, social science, and the arts. Through litigation and legislative advocacy, EJS challenges racially discriminatory and unlawful school practices that disproportionately target Black and Latinx students and deprive students of color and students with disabilities of their education. EJS has a strong interest in seeing that the School District of Philadelphia provides necessary and sufficient interpretation and translation services as legally required under the Individuals with Disabilities Education Act, to ensure that the thousands of LEP families with students in the District can understand and participate in their students' special education processes.

The Judge David L. Bazelon Center for Mental Health Law ("Bazelon Center"), is a non-profit legal advocacy organization dedicated to advancing the rights of people with disabilities, including mental disabilities, for over four decades. Ensuring that children with disabilities are provided with a free appropriate public education, as mandated by the IDEA, is a central part of the Bazelon Center's mission. The Center has litigated groundbreaking class actions seeking to improve educational and health services for children with mental disabilities, including *Mills v. Board of Education of D.C.*, 348 F. Supp. 866 (D.D.C. 1972).

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 4 million members, activists, and supporters dedicated to defending and preserving the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU strives for an America free of discrimination; when the government has the power to restrict due process for one vulnerable group, everyone's rights are at risk. The ACLU has a longstanding interest in fighting inequality in education, and seeks to ensure full access to education for all marginalized communities.

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services, including adequate educational services. Juvenile Law Center urges courts to recognize the important constitutional guarantees that protect children's liberty interests and educational rights. Juvenile Law Center participates as amicus curiae in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

Education Law Center ("ELC") is a nonprofit organization that advocates on behalf of public school children for equal and adequate educational opportunity under state and federal laws. Across the country, ELC provides research and analyses related to education cost and fair school funding, high quality preschool, and other

proven education programs; assists parent and community organizations, school districts, and state policymakers in gaining the expertise needed to improve outcomes for disadvantaged children; and supports litigation and other efforts to bridge resource gaps, especially in the nation's high-need and high-poverty public schools. ELC has extensive experience litigating education rights cases, including special education and class action litigation.

The Center for Law and Education ("CLE") is a non-profit organization working to make the right of all students to a high-quality education a reality, with an emphasis on low-income students, and has participated in successful class actions on their behalf, as well as collaborative projects with school systems in furthering that right. It served for twenty-five years as the national center to support neighborhood legal services programs on education issues. CLE has a long history of work on behalf of students with disabilities and students and families with limited English proficiency, including representation of those who share both characteristics.

Equal Rights Advocates ("ERA") is a national non-profit civil rights organization that fights for gender justice in workplaces and schools across the country. Since 1974, ERA has stood on the front lines of the struggle for civil rights and social justice, fighting to protect and expand rights and opportunities for women, girls, and people of all gender identities through groundbreaking legal and legislative advocacy. ERA has served as counsel and participated as amicus curiae in numerous class action and individual cases involving the interpretation and enforcement of civil

rights laws, including Title IX of the Education Amendments of 1972, that are essential to providing and ensuring full and equal access to education in private and public institutions. From its decades of experience, ERA knows that preserving plaintiffs' access to injunctive and declaratory relief via class action lawsuits is critical to enforcing these laws and fulfilling the promise of equal educational opportunity for all.

Children's Rights is a national advocacy non-profit organization dedicated to improving the lives of vulnerable youth in government systems. Children's Rights uses class action litigation to advocate on behalf of children harmed by America's broken child welfare, juvenile justice, education, and healthcare systems. Children's Rights' work includes a proposed class action under the IDEA to ensure that eligible youth with disabilities receive the special education services to which they are entitled while detained in a county jail.

Disability Rights Advocates ("DRA") is a non-profit, public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, and housing. DRA's clients, staff and board of directors include people with various types of disabilities. With offices in New York City and Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities nationwide

Lawyers for Good Government ("L4GG") is a non-profit organization representing a community of more than 125,000 lawyers, law students, and activists. L4GG coordinates large scale pro bono programs and issue advocacy efforts to ensure that all levels of government—national, state, and local—provide equal rights, equal opportunities, and equal justice to all. L4GG has an interest in this amicus brief to ensure that marginalized communities can challenge violations of their civil rights by class action lawsuits to ensure they have access to justice.

Public Advocacy for Kids ("PAK") is a national policy organization advocating for the education, academic, social services, health and child care, nutritional and developmental needs of children and families, especially low income, special needs and those students who are often marginalized and denied equal justice. It has been common practice of our organization to seek redress through the courts to enforce equity, non-discrimination, social justice, and civil rights of students and their parents, and therefore PAK's major interest in supporting this amici brief.

Education Deans for Justice and Equity ("EDJE") is a nationwide alliance of deans of colleges and schools of education that advances equity and justice in education by speaking and acting collectively and in solidarity with communities regarding policies, reform proposals, and public debates. We speak on issues from the perspective of educational research, which soundly supports this amicus brief.

The Community Justice Project ("CJP") engages in class action litigation and other systemic advocacy to help create positive change for low-income residents of

Pennsylvania. CJP has experience advocating for the rights of students in Pennsylvania school districts, especially LEP students. CJP is a leader in the Commonwealth on issues of language access, having engaged in advocacy to address language access issues in housing, policing, the court system, and other public institutions. Given CJP's extensive experience in language access, CJP has an interest in ensuring that school districts across Pennsylvania provide meaningful and appropriate translation and interpretation services to parents and guardians of students with disabilities.

The Legal Aid Justice Center ("LAJC") partners with communities and clients to achieve justice by dismantling systems that create and perpetuate poverty. LAJC's mission is to seek equal justice for all by solving clients' legal problems, strengthening the voices of low-income communities, and rooting out the inequities that keep people in poverty.

Disability Rights Maryland ("DRM") is the designated Protection and Advocacy Agency for the State of Maryland— a non-profit agency established under federal law to protect, advocate for and advance the rights of children and adults with disabilities. DRM has provided case representation to thousands of students with disabilities and has engaged in systemic education litigation, including the *Vaughn G., et al., v. Mayor and City Council of Baltimore* lawsuit. DRM has an interest in a just resolution for students with disabilities who need access to the courts to enforce their rights. Litigating systemic policy violations on a case by case basis, rather than for

class wide relief, will result in a lack of enforcement of the rights of students with disabilities, inefficient and ineffective use of judicial resources, and an increased ability of school systems to continue illegal policies and practices for the many while providing remedy only for the litigious few.

For almost fifty years, Advocates for Children of New York ("AFC") has worked with low-income families to secure quality public education services for their children, including children with disabilities. AFC provides a range of direct services, including advocacy for students and families in individual cases, and also pursues institutional reform of educational policies and practices through advocacy and litigation. AFC routinely advocates for the educational rights of children and their families through class actions and therefore has a strong interest in this appeal.

The Youth Justice Education Clinic ("YJEC") at Loyola Law School's Center for Juvenile Law and Policy represents system-involved young people with disabilities in special education and school discipline proceedings in Los Angeles county. Many of YJEC's clients come from households that primarily speak a language other than English and require translation and interpretation services in order to meaningfully participate in education advocacy. To decrease the barriers to education that our clients, their families, and other like them around the country face, YJEC has a strong interest in ensuring that families can obtain injunctive and declaratory relief through federal class actions on issues such as speedy translation and interpretation services for parents with limited English proficiency.

SUMMARY OF THE ARGUMENT

Class actions have played an essential role in securing some of the most important civil and educational rights. For example:

- The Supreme Court reversed the "separate but equal" doctrine and declared racial segregation unconstitutional in a class action brought by the families of thirteen black children denied enrollment at the school closest to their home in Topeka, Kansas, in *Brown v. Board of Education*.[2]

- After *Brown*, it was through a class action on behalf of ten black students who still faced de facto segregation in central Charlotte that the Supreme Court ordered busing to achieve school integration.[3]

- The Individuals with Disabilities Education Act ("IDEA") arose from two class actions—including one within this Circuit—challenging school districts' denial of free education to children with disabilities.[4]

- In one of the first cases interpreting a "free and appropriate public education" ("FAPE") under IDEA, families of children with disabilities successfully challenged a Pennsylvania policy capping the maximum days of instruction at 180, in a class action affirmed by this Court.[5]

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[2] 347 U.S. 483 (1954). While "there can be no doubt that the Supreme Court in *Brown* . . . sought to combat racial inequality and segregation, . . . *Brown* is also about education—education as a civil right." William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897 (2017)

[3] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1(1971).

[4] *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 180 n.2 (1982) (reciting legislative history of IDEA). One case challenged a Pennsylvania law allowing public schools to deny a free education to children who reached the age of eight, but had not yet reached the mental age of five. *P.A.R.C. v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971). The other case challenged the District of Columbia's denial of education to children it considered to be "mentally retarded, emotionally disturbed, physically handicapped, hyperactive and other children with behavioral problems." *Mills v. Board of Education of D.C.,* 348 F. Supp. 866, 868 (D.D.C. 1972).

[5] *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir. 1980).

Simply put, class actions are an integral part of the pursuit of educational and civil rights by enabling otherwise marginalized individuals to collectively challenge unlawful or discriminatory laws and policies. The district court's decision, however, embraces an approach to numerosity and commonality that, if affirmed, imperils the availability of class actions for these important cases going forward.

The district court's approach to numerosity is of acute concern in cases such as this one, and others to follow, that seek injunctive relief protecting the educational and civil rights of future class members. Indeed, the district court altogether disregards the existence of future class members. Some of those future class members are students who currently attend the school district but have not yet been identified as having special needs (and who—because of the systemic problems—might *never* be so identified). Others are children who have yet to enroll. Still others are not yet born. Joinder of any of these students is not only impracticable but impossible. Yet the district court ignores them.

The district court also misapprehends the Plaintiffs' evidence of numerous current class members in a way that would make numerosity an insurmountable obstacle in many other education rights cases. While a court may not certify a class based on bald speculation, it is also improper to deny certification based on far-fetched speculation that numerosity might be somehow lacking. Yet the district court found inadequate numerosity on the theory that *some* of the thousands of special education students already enrolled and identified in the school district who come

from homes that speak a primary language other than English—many of whom themselves are not English-proficient—*might* have bilingual parents who are proficient in English. While possibly true for some, that would have to be true for almost 99% of those households—a conclusion that defies common sense—to be a valid basis to deny class certification.

As to commonality, the district court purports to follow in the path of the Supreme Court's decision in *Wal-Mart v. Dukes.*[6] But that case did not alter the historic role of class actions in redressing the common harms experienced by students and caused by the policies and practices of public entities—such as Plaintiffs seek to do here. To the contrary, certification remains proper in cases like this one, in which plaintiffs seek injunctive relief based on common contentions of law and fact capable of class-wide resolution.

ARGUMENT

I. THE DISTRICT COURT'S RULING UNDERMINES THE PURPOSE OF CLASS ACTION AS A TOOL TO VINDICATE INDIVIDUAL RIGHTS THROUGH COLLECTIVE ACTION.

A. The Express Purpose of Rule 23(b)(2) Was Strengthening Class Actions as a Weapon Against Discrimination and Oppression.

The modern class action rule was a response to the fierce opposition that arose in the wake of *Brown v. Board of Education*, which outlawed racial school segregation, accelerated the civil rights movement, and was itself a class action under the original

[6] 564 U.S. 338 (2011).

Rule 23 adopted in 1938. The subsequent history informs the application of Rule 23(b)(2) here. White southern backlash to *Brown* was intense, with most southern states creating "pupil assignment" laws to prevent more class actions challenging ongoing segregation.[7] Such laws governed the transfer of students between schools and required school boards to consider—or at least give token consideration to—many individualized factors when making school placement decisions for each pupil.[8] The laws' true purpose was to give school boards a class action-proof pretext to segregate, by rendering the segregation decisions too "individualized" to certify for class treatment.

The southern states' tactic worked—at least at first. In one case, for example, a South Carolina district court rejected class certification by reciting the various requirements of the pupil assignment laws and concluding the class would be too individualized because "a School Board must consider a great many factors unrelated to race, such as geography, availability of bus transportation, availability of classroom space, and scholastic attainment in order to . . . place the child in the school where he has the best chance to improve his education." *Brunson v. Board of Trustees of School District No. 1*, 30 F.R.D. 369, 371 (E.D.S.C. 1962).[9] Courts' refusal to certify classes in

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[7] *See* Hon. David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1081 (2004).

[8] *Id.*

[9] *See also Carson v. Warlick*, 238 F.2d 724, 729 (4th Cir. 1956) (internal citation omitted) (upholding similar pupil assignment statute) ("[Students] are admitted . . . as

these cases made school integration nearly impossible; students could only seek to alter their school placement one by one, case by case.

The Advisory Committee on the Rules of Civil Procedure put states' efforts to undermine civil rights class actions in its crosshairs when it amended Rule 23 in 1966.[10] The revised rule tore down the southern states' newly created barriers by focusing not on individual circumstances, but on the harm that all members of a group shared and that could be remedied by group relief.[11] The Committee's members—many of whom were civil rights advocates as well as civil procedure scholars—spoke to this explicit purpose in congressional hearings and in private letters.[12]

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individuals, not as a class or group. . . the school board must pass upon individual applications made individually to the board.").

[10] The advisory committee's notes in the text of Rule 23 leave no doubt as to this intent. The notes describe as "illustrative" actions that would fall under (b)(2) "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." FED. R. CIV. P. 23, advisory committee's notes to 1966 amendment. As examples, the committee's note includes citations to a long list of class action cases challenging pupil assignment laws. *Id.*

[11] *See Wal-Mart*, 564 U.S. at 361 ("In particular, [Rule 23(b)(2)] reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single class-wide order.").

[12] *See* Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 KAN. L. REV. 325, 328-59 (2017) (detailing the historical record of the drafting process for 1966 amendments to Rule 23).

The new provision they added—Section (b)(2)—allows certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[13] The new provision cleared the path to certify classes challenging discriminatory policies that applied to all class members, allowing plaintiffs to overcome factual variations in how those policies affected class members. In this case, in holding that variations in how students were affected by the school district's failure to provide legally required language services precluded class certification, the district court failed to apply Rule 23(b)(2) as it was intended.

B. Rule 23(b)(2) Class Actions Have Been an Inseparable Part of the Pursuit of Educational Rights.

Often in the context of class actions, the Supreme Court has repeatedly emphasized the critical importance of education.

In *Brown*, the Court wrote that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. at 493.

[13] As one of the drafters, John P. Frank, later wrote: "If there was [a] single, undoubted goal of the [Advisory] Committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation. The one part of the rule which was never doubted was (b)(2) and without its high utility, in the spirit of the times, we might well have had no rule at all." John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions, in 2 Working Papers of the Advisory Comm. On Proposed Amendments to Civil Rule 23 260, 266* (Rules Committee Support Office, 1997), http://www.uscourts.gov/sites/default/files/workingpapers-vol2.pdf.

In a case brought by a class of Ohio students to ensure their entitlement to due process protections, the Court proclaimed education to be "perhaps the most important function of state and local governments." *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (quoting *Brown*, 347 U.S. at 493).

And in upholding the rights of a class of undocumented children to attend public school, the Court affirmed that "education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Plyler v. Doe*, 457 U.S. 202 (1982).

The importance of education applies with equal force for students with disabilities. The IDEA[14] statute arose, in large part, from a pair of historic district court class actions.[15] In turn, Congress envisioned that class-wide and systemic injunctive relief as key to enforcement of the IDEA. For example, in discussing the IDEA's administrative remedies, the statute's original sponsors declared that the IDEA does not "require each member of the class to exhaust such procedures in any *class action* brought to redress an alleged violation of the statute." 121 Cong. Rec. S20, 433 (Nov. 19, 1975) (statement of Sen. Williams) (emphasis added). *See also* H.R. Rep.

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[14] The predecessor to the IDEA, the Education for All Handicapped Children Act, was enacted in 1975. *See* Education for all Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.

[15] *See P.A.R.C.*, 334 F. Supp. 1257; *Mills*, 348 F. Supp. 866.

No. 99-296 at 7 (1985) (stating that exhaustion of administrative remedies was not required when agency has adopted illegal policy or practice of general applicability). With full knowledge that Rule 23(b)(2) class actions have been used to enforce the provisions of the IDEA, Congress has continued to reauthorize the IDEA, most recently in 2004, and has amended it as recently as 2015 without adding any language to prohibit or restrict class actions.[16]

The Third Circuit has a particularly robust history of certifying classes seeking to vindicate their civil rights. *See, e.g.*, *Baby Neal ex rel. Kanter v. Casey,* 43 F.3d 48 (3d Cir. 1994) (noting that commonality requirement is "easily met" and that Rule 23(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.").

In the specific context of education for children with disabilities, courts in the Third Circuit have certified classes challenging:

- Allocation of special education funding based on formulas that resulted in the deprivation of a free and appropriate public education under the IDEA, *C.G. v. Pa. Dep't of Educ.*, CIV.A 1:06-CV-1523, 2009 WL 3182599, at *8 (M.D. Pa. Sept. 29, 2009);

- Denial of access of children with disabilities to vocational-technical programs, *Serventi v. Bucks Tech. High Sch.*, 225 F.R.D. 159 (E.D. Pa. 2004);

[16] *See* ABOUT IDEA, U.S. DEP'T OF EDUCATION, https://sites.ed.gov/idea/about-idea/.

- Identification and timely evaluation of students with disabilities, *M.A. ex rel. E.S. v. State-Operated Sch. Dist. of City of Newark,* 344 F.3d 335, 352 (3d Cir. 2003);

- Failure to provide one-to-one support for children with mental health disabilities, *Kellner v. Sch. Dist. of Philadelphia and Pennsylvania Dep't of Educ.*, No. 98-cv-6190 (E.D. Pa. Apr. 30, 1999);

- Denial of the option of receiving a free appropriate education in regular classrooms with individualized supportive services, *Gaskin v. Pennsylvania*, No. CIV. A. 94-4048, 1995 WL 355346 (E.D. Pa. June 12, 1995);

- Delay in providing an appropriate educational placement for children with disabilities whose school districts have determined that placements were not available, *Cordero v. Pennsylvania Dep't of Educ.*, 795 F. Supp. 1352, 1357 (M.D. Pa. 1992); and

- A state statute limiting access to educational services for children with disabilities abandoned by their parents from another state, *Steven M. v. Gilhool*, 700 F. Supp. 261 (E.D. Pa. 1988).

The prevalence and importance of class actions in enforcing the IDEA is further established by the many other cases certifying such classes nationwide. [17]

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[17] *See, e.g.*, *R.A-G ex rel. R.B. v. Buffalo City Sch. Dist. Bd. of Educ.*, No. 12-CV-960S, 2013 WL 3354424 (W.D.N.Y. July 3, 2013), *aff'd sub nom. R.A.G. ex rel. R.B. v. Buffalo City Sch. Dist. Bd. of Educ.,* 569 F. App'x 41 (2d Cir. 2014); *J.G. ex rel F.B. v. Mills*, 2010 WL 5621274, *1, 5 (E.D.N.Y. Dec. 28, 2010), report and recommendation adopted, 2011 WL 239821 (E.D.N.Y. Jan. 24, 2011); *L.M.P. ex rel. E.P. v. Sch. Bd*, 516 F. Supp. 2d 1294, 1304 (S.D. Fla. 2007) (denying motion to dismiss class claims and noting "claims of generalized violations of the IDEA lend themselves well to class action treatment"); *Barr-Rhoderick v. Bd. of Educ.*, 2006 U.S. Dist. LEXIS 72527 (D.N.M. Apr. 11, 2006); *J.S. v. Attica Cent. Schs.*, 2006 U.S. Dist. LEXIS 12827, 2006 WL 581187 (W.D.N.Y. Mar. 7, 2006); *LV v. N.Y. City Dep't of Educ.*, 2005 U.S. Dist. LEXIS 20672 (S.D.N.Y. Sept. 15, 2005); *D.D. v. N.Y. City Bd. of Educ.*, 2004 U.S. Dist. LEXIS 5189 (E.D.N.Y. Mar. 30, 2004) *rev'd in part on other grounds* by 465 F.3d at 515; *Blackman v. District of Columbia*, 328 F. Supp. 2d 36 (D.D.C. 2004); *Corey H. ex rel. Shirley P. v. Bd. of Educ.*, 995 F. Supp. 900 (N.D. Ill. 1998); *Petties v. District of Columbia*, 881 F. Supp. 63 (D.D.C. 1995); *Jones v. Schneider*, 896 F. Supp. 488 (D.V.I. 1995);

Nothing in the Supreme Court's opinion in *Wal-Mart* changes this historic and correct application of Rule 23(b)(2) to certify classes of students with disabilities asserting their educational civil rights. Post-*Wal-Mart*, for example, district courts in this Circuit have certified a class of autistic students who challenged frequent school transfers, *P.V. ex rel. Valentin v. Sch. Dist. of Philadelphia*, 289 F.R.D. 227, 236 (E.D. Pa. 2013), and a class of students with disabilities challenging school funding decisions that allegedly resulted in decreased special education funding, *Chester Upland Sch. Dist. v. Pennsylvania*, No. CIV.A. 12-132, 2012 WL 1450415, at *1 (E.D. Pa. Apr. 25, 2012).

II. THE DISTRICT COURT'S ERRONEOUS APPROACH THREATENS TO DEVASTATE THE ABILITY OF CHILDREN AND THEIR PARENTS TO ENFORCE EDUCATION RIGHTS.

A. The Proposed Classes Satisfy the Numerosity Requirement.

1. Future Class Members Make Joinder Impracticable, Thus Satisfying Rule 23(a)(1).

In ruling that the proposed classes are sufficiently ascertainable yet fail to meet Rule 23(a)'s numerosity requirement, the district court lost sight of one of the main purposes of the lawsuit: obtaining injunctive relief for *future* class members.[18] From *Brown* through today, educational rights litigation is forward-looking, aiming to protect

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Reusch v. Fountain, No. MJG-91-3124, 1994 WL 794754 (D. Md. Dec. 29, 1994); *Evans v. Evans*, 818 F. Supp. 1215 (N.D. Ind. 1993); *Louis M. v. Ambach*, 113 F.R.D. 133 (N.D.N.Y. 1986); Andre H. v. Ambach, 104 F.R.D. 606 (S.D.N.Y. 1985).

[18] Plaintiffs moved to certify their classes under 23(b)(2), seeking only injunctive relief and not damages. Importantly, both the Parent Class and Student Class contain future class members. Dkt. No. 83 at 1-2.

not just those students currently affected by unlawful policies, but everyone else who will come later.[19] It is well-established that joinder of such future class members is not merely "impracticable"—which is the touchstone to satisfy numerosity[20]—but, given the constant fluidity of students in this or any other case seeking to vindicate education rights, is impossible. *See Westchester Ind. Living Ctr. Inc. v. State Univ. of New York*, 331 F.R.D. 279, 290 (S.D.N.Y. 2019) ("[M]any class members are unidentifiable at this stage because . . . the class is fluid – new freshmen, transfer, and visiting students come in each year, while graduating and visiting students leave. . . . Joinder of all class members at this stage is therefore difficult, if not impossible."). The district court thus erred by failing to even acknowledge the presence of future class members in its analysis.

The impracticability of joining future class members is not new. This Court recognized almost forty years ago that the existence of future class members makes joinder impracticable. *See Weiss v. York Hosp.*, 745 F.2d 786, 808 (3d Cir. 1984) ("A judicial determination that a particular practice infringes upon protected rights and is

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[19] *See* Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U.L. REV. 423, 468 (2016) ("The enforcement or non-enforcement of education rights today will have both short- and long-term effects. And those long-term effects may be even more important.").

[20] Although commonly called the "numerosity" requirement, Rule 23(a)(1)'s "core requirement is that joinder be impracticable" and numerosity merely "provides an obvious situation in which joinder may be impracticable." Newberg on Class Actions § 3:11 (5th ed. 2018).

therefore invalid will prevent its application by the defendant against many persons not before the court. Thus rigorous application of the numerosity requirement would not, as the district court noted, appear to be warranted"); *see also Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001) ("The joinder of potential future class members who share a common characteristic, but whose identity cannot be determined yet is considered impracticable."); *Lanning v. Southeastern Penn. Transp. Auth.*, 176 F.R.D. 132, 148 (E.D. Pa .1997) ("The number of women who will apply in the future and who will be denied the equal opportunity to become SEPTA police officers is necessarily unidentifiable and thus their joinder is certainly impracticable.").

The D.C. Circuit emphasized this same principle last year, explaining that classes that include "future claimants generally meet the numerosity requirement due to the impracticality of counting such class members, much less joining them." *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019). Other courts that have reached this issue agree. *See also Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000) (finding numerosity satisfied in case alleging sexual discrimination in women's collegiate athletics because "numerous future female LSU students will desire to try out for varsity soccer and fast-pitch softball"); *D.L. v. District of Columbia*, 302 F.R.D. 1, 11 (D.D.C. 2013) (recognizing in IDEA class action that "the class seeks prospective relief for future class members, whose identities are currently unknown and who are therefore impossible to join."); *Putzer v. Whorton*, 2008 WL 4167509, at *8 (D. Nev. Sept. 3, 2008) ("A class which includes unnamed and unknown future members

supports the numerosity requirement regardless of the class size, as joinder of said members is impracticable."); *Ali v. Ashcroft*, 213 F.R.D. 390, 408–09 (W.D. Wash. 2003) ("[W]here the class includes unnamed, unknown future members, joinder of such unknown individuals is impracticable and the numerosity requirement is therefore met, regardless of class size."); *Gomez v. Illinois State Bd. of Educ.,* 117 F.R.D. 394, 399 (N.D. Ill. 1987) (noting that "numerosity is met where . . . the class includes individuals who will become members *in the future.* As members *in futuro,* they are necessarily unidentifiable, and therefore joinder is clearly impracticable."); Newberg on Class Actions § 3:15 (5th ed. 2018) ("future claimants . . . may make class certification more, not less, likely . . . [and] courts generally state that the numerosity requirements are relaxed due to the difficulty in determining the number and identity of these future claimants.").

The school district's systemic discriminatory practices here have, and will continue to have, a far broader effect than just the students currently enrolled. If not corrected, future students whose parents require translation and interpretation services to meaningfully participate in the IEP process and guide their children's education will not receive essential services. Within only five or six years, students who have not even been born yet—and thus certainly cannot be practicably joined—will be subject to the district's discriminatory policies if this Court does not intervene. The same is true for students who may already be enrolled in the District but have not yet been evaluated for or identified as having a disability and thus also cannot now be

joined. Joinder is thus impracticable and meets the requirements of Rule 23(a)(1) without more.

2. The Court Failed to Draw Reasonable Inferences Regarding Numerosity From the Evidence Before it.

The district court's denial of class certification also inflicts damage to basic principles of what is necessary to show numerosity among *current* class members in a civil rights case by conflating common-sense inferences with impermissible speculation. Indeed, common sense inferences as applied to testimonial evidence and statistics maintained by a school district are often the only viable sources of support for numerosity in IDEA and other education rights class actions.

Common sense dictates that there are at least forty special education students in the District whose families have limited English proficiency.[21] To start, there is sufficient numerosity if slightly more than *one-percent* of the 3,500 to 3,800 special education students in households with a home language other than English have parents with limited English proficiency.

But the percentage is likely much greater. Of the 25,990 families in the District with a primary home language other than English, 75% expressly requested documents in another language. Common sense suggests they did so because they are not English proficient. Applying that math to what else we know, that would amount

[21] It is well established that while there is "no magic number," forty potential current class members would satisfy numerosity. *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001).

to approximately 2,900 special education students in the District with parents who are not English proficient (75 % of the 3,800 special education students in households with a home language other than English).

Yet there are still more ways of approaching this, with the same result. For example, there are 1,500 students who both receive special education services and who are also English language learner students—meaning they *have not acquired English proficiency at home*. If just 3% of those children have parents who are also not proficient numerosity would be easily met (.03 X 1,500 = 45 students). Plaintiffs' brief provides yet more evidence showing sufficient numerosity, limited only by the District's own failure to collect as much information as it should have.

The district court noted all of these figures, yet still found that it would require "impermissible speculation" to say there were at least forty students whose parents are not English proficient. Not so. What *is* unreasonably speculative is what the district court itself did—give credence to the absurd notion that the District has thousands of special education students who come from homes that primarily speak another language, whose parents request materials in another language, and who themselves are *not* English proficient, yet that virtually all of their parents somehow *are* English proficient. The district court's logic is akin to insisting water is not wet while standing in a downpour.

The district court reasoned that "[t]he theory that a home with a primary language other than English thus proves that the parents in that home are limited

English proficient fails to acknowledge the very real possibility that the parent may also be multilingual or proficient in English." Memorandum at 2. Indeed, there is a possibility that *some* of the parents of the several thousand special education students identified may be multi-lingual. Some almost certainty are—adoption, for example, could create such an occurrence. But to suggest that 99% of them might be—as the district court necessarily had to do to reject numerosity—is absurdly fanciful. *See Gomez*, 117 F.R.D. at 3987-99 ("[a] court is entitled to make a good faith estimate of the number of class members. . . it is entirely reasonable that there are hundreds, possibly thousands, of Spanish speaking children dispersed over the entire state of Illinois who fit squarely within the class definition "). The district court's casual disregard of the evidence of numerosity before it is legally wrong and damning to the pursuit of vindicating education rights under IDEA and other education civil rights laws. Indeed, the same logic could be applied to eviscerate numerosity in countless IDEA and other education civil rights class actions past, present, and future and encourage other school districts not to record or only minimally maintain similarly important data.

Largely rejecting Plaintiffs' evidence, the court cites to one anecdotal declaration by one special education teacher from the school district who claimed

that, with one or two exceptions, all of the parents of her students spoke English. Memorandum at 22.[22]

The district court simultaneously disregarded statements by three individuals who collectively had been in dozens of meetings of special education students with LEP parents. The district court's only explanation for this was that, per a footnote, none of the testimony touched on "whether those parents were able to meaningfully participate in their child's education." Memorandum at 22 n.5. Such reasoning, however, is an impermissible inquiry into the merits—whether meaningful participation was provided—and not into the appropriate question at class certification of numerosity—whether there are a sufficient number of parents who are LEP. Contrary to the district court's conclusion, that testimony is strong, direct evidence of numerosity, supports certification, and was wrongly disregarded by the court as part of an impermissible merits inquiry. *See In re Wellbutrin SR Direct Purchaser Litig.*, No. 04-5525, 2008 U.S. Dist. LEXIS 36719, at *6 (E.D. Pa. May 2, 2008). These witness statements are direct evidence of numerosity and satisfy Rule 23.

[22] The district court cites to one additional declaration from another teacher for the proposition that the home language surveys do not measure English proficiency and that only anecdotal data would allow a teacher to know if parents were LEP. Memorandum at 22.

B. The District Court Misapplied *Wal-Mart v. Dukes* and Ignored a Common Course of Conduct.

Despite acknowledging that the commonality bar is "not a high one," the district court misconstrued precedent to find a lack of commonality. It may be true that '[a]ny competently crafted class complaint literally raises common questions." Memorandum at 25 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)). But it is equally true that a court can improperly find a lack of commonality by applying too stringent of a standard, as the district court did here.

Wal-Mart did not change the law surrounding numerosity, but did clarify the law surrounding commonality. *See, generally, Wal-Mart*, 564 U.S. The circumstances, and reasoning, of *Wal-Mart* are markedly different both from this case and IDEA and other education civil rights actions more generally and do not stand in the way of class certification in such cases.

1. This Case, and Similar IDEA and Other Education Civil Rights Class Actions, Adequately Allege a Common Course of Conduct Satisfying *Wal-Mart*.

Wal-Mart reaffirmed the ability of plaintiffs to maintain a class action based on "significant proof" that a defendant followed a "general policy of discrimination." *Wal-Mart*, 564 U.S. at 333. The Supreme Court found that commonality was lacking because plaintiffs had not established an institution-wide policy of discrimination. *Id.* at 333-335. The fact pattern in that case was vastly different than here. The class certified by the district court consisted of more than 1.5 million plaintiffs at thousands

of locations in disparate geographic areas, working under different managers, all of whom had discretion to set wages. Plaintiffs failed to "bridge the gap" between the discrimination they allegedly faced and a systemic, institutional policy that resulted in the discrimination. *Id.* And, notably, it was not *per se* discrimination in that case to be paid differently. Plaintiffs had the burden to demonstrate they were paid differently for a discriminatory reason.

Here, by contrast, IDEA imposes an affirmative mandate to allow "meaningful participation" by parents in the IEP process. *See, e.g.,* 34 C.F.R. 300.322. This affirmative mandate is the "glue" that holds the class together. *Wal-Mart*, 564 U.S. at 352. It does not matter *why* meaningful participation was denied, simply that it was. The D.C. Circuit explained this in terms that apply with equal force in this case:

> There is, however, a significant distinction between *Wal-Mart* and this case. . . . IDEA requires the District to find and serve all children with disabilities as a condition of its funding. Unlike Title VII liability, IDEA liability does not depend on the reason for a defendant's failure and plaintiffs need not show why their rights were denied to establish that they were. They need only show that the District in fact failed to identify them, failed to provide them with timely eligibility determinations, or failed to ensure a smooth transition to preschool. *Wal-Mart's* analysis of commonality in the Title VII context thus has limited relevance here.

See DL v. District of Columbia, 860 F.3d 713, 725 (D.C. Cir. 2017). Here, Plaintiffs have alleged a specific, institutional practice of failing to provide adequate translation and interpretation services. That is sufficient to support a finding of commonality.

As this Court found in another post-*Wal-Mart* case, "[u]nlike the *Wal-Mart* plaintiffs, the Plaintiffs in this case have alleged that the class was subjected to the

same kind of illegal conduct by the same entities, and that class members were harmed in the same way, albeit to potentially different extents." *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, PNC Bank NA, 795 F.3d 380, 399 (3d Cir. 2015). As in *In re Cmty Bank*, the Plaintiffs in this case have alleged the same kind of illegal conduct (failure to provide adequate translation and interpretation services), by the same entity (the school district), and suffered the same harm (inability to meaningfully participate in the IEP process). This Court found commonality in that class even where, as potentially is the case here, the harm each individual plaintiff suffered was of a potentially different scale. *Id.*

2. The Allegations Are Sufficient to Form the Basis for a Finding of Commonality.

The crux of the district court's ruling on commonality is that there is no "independent requirement" that translation or interpretation services be provided, finding such services necessary only to the extent they are required to allow for meaningful participation. Memorandum at 29. It is the "amorphous and individualized nature" of meaningful participation that the district court finds precludes commonality. In doing so, the district court advances dangerously circular reasoning.

When, as here and in other education cases, a school district fails at the first and broadest step of even making adequate services available—essentially, a lack of necessary action—the resulting individualized differences among class members with

respect to how they are affected and which particular services they may need cannot defeat commonality. As one court explained:

> The defendants, by refusing to promulgate uniform guidelines by which to assess and place LEP children, and by refusing to supervise local school districts' implementation of assessment guidelines and placement of LEP children, have clearly refused to act on grounds generally applicable to the class.

Gomez, 117 F.R.D. at 403 (N.D. Ill. 1987).

The regulations supporting IDEA clearly require the "[u]se of interpreters or other action, as appropriate." 34 C.F.R. 300.322. Indeed, the requirement is unmistakable:

> The public agency *must* take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

Id. (emphasis added). Here, the school district failed to act. Yet despite the clarity of this broad mandate, the district court found no commonality because the implementation of the broader goal would turn on individual accommodation—"whatever action is necessary." Such reasoning would preclude class actions under not only IDEA, but also under the Americans with Disabilities Act, the Pregnancy Discrimination Act and other federal anti-discrimination statutes requiring covered entities to take affirmative actions to ensure civil rights. *See, e.g.*, *Frederick L. v. Dep't of Pub. Welfare*, 422 F.3d 151, 160 (3d. Cir. 2005) (in Americans with Disabilities Act class action, reversing district court decision that class plaintiffs seeking "integration

accommodation[s]" to facilitate deinstitutionalization had not proven systemic liability).

The allegations here simply do not require the sort of individualized inquiry that would defeat class certification. Rather, they are precisely the sort of allegations that are routinely brought in these sorts of cases—allegations of systemic behavior that impacts all class members in the same general way. As this Court noted in *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 427 (3d Cir. 2016), that does not mean every class member has the same injury or even that every class member has been injured. All plaintiffs and proposed class members have suffered the same general injury—the systemic failure by the district to provide adequate language services. That some plaintiffs may need different forms of translation or interpretation services does not defeat commonality as the district court suggests. Whatever "meaningful participation" means, the nearly complete failure alleged by Plaintiffs to provide adequate language services to LEP parents is not it.

Moreover, the Court engaged in a lengthy merits inquiry to buttress its finding there is no commonality among class members. Memorandum at 33-36. For example, the court concluded that there is no commonality because the district provides some services such as a Procedural Safeguard Notice provided in eight languages outlining certain parental rights. Memorandum at 32. Even if there was reason to believe that such a notice was adequate to allow a finding of meaningful participation (which there is not), and even if there was reason to believe those eight

languages covered a sufficient number of families to defeat numerosity or commonality (which there is not), both of those inquiries are merits inquiries that may not be undertaken at the class certification phase. Additionally, these services are not dispositive at the merits stage because, as the lower court noted, Plaintiffs here allege that the services provided were inadequate which does not mean that in every case no services were provided at all. *Accord In re NFL*, 821 F.3d at 427. Even where the accommodation is provided, it must be effective in fostering meaningful participation.

Further, the district court's reasoning is inconsistent. On the one hand the court says it will not speculate when determining numerosity, yet on the other hand speculates that providing a notice in eight languages is potentially sufficient to provide meaningful participation and defeat commonality. *Compare* Memorandum at 19 *with* Memorandum at 32.

The classes ultimately certified and affirmed by the D.C. Circuit in *DL v. District of Columbia* are instructive. 860 F.3d at 718. There, the district court certified a Rule 23(b)(2) class of students who alleged harm by systemic violations of the IDEA "child find" obligation. The Supreme Court subsequently decided *Wal-Mart* and the school district appealed. The D.C. Circuit then vacated the class certification based on a lack of commonality because the plaintiffs' harms occurred at a variety of different stages of the educational process. *See DL v. District of Columbia*, 713 F.3d 120, 126 (D.C. Cir. 2013). The district court solved the problem on remand by certifying four subclasses—one for each particular provision of the IDEA that plaintiffs alleged was

breached. *DL*, 302 F.R.D. at 9. Each subclass addressed a specific "question whether the District's policies were adequate to fulfill a specific statutory obligation under the IDEA. Stated differently, each subclass alleges a uniform practice of failure that harmed every subclass member in the same way." *Id.* at 13. The D.C. Circuit upheld the subclasses and injunctive relief ordered on appeal, holding that the subclasses tied to a specific policy defect, as opposed to generalized violations of IDEA, satisfied Rule 23 and complied with *Wal-Mart*. *DL*, 860 F.3d at 718. *Cf Jamie S. v. Milwaukee Pub. Sch.,* 668 F.3d 481, 498 (7th Cir. 2012) (finding a lack of commonality because the range of violations was too broad).

This case, like many other education rights cases, mirrors *DL*. Plaintiffs have not alleged a violation of the IDEA generally, but rather, specific obligations the school district has failed to meet. As in *DL*, the Plaintiffs "do not seek to litigate the merits of individual, fact-specific IDEA claims . . . but whether the District generally met its statutory obligations to disabled children under the IDEA"—here, to provide translation and interpretation services allowing meaningful participation in the special education process by the parents of children with disabilities. 302 F.R.D. at 13. The facts and claims here fall squarely within the analytical framework identified in *DL* and the classes proposed by Plaintiffs should be certified.

CONCLUSION

For the foregoing reasons and as set forth in Plaintiffs' merits brief, the Court should reverse the district court's denial of class certification.

Dated: August 26, 2020

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeal for the Third Circuit.

Executed this 26th day of August 2020.

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I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B). It contains 6,455 words, excluding the parts of the brief exempted by Federal Rule 32(f).

2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

3. This brief complies with the electronic filing requirement of 3d Cir. L.A.R. 31.1.(c)(2011). The text of this electronic brief is identical to the text of the paper copies. Windows Defender (virus definition version 1.321.2184.0) has been run on the file containing the electronic version of this brief, and no virus has been detected.

Executed this 26th day of August 2020.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit, using the CM/ECF system, which will automatically send notification and an electronic copy of the brief to the counsel of record for the parties.

Executed this 26th day of August 2020.

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