UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

P.V., et al.,	:	
Plaintiffs,	:	
	:	**CIVIL ACTION**
v.	:	
	:	**NO. 2:11-cv-04027-LDD**
The School District of Philadelphia, et al.,	:	
Defendants.	:	

MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS SCHOOL DISTRICT OF PHILADELPHIA, ARLENE ACKERMAN, LINDA WILLIAMS AND THE SCHOOL REFORM COMMISSION

Defendants The School District of Philadelphia, Dr. Arlene Ackerman, Ms. Linda Williams, and the School Reform Commission (collectively, the "School District") respectfully move this Court for entry of summary judgment, dismissing the complaint of plaintiffs P.V., M.M., J.V., and R.S., with prejudice. In support of their motion, the School District avers as follows:

STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to this Court's procedures applicable to summary judgment motions, the following numbers paragraphs set forth those facts material to this motion that are not in dispute.

The Parties

1. The plaintiffs in this action are four children, P.V., M.M., J.V. and R.S. *See* Compl. (attached as Ex. A) ¶¶ 15-18.

2. Defendants Arlene Ackerman and Linda Williams are not currently employed by the School District.

3. Each of the plaintiffs has an Individualized Education Program ("IEP") that requires access to an autism support classroom. *Id.* The School District has provided the autism support required by the plaintiffs' IEPs at the Richmond Elementary School ("Richmond"), a kindergarten through fifth grade ("K-5") school. *See* Pl. Objs./Resps. to Defs. 1st Set Interrogs. (attached as Ex. B), at No. 7.

4. From kindergarten through second grade, the School District provided the autism support required by the plaintiffs' IEPs in a kindergarten through second grade ("K-2") autism support classroom at Richmond, where plaintiffs were taught by Ms. Leah Taylor. *Id*.

5. All of the plaintiffs regard Ms. Taylor as an excellent teacher. *See* H. Sanasac Dep. (attached as Ex. C), at 47:25 – 49:3; S. Vargas Dep. (attached as Ex. D), at 84:16 – 85:5; Y. Cruz Dep. (attached as Ex. E), at 6:3-11; C. Murphy Dep. (attached as Ex. F), at 51:14-23.

6. Prior to the 2011-2012 school year, Ms. Taylor's K-2 autism support classroom was the only autism support classroom at Richmond. *See* K. Hunt Dep. (attached as Ex. G), at 96:3-21.

7. The School District considered transferring each of the plaintiffs to a different school building, where the autism support required by plaintiffs' IEPs would be provided when the plaintiffs completed the second grade in the Spring of 2011. However, after plaintiffs initiated due process hearings to remain at Richmond for third grade, the School

District found suitable space in Richmond for a new third grade through fifth grade ("3-5") autism support classroom, which would allow the plaintiffs to remain at Richmond through fifth grade. *See* Tr., Due Process Hrg. of J.V. (attached as Ex. H), at 6:25 – 7:15.

8. For the 2011-2012 school year, all four plaintiffs continued to attend the Richmond school and received the autism support required by their IEPs in an autism support classroom taught by Ms. Rachel Szychulski. All of the plaintiffs acknowledge that Ms. Szychulski (whom they call "Miss S") is an excellent teacher. *See* Ex. C, at 80:22 – 81:23; Ex. D, at 74:7-10, 85:24 – 86:15; Ex. E, at 5:24 – 6:20; Ex. F, at 10:1-15.

9. None of the plaintiffs has ever been transferred from one school to another school because of a supposed automatic autism transfer policy.

The Location of the School District's Autism Support Classrooms

10. The School District operates over 250 school buildings and serves more than 154,000 students. *See* List of Schools (attached as Ex. I), at DEF1002-DEF1005; Intermediate Unit Sp. Educ. Plan Doc., 2011-2012 School Year (attached as Ex. J), at DEF633.

11. For the 2011-2012 school year, 1,684 kindergarten through eighth grade ("K-8") students were identified as requiring access to an autism support classroom. *See* Chart of Dist. Students with Autism (attached as Ex. K).

12. The School District currently has more than 130 autism support classrooms serving students in kindergarten through eighth grade. *See* M. Monras-Sender Dep. (attached as Ex. L), at 35:16 – 37:13.

13. The school buildings within the School District have varied grade configurations (for example, K-2, K-5, 6-8, and K-8). *See* Ex. I.

14. The School District's autism support classrooms for kindergarten through eighth grade most often cover three grades, kindergarten through second grade ("K-2"), third grade through fifth grade ("3-5") and sixth grade through eighth grade ("6-8"). Ex. A, at ¶ 36; Ex. I.

15. There is an uneven geographic distribution of children requiring autism support, located throughout the School District. Ex. G, at 100:6-22.

16. The School District does not maintain autism support classrooms in all of its schools. *See* S.D. Designee Dep. (attached as Ex. M), at 151:6 – 153:16.

17. The grades covered by autism support classrooms vary from school to school, meaning "there might be a K-2 [autism support] class in one school, [and] a 3-5 in another school." *Id.*; *see also* Tr., Due Process Hrg. for M.M. and P.V. (2/9/2011) (attached as Ex. N), at 655:6 – 656:22 (Maria Monras-Sender testimony).

18. Each year, based on information about how many students requiring autism support are entering the School District, leaving it, or moving from one grade level to the next, the School District's Special Education Directors undertake a complex process to identify suitable locations for autism support classrooms in the coming school year. Ex. M, at 45:21 – 49:9.

19. If, based on the above considerations, the Special Education Directors deem it appropriate to open a new autism support classroom in a school building (whether it be a

new K-2 classroom or a new 3-5 classroom), they then "walk around to classrooms [in the school]" to determine the feasibility of doing so, taking into account such considerations as whether there is sufficient space in the building and whether "there is a bathroom near the classroom we're proposing." *Id*. at 152:16 – 153:16; *see also* 22 PA. CODE § 14.144(3)(v) (requiring that all special education classrooms be "composed of at least 28 square feet per student"); 22 PA. CODE § 14.146(a) (stating that "maximum age range in specialized settings shall be 3 years in elementary school (grades K-6) and 4 years in secondary school (grades 7-12)").

20. Each year, many families move into the School District or move from one location in the School District to another without providing the School District with advance notification. *See* Ex. G, at 100:6-22.

21. On the first day of classes each year, many students simply "walk in the door" of their neighborhood school, without regard to whether they are registered there. *Id*. at 99:23 – 100:5.

Assigning Students to Autism Support Classrooms

22. When a student requiring autism support completes the highest grade level for which autism support is located in his or her current school building, the School District must determine the location at which the educational programs and services required by his or her IEP will continue to be provided. Ex. L, at 43:10-23.

23. Sometimes, as in the case of the plaintiffs here, the educational programs and services can continue to be provided in the same school building, but, if that is not feasible, they will be provided in a different building. Ex. L, at 42:12 – 43:3.

24. When the new location is in different building, the assignment to the new location is called an "upper-level transfer." Ex. M, at 37:22 – 38:9; Ex. L, at 37:24 – 39:23, 42:19 – 43:3. Whether the new location is in the same building or a different building, there is no claim (or evidence) in this case that the programs and services provided at the new location are deficient (or different) in any relevant respect.

25. Decisions relating to upper-level transfers are made about each student on an individual basis, based primarily upon his or her IEP. *See* L. Williams Decl. (attached as Ex. O), at ¶ 8; Ex. M, at 53:6 – 55:14.

26. When an IEP team determines that a student shall be placed in an autism support classroom, the School District endeavors to find the school closest to that child's home that can provide him or her with the educational programming and services called for in his or her IEP. Ex. L, at 55:6-17.

27. Although the School District generally does not permit parents to dictate the specific building to which their child is assigned, "if [parents] make a request their request is taken into consideration." Ex. L, at 55:18-22.

28. In some cases, the School District allows parents to participate in choosing the school building that their child will attend. For example, prior to the 2011-2012 school year, Yolanda Cruz, mother of P.V., was given the choice whether her son would be transferred to

McKinley Elementary or remain at Richmond. Ex. E, at 54:5-11. In August of 2011, Ms. Cruz decided to have P.V. remain at Richmond. *Id*. at 54:20 – 55:2.

29. Upper-level transfers are only effectuated when a student's IEP cannot be implemented at his or her current school. Ex. M, at 42:3-16.

30. Loveli McKinnie, the parent of a fifth grade student with autism (A.M.) who is not a party to this litigation, testified that when A.M. was in kindergarten at Olney Elementary School ("Olney"), her K-2 autism support class was the only autism support class in the school. *See* L. McKinnie Dep. (attached as Ex. P), at 34:21-24.

31. When A.M. reached the third grade, however, thus aging out of the K-2 autism support class, Ms. McKinnie testified that her daughter and her classmates were not transferred; rather "the K through 2 became a 1 through 3 class, and then [the next year] it became a 2 through 4 class." *Id*. at 35:6-14. Although the School District did not continue that trend by turning the 2-4 classroom into a 3-5 classroom the following year, A.M.'s IEP team specifically tailored an IEP to her needs, under which A.M. was integrated into a non-disabled classroom, allowing her to remain at Olney for fifth grade, instead of transferring to a school with a fifth grade autism support classroom. *Id.* at 71:22 – 72:10.

Plaintiffs' Litigation Demand for Systemic Change

32. Plaintiffs filed suit on June 20, 2011. *See* Ex. A, at p. 23.

33. Even though none of the plaintiffs has ever been transferred under the alleged "automatic autism transfer policy," plaintiffs claim that in assigning students requiring autism support to school buildings that do not have autism support classrooms for all grades in

the school building, the School District violates: (a) the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.* ("IDEA"); (b) Chapter 14 of the Pennsylvania Code, 22 PA. CODE §§ 14.1, *et seq*. ("Chapter 14"); (c) the Americans with Disabilities Act, 42 U.S.C. §§ 12132, *et seq.* ("ADA") or (d) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). Ex. A, at ¶¶ 56, 59, 62, 65.

34. Plaintiffs assert that this Court should overrule the School District's determination of the appropriate locations for autism support classrooms and order that an autism support classroom cannot be located in any school building that cannot accommodate autism support classrooms for all grades taught in that building. *Id*. at p. 21, ¶ 5.

35. Plaintiffs contend that it was illegal to locate their admittedly excellent K-2 autism support classroom at Richmond because there did not, at the time, appear to be space in Richmond for a 3-5 autism support classroom. *Id*.

The Lack of Evidence Supporting Plaintiffs' Claims

36. No plaintiff has ever received an upper-level transfer.

37. None of the four plaintiffs' parents testified that the plaintiffs' academic or behavioral progress was adversely affected by an upper-level transfer.

38. Plaintiffs' expert witness Dr. Ami Klin testified that he was not asked to opine on whether the academic or behavioral progress of plaintiffs – or of students requiring autism support in general – were adversely affected by an upper-level transfer. *See* A. Klin Dep. (attached as Ex. Q), at 18:5 – 19:4, 89:25 – 91:10.

39. Dr. Klin testified that to determine whether an upper-level transfer adversely affected a student's academic or behavioral progress, one would have to analyze data showing the student's academic and behavioral progress for a reasonable time before and after the transfer. *Id.* at 27:15 – 31:22 (stating that to perform an analysis concerning the impact of transition, "it would be critical for me to have pre and post data"). Dr. Klin added that, although such an analysis can be done, he was not asked to do it here. *Id*. at 28:11-18.

40. Plaintiffs have not identified a single student whose academic or behavioral progress has been adversely affected by an upper-level transfer.

41. Plaintiffs have not identified any evidence that an upper-level transfer has had an adverse impact on the academic or behavioral progress of any student requiring autism support.

42. Plaintiffs have neither identified nor taken discovery concerning any student within the School District who was upper-level transferred over an objection by his or her parents.

43. Plaintiffs have neither identified evidence nor taken discovery concerning any material differences that may or may not exist in the quality or nature of the autism support programming and services in different schools in the School District. *See* Ex. Q, at 77:19 – 79:4 (concession by Dr. Klin that he has not evaluated the comparability of autism support programs at the various elementary and middle schools within the School District).

44. There is no evidence to suggest that by transferring a student requiring autism support from one school building to another, the School District is doing anything more than changing the location at which that student's IEP is implemented.

45. Although plaintiffs' expert witness Dr. Ami Klin testified that many students with autism have trouble with "unplanned transitions," *see* Expert Rep. of A. Klin (attached as Ex. R), at p. 1, he conceded that neither determining whether the School District adequately manages transitions of students with autism from one school to another, nor determining whether the academic or behavioral progress of any students requiring autism support have been adversely affected by an upper-level transfer, were within the scope of his engagement. *See* Ex. Q, at 49:5 – 50:12, 89:13 – 91:10.

46. Plaintiffs have not offered any expert opinion to suggest that plaintiffs' academic or behavioral progress – or the academic or behavioral progress of any of the School District's students requiring autism support – has been significantly affected by a change in location. *Id.* at 17:20-22 (testimony by Dr. Klin that he has not reviewed any of the plaintiffs' IEPs), 89:25 – 91:10 (acknowledgment by Dr. Klin that he cannot testify as to the manner in which transferring from one school in the Philadelphia School District to another affects the academic or behavioral progress of students requiring autism support).

47. Plaintiffs have not presented any expert opinion that transitions, such as upper-level transfers, affect the individual plaintiffs' academic or behavioral progress. *Id*. at 18:20 – 19:4 (Dr. Klin's testimony that he did not do anything to determine whether "unplanned transitions" impacted the learning ability, learning rate or the behavior of the children involved in this lawsuit).

48. Plaintiffs have presented no evidence, statistical or otherwise, that any student's academic or behavioral progress has been adversely affected by the School District's assignment of students requiring autism support to school buildings that do not contain autism support classrooms for all grades housed therein.

49. Plaintiffs have not presented any evidence, statistical or otherwise, showing that students with autism are transferred any more frequently than students without disabilities.

50. Plaintiffs never sought discovery concerning transfers of non-disabled students. *See* Pl. 1st Req. for Prod. of Docs. & 1st Set of Interrogs. (attached as Exhibits U and V, respectively).

51. Plaintiffs have not identified any evidence suggesting that by assigning students requiring autism support to school buildings that do not have autism support classrooms for all grades in the school building, the School District is denying those students a free appropriate public education.

GROUNDS IN SUPPORT OF MOTION

The legal grounds for this motion are set forth in the accompanying memorandum of law, which is incorporated by reference.

Respectfully submitted,

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Of Counsel.

Dated: August 3, 2012.

UNITED STATES DISTRICT COURT
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	:	**CIVIL ACTION**
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	:	**NO. 2:11-cv-04027-LDD**
The School District of Philadelphia, et al.,	:	
Defendants.	:	

MEMORANDUM OF DEFENDANTS SCHOOL DISTRICT OF PHILADELPHIA, ARLENE ACKERMAN, LINDA WILLIAMS AND THE SCHOOL REFORM COMMISSION IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Of Counsel.

Dated: August 3, 2012

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Defendants The School District of Philadelphia, Dr. Arlene Ackerman,[1] Ms. Linda Williams,[2] and the School Reform Commission (collectively, the "School District") submit this memorandum in support of their motion for summary judgment.

Summary judgment should be entered in favor of the School District, dismissing all of plaintiffs' claims with prejudice, because:

1. None of the plaintiffs has been transferred from one school building to another pursuant to the so-called (but non-existent) automatic autism transfer policy; and

2. The School District does not violate (a) the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.* ("IDEA"); (b) Chapter 14 of the Pennsylvania Code, 22 PA. CODE §§ 14.1, *et seq*. ("Chapter 14"); (c) the Americans with Disabilities Act, 42 U.S.C. §§ 12132, *et seq.* ("ADA") or (d) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") by locating an autism support classroom for certain grades in a school building without also locating autism support classrooms for all other grades taught in that school building.

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[1] Dr. Ackerman is not currently employed by the School District. Her employment with the School District ended in August 2011.

[2] Ms. Williams is not currently employed by the School District. Her employment with the School District ended in June 2012.

I. STATEMENT OF FACTS[3]

A. The Parties

The plaintiffs in this action are four children, P.V., M.M., J.V. and R.S. *See* Compl. (attached as Ex. A) ¶¶ 15-18. The plaintiffs have Individualized Education Programs ("IEPs") requiring that they have access to an autism support classroom. *Id.* The School District has provided the autism support required by the plaintiffs' IEPs at the Richmond Elementary School ("Richmond"), a kindergarten through fifth grade ("K-5") school. *See* Pl. Objs./Resps. to Defs. 1st Set Interrogs. (attached as Ex. B), at No. 7.

From kindergarten through second grade, the School District provided the autism support required by the plaintiffs' IEPs in a kindergarten through second grade ("K-2") autism support classroom at Richmond, where plaintiffs were taught by Ms. Leah Taylor. *Id.* All of the plaintiffs regard Ms. Taylor as an excellent teacher. *See* H. Sanasac Dep. (attached as Ex. C), at 47:25 – 49:3; S. Vargas Dep. (attached as Ex. D), at 84:16 – 85:5; Y. Cruz Dep. (attached as Ex. E), at 6:3-11; C. Murphy Dep. (attached as Ex. F), at 51:14-23

Ms. Taylor's K-2 autism support classroom was the only autism support classroom at Richmond. *See* K. Hunt Dep. (attached as Ex. G), at 96:3-21. Accordingly, when the plaintiffs completed the second grade in the Spring of 2011, the School District considered transferring each of the plaintiffs to a different school building, where the autism support required by plaintiffs' IEPs would be provided. However, after plaintiffs initiated due process

[3] Defendants' motion also contains a statement of undisputed material facts in numbered paragraphs with record citations.

hearings to remain at Richmond for third grade, the School District found suitable space in Richmond for a new third grade through fifth grade ("3-5") autism support classroom, which would allow the plaintiffs to remain at Richmond through fifth grade. *See* Tr., Due Process Hrg. of J.V. (attached as Ex. H), at 6:25 – 7:15. Accordingly, for the 2011-2012 school year, all four plaintiffs continued to attend the Richmond school and received the autism support required by their IEPs in an autism support classroom taught by Ms. Rachel Szychulski. All of the plaintiffs acknowledge that Ms. Szychulski (whom they call "Miss S") is an excellent teacher. *See* Ex. C, at 80:22 – 81:23; Ex. D, at 74:7-10, 85:24 – 86:15; Ex. E, at 5:24 – 6:20; Ex. F, at 10:1-15.

None of the plaintiffs has ever been transferred from one school to another school because of a supposed automatic autism transfer policy.

B. The School District's Provision of Autism Support

1. Location of the School District's Autism Support Classrooms

The School District operates over 250 school buildings and serves more than 154,000 students. *See* List of Schools (attached as Ex. I), at DEF1002-DEF1005; Intermediate Unit Sp. Educ. Plan Doc., 2011-2012 School Year (attached as Ex. J), at DEF633. For the 2011-2012 school year, 1,684 kindergarten through eighth grade ("K-8") students were identified as requiring access to an autism support classroom. *See* Chart of Dist. Students with Autism (attached as Ex. K).

The School District currently has more than 130 autism support classrooms serving students in kindergarten through eighth grade. *See* M. Monras-Sender Dep. (attached as Ex. L), at 35:16 – 37:13. The school buildings within the School District have varied grade

configurations (for example, K-2, K-5, 6-8, and K-8). *See* Ex. I. The School District's autism support classrooms for kindergarten through eighth grade most often cover three grades, kindergarten through second grade ("K-2"), third grade through fifth grade ("3-5") and sixth grade through eighth grade ("6-8"). Ex. A, at ¶ 36; Ex. I. Due, in part, to the varied grade configurations of its schools and the uneven geographic distribution of children requiring autism support, the School District does not maintain autism support classrooms in all of its schools. *See* S.D. Designee Dep. (attached as Ex. M), at 151:6 – 153:16; Ex. G, at 100:6-22. For those same reasons, the grades covered by autism support classrooms vary from school to school, meaning "there might be a K-2 [autism support] class in one school, [and] a 3-5 in another school." Ex. M, at 151:6 – 153:16; *see also* Tr., Due Process Hrg. for M.M. and P.V. (2/9/2011) (attached as Ex. N), at 655:6 – 656:22 (Maria Monras-Sender testimony).

Each year, based on information about how many students requiring autism support are entering the School District, leaving it, or moving from one grade level to the next, the School District's Special Education Directors undertake a complex process to identify suitable locations for autism support classrooms in the coming school year. Ex. M, at 45:21 – 49:9. Suppose, for example, that a K-5 school had only a K-2 autism support classroom for the 2011-2012 school year. To determine that school's needs for the 2012-2013 school year, the Special Education Directors would examine the number of students requiring autism support that are expected to enroll at that school in the Fall and the number of students requiring such support who will have aged out of the K-2 classroom. Ex. M, at 151:6 – 152:15. If, based on those considerations, the Special Education Directors then deem it appropriate to open a new autism support classroom in that school building (whether it be a new K-2 classroom or a new 3-5 classroom), they then "walk around to classrooms [in the school]" to determine the feasibility of

doing so, taking into account such considerations as whether there is sufficient space in the building and whether "there is a bathroom near the classroom we're proposing." *Id*. at 152:16 – 153:16; *see also* 22 PA. CODE § 14.144(3)(v) (requiring that all special education classrooms be "composed of at least 28 square feet per student"); 22 PA. CODE § 14.146(a) (stating that "maximum age range in specialized settings shall be 3 years in elementary school (grades K-6) and 4 years in secondary school (grades 7-12)").

This is a fluid process. Each year, many families move into the School District or move from one location in the School District to another without providing the School District with advance notification. *See* Ex. G, at 100:6-22. Indeed, on the first day of classes each year, many students simply "walk in the door" of their neighborhood school, without regard to whether they are registered there. *Id*. at 99:23 – 100:5.

2. Assigning Students to Autism Support Classrooms

When a student requiring autism support completes the highest grade level for which autism support is located in his or her current school building, the School District must determine the location at which the educational programs and services required by his or her IEP will continue to be provided. Sometimes, as in the case of the plaintiffs here, the programs and services can continue to be provided in the same school building, but, if that is not feasible, they will be provided in a different building. When the new location is in different building, the assignment to the new location is called an "upper-level transfer." Ex. M, at 37:22 – 38:9; Ex. L, at 37:24 – 39:23, 42:19 – 43:3. Whether the new location is in the same building or a different building, there is no claim (or evidence) in this case that the programs and services provided at the new location are deficient (or different) in any relevant respect.

Decisions relating to upper-level transfers are made about each student on an individual basis, based primarily on his or her IEP. *See* L. Williams Decl. (attached as Ex. O), at ¶ 8; Ex. M, at 53:6 – 55:14. When an IEP team determines that a student needs to be placed in an autism support classroom, the School District endeavors to find the school closest to that child's home that can provide him or her with the educational programming and services called for in his or her IEP. Ex. L, at 55:6-17. Although the School District generally does not permit parents to dictate the specific building to which their child is assigned, "if [parents] make a request their request is taken into consideration." Ex. L, at 55:18-22. In some cases, however, the School District allows parents to participate in choosing the school building that their child will attend. For example, prior to the 2011-2012 school year, Yolanda Cruz, mother of P.V., was given the choice whether her son would be transferred to McKinley Elementary or remain at Richmond. Ex. E, at 54:5-11. In August of 2011, Ms. Cruz decided to have P.V. remain at Richmond. *Id*. at 54:20 – 55:2.

Plaintiffs mischaracterize the upper-level transfer process as an "automatic autism transfer policy." *See* Ex. A, at ¶ 38. To the contrary, upper-level transfers are only effectuated when a student's IEP cannot be implemented at his or her current school. Ex. M, at 42:3-16. Loveli McKinnie, the parent of a fifth grade student with autism (A.M.) who is not a party to this litigation, testified that when A.M. was in kindergarten at Olney Elementary School ("Olney"), her K-2 autism support class was the only autism support class in the school. *See* L. McKinnie Dep. (attached as Ex. P), at 34:21-24. When A.M. reached the third grade, however, thus aging out of the K-2 autism support class, Ms. McKinnie testified that her daughter and her classmates were not transferred; rather "the K through 2 became a 1 through 3 class, and then [the next year] it became a 2 through 4 class." *Id*. at 35:6-14. Although the School District did not continue that

trend by turning the 2-4 classroom into a 3-5 classroom the following year, A.M.'s IEP team specifically tailored an IEP to her needs, under which A.M. was integrated into a non-disabled classroom, allowing her to remain at Olney for fifth grade, instead of transferring to a school with a fifth grade autism support classroom. *Id.* at 71:22 – 72:10.

C. Plaintiffs' Litigation Demand for Systemic Change

Plaintiffs sued on June 20, 2011. Even though none of the plaintiffs has ever been transferred under the alleged "automatic autism transfer policy," they claim that in assigning students requiring autism support to school buildings that do not have autism support classrooms for all grades in the school building, the School District violates the IDEA, Chapter 14 of the Pennsylvania Code, the ADA, and Section 504 of the Rehabilitation Act. *See* Ex. A, at ¶¶ 56, 59, 62, 65. Plaintiffs assert that this Court should overrule the School District's determination of the appropriate locations for autism support classrooms and order that an autism support classroom cannot be located in any school building that cannot accommodate autism support classrooms for all grades taught in that building. *Id*. at p. 21, ¶ 5. To put it another way, the plaintiffs contend that it was illegal to locate their admittedly excellent K-2 autism support classroom at Richmond because there did not, at the time, appear to be space in Richmond for a 3-5 autism support classroom.

D. The Lack of Evidence Supporting Plaintiffs' Claims

As noted, no plaintiff has ever received an upper-level transfer. It necessarily follows that none of the four plaintiffs' parents testified that the plaintiffs' academic or behavioral progress was adversely affected by such a transfer.

Similarly, plaintiffs' expert witness Dr. Ami Klin, testified that he was not asked to opine on whether the academic or behavioral progress of plaintiffs – or of students requiring autism support in general – were adversely affected by an upper-level transfer. *See* A. Klin Dep. (attached as Ex. Q), at 18:5 – 19:4, 89:25 – 91:10.[4] Dr. Klin testified that to determine whether an upper-level transfer adversely affected a student's academic or behavioral progress, one would have to analyze data showing the student's academic and behavioral progress for a reasonable time before and after the transfer. *Id.* at 27:15 – 31:22 (stating that to perform an analysis concerning the impact of transition, "it would be critical for me to have pre and post data"). Dr. Klin added that, although such an analysis could be done, he was not asked to do it here. *Id*. at 28:11-18. Without that analysis, any argument about whether students' academic or behavioral progress is impacted by upper-level transfers is the rankest kind of speculation.

Not only is plaintiffs' case lacking in the sort of expert analysis Dr. Klin testified would be needed, but plaintiffs have not identified a single student whose academic or behavioral progress has been adversely affected by an upper-level transfer. Indeed, plaintiffs have not deposed or sought discovery from anyone who has ever *observed* any adverse impact that an upper-level transfer has had on the academic or behavioral progress of a student requiring

[4] Although plaintiffs engaged in motion practice to obtain more than 100,000 pages of documents, they showed very few of those documents to Dr. Klin. Those documents were produced at great expense, as nearly every page had to be redacted to protect students' privacy. *See* Expert Rep. of A. Klin (attached as Ex. R), at pp. 3-4. Plaintiffs did not show Dr. Klin any of the notices of recommend educational placement ("NOREPs") that, pursuant to this Court's Order dated 10/31/12 (Doc. 23), the School District produced for every K-8 student in the School District who requires autism support. Similarly, plaintiffs did not provide a single student's IEP or educational progress report to Dr. Klin for his review.

autism support. Moreover, plaintiffs have not identified any student within the School District who was actually upper-level transferred over an objection by his or her parent.

Plaintiffs have also not made any inquiry into whether there are any differences in the quality of the programs and services that the School District provides to students requiring autism support in different school buildings. *See, e.g.*, Ex. Q, at 77:19 – 79:4 (concession by Dr. Klin that he has not evaluated the comparability of autism support programs at the various elementary and middle schools within the School District). Without evidence that either (a) compares the programming and services that different schools within the School District offer to students requiring autism support, or (b) details the manner, if any, in which the academic or behavioral progress of students requiring autism support have been affected by transfers, there is nothing, aside from mere conjecture, to suggest that such transfers actually affect students' academic or behavioral progress in any significant way. In sum, there is no evidence to suggest that by transferring a student requiring autism support from one school building to another, the School District is doing anything more than changing the location at which that student's IEP is implemented.

II. LEGAL STANDARD AND BURDEN OF PROOF

Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party, the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Galena v. Leone*, 638 F.3d 186, 196 (3d Cir. 2011). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A motion for summary

judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." *Am. Eagle Outfitters v. Lyle & Scott Ltd.,* 584 F.3d 575, 581 (3rd Cir. 2009) (citing *Anderson* 477 U.S. at 247-48).

After the movant makes an initial showing, the burden shifts to the non-moving party to set forth "specific facts showing that there is a genuine dispute for trial." *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(c)(1)(A) (party must cite to "particular parts of materials in the record"); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 193 (3d Cir. 2009) (holding that "at summary judgment, a non-moving party may not rest on mere allegations"). Summary judgment for a defendant is appropriate when "the plaintiff fails to make a showing sufficient to establish the existence of an element essential to [its] case, and on which [it] will bear the burden of proof at trial." *Detz v. Greiner Industries, Inc*., 346 F.3d 109, 115 (3rd Cir. 2003) (quoting *Cleveland v. Policy Mgmt. Sys. Corp*., 526 U.S. 795, 805-06 (1999)) (internal quotation marks omitted).

In actions brought against a school district arising under the IDEA, the district court is not bound by a hearing officer's conclusions of law, and the application of legal standards at the administrative hearing are subject to *de novo* review. *In re: Educational Assignment of Joseph R.*, No. 07-2753, 2009 U.S. App. LEXIS 6287 at *10-11 (3d Cir. March 24, 2009); *Ridley Sch. Dist. v. M.R.*, No. 09-2503, 2011 U.S. Dist. LEXIS 14188 at *19 (E.D. Pa. Feb. 14, 2011). In such actions, plaintiffs bear the burdens of proof and persuasion. *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005); *Brett S. v. West Chester Area Sch. Dist.*, No. 04-5598, 2006 U.S. Dist. LEXIS 10249 at *7-9 (E.D. Pa. March 15, 2006); *Greenwood v. Wissahickon Sch. Dist.*, No. 04-3880, 2006 U.S. Dist. LEXIS 4274 at *2 (E.D. Pa. Feb. 3, 2006). Similarly, in actions brought under the ADA and the Rehabilitation Act, the plaintiff bears the burden of proof

and the burden of persuasion in establishing a prima facie case of discrimination. *See, e.g.*, *Moore v. Univ. of Pittsburgh*, No. 02-1734, 2004 U.S. Dist. LEXIS 31398 at *30 (W.D. Pa. May 17, 2004).

III. ARGUMENT

A. Plaintiffs Have No Claim Because They Were Not Transferred.

Plaintiffs cannot complain about a supposed automatic autism transfer policy because they were never transferred. As a consequence, plaintiffs lack standing to pursue the claims in the complaint. Since the standing requirement is an "irreducible constitutional minimum," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), plaintiffs' complaint must be dismissed. The class action allegations cannot cure plaintiffs' lack of standing. Rule 23 of the Federal Rules of Civil Procedure cannot enable a party to bring a claim as a representative of a putative class if that party does not have standing to bring the claim on its own behalf. *See Davis v. Thornburgh*, 903 F.2d 212, 222 (3d Cir. 1990).

One of the three essential elements of standing[5] is that "the plaintiffs must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and quotations omitted). Because none of the plaintiffs was ever transferred from Richmond, none of them suffered injuries to their educational or behavioral progress as a result

[5] The three elements of standing are: (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury and the conduct complained of and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See, e.g.*, *Lujan*, 504 U.S. at 560.

of the School District's alleged policy regarding the location of autism support services. *See* Ex. C, at 110:13-20; Ex. D, at 90:16-18; Ex. E, at 5:9-15; Ex. F, at 9:24-25. Simply put, plaintiffs cannot demonstrate any "concrete or particularized" injury from transfers that never happened. *See Hawkins v. District of Columbia*, 692 F. Supp. 2d 81, 83-84 (D. D.C. 2010) (holding plaintiff was not entitled to relief where she obtained most of the remedies she sought in her complaint, including School District approval of plaintiff's preferred school). Indeed, plaintiffs have not identified evidence of *any* student whose academic or behavioral progress has *ever* been adversely affected by a transfer. Although plaintiffs' expert witness Dr. Ami Klin testified that many students with autism have trouble with "unplanned transitions," *see* Ex. R, at p. 1, he conceded that neither determining whether the School District adequately manages transitions of students with autism from one school to another, nor determining whether the academic or behavioral progress of *any* students with autism have been adversely affected by an upper-level transfer, was within the scope of his engagement. *See* Ex. Q, at 49:5 – 50:12, 89:13 – 91:10.

B. The School District Does Not Violate the IDEA or Chapter 14 of the Pennsylvania Code By Assigning Students Requiring Autism Support to School Buildings That Do Not Have Autism Support Classrooms For All Grades In the School Building.

There is no dispute that the School District assigns students requiring autism support to classrooms that support students with autism if their IEPs call for such support. Plaintiffs contend, however, that such assignments are unlawful under the IDEA or Chapter 14,[6]

[6] Chapter 14 of the Pennsylvania Code incorporates by reference the procedural due process requirements in the regulations issued under the IDEA. *Blunt v. Lower Merion Sch. Dist.*, No. 07-3100, 2008 U.S. Dist. LEXIS 11918 at *26-27 (E.D. Pa. Feb. 15, 2008). Chapter 14 was "implemented to fulfill the state's obligation under the IDEA." *William D. v. Manheim Twp. Sch. Dist.*, No. 04-4535, 2007 U.S. Dist. LEXIS 72657 at *13 (E.D. Pa. Sept. 27, 2007).

even though those classrooms are appropriate for their education, if the classrooms are not located in school buildings that contain other classrooms to provide autism support for them as they enter higher grades in later school years. This argument is without merit. The School District did not violate these laws by placing plaintiffs in a K-2 autism support classroom in Richmond merely because, at that time, there was not also a 3-5 autism support classroom in Richmond.

1. Nothing in the IDEA is Supportive of Plaintiffs' Claims.

Although the IDEA provides requirements that the School District must adhere to in the creation and implementation of students' IEPs, the IDEA leaves decisions concerning the physical location of such programs and services to the School District's discretion.

The IDEA does not give parents the right to participate in the School District's determination of the specific building in which each child will receive the educational programming and services outlined in his or her IEP. Section 614(d) of the IDEA, entitled "Individualized Education Programs," sets forth guidelines that school districts must follow in the *creation and implementation* of each student's IEP. 20 U.S.C. § 1414(d). Section 614(d), however, does not provide any requirements concerning either the location of the school building in which a student should receive his or her individualized education program or the length of time that the student should be permitted to remain at that school building. *Id.* Clearly, Section 614(d) of the IDEA does not support plaintiffs' claim that the School District is violating the IDEA by assigning students requiring autism support to school buildings that do not have autism support classrooms for all grades in the school building.

Similarly, Section 614(e) of the IDEA, 20 U.S.C. § 1414(e), entitled "Educational Placements," does not limit the School District's discretion to unilaterally determine the school buildings in which students' IEPs are implemented. Section 614(e) dictates that "each local educational agency or State educational agency shall 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." 20 U.S.C. § 1414(e). However, "educational placement" means educational programming and services – not the location at which a student *receives* educational programming and services. *In re: Educational Assignment of Joseph R.*, No. 07-2753, 2009 U.S. App. LEXIS 6287 at *15 (3d Cir. March 24, 2009) (affirming the district court's holding that relocating a student with learning disabilities from a learning support classroom to an inclusion classroom did not constitute a "change in educational placement" where there was "no evidence that the move to an inclusion classroom was likely to affect [the student's] learning experience in any 'significant way'") (non-precedential).[7] The U.S. Department of Education also distinguishes between "educational placement" and location. *See Letter to Fisher*, 21 IDELR

[7] *George A. v. Wallingford Swarthmore Sch. Dist.*, 655 F.Supp.2d 546, 550 (E.D. Pa. 2009) and *R.B. v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 763 (E.D. Pa. 2010) are not to the contrary. In *George A.*, the court refused to "entirely divorce" the location from "educational placement," where, despite the fact that the plaintiff's IEP specifically provided that the special education supports and services he required could not be provided in his neighborhood school, the defendant school district, as a disciplinary measure, attempted to transfer the plaintiff, a hearing-impaired high school student, to his neighborhood school. 655 F.Supp.2d at 551. Unlike in *George A.*, here, there is no allegation or evidence suggesting that the School District is trying to transfer students with disabilities to a school building where their IEPs cannot be fully implemented. Similarly in *R.B.*, the court held that a charter school was not relieved of its duty under the IDEA to provide a free appropriate public education, where it disenrolled a student with Down syndrome without providing her with an alternate location where her IEP could be implemented. 762 F. Supp. 2d at 761. Here, plaintiffs have not alleged, and there is no evidence to suggest, that by assigning students with autism to school buildings that do not have autism support classrooms for all grades housed in them, the School District is shirking its obligation to provide a free appropriate public education to students requiring autism support.

992 (OSEP 1994) (attached as Ex. S), at p. 1 (noting that IDEA's procedural notice requirements are not triggered where "a change in placement involves only a change in location – for example the school or facility, and not a corresponding change in program"); *see also* U.S. Dep't of Educ., Offc. of Civil Rights, *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *http://www2.ed.gov/about/offices/list/ocr/504faq.html* (2012) (attached as Ex. T), at p. 9 (noting that "placement" "refers to [the] regular and/or special education program in which a student receives educational and/or related services").

Courts outside of the Third Circuit have similarly distinguished between "educational placement" and the location where a student with disabilities receives his or her educational programming and services. *See T.Y. v. N.Y. City Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (stating that "'educational placement' refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the 'bricks and mortar' of the specific school") (citing *Concerned Parents v. N.Y. City Bd. of Educ.*, 629 F.2d 751, 756 (2d Cir. 1980)); *A.W. v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004) (noting that under the IDEA, the term "placement" "refers only to the setting in which a student is educated, rather than the precise location"); *Weil v. Bd. of Elementary & Secondary Educ.*, 931 F.2d 1069, 1072 (5th Cir. 1991) (finding that a school board's transfer of a student from one school to another did not amount to a change in the student's educational placement); *Tilton v. Richards*, 705 F.3d 800, 804 (6th Cir. 1983) (finding a transfer to a new school to constitute a change in placement only where evidence demonstrated that "the programs at alternative schools are not comparable" to the program offered at the student's current school); *Hale v. Poplar Bluff R-I Sch. Dist.*, 280 F.3d 831, 834 (8th Cir. 2002) (concluding that "a transfer to a different school building for fiscal or other reasons unrelated to the disabled child has

generally not been deemed a change in placement, whereas an expulsion from school or some other change in location made on account of the disabled child or his behavior has usually been deemed a change in educational placement").

The case most closely analogous to this dispute is *L.M. v. Pinellas Cty. Sch. Bd.*, No. 10-539, 2010 U.S. Dist. LEXIS 46796 (M.D. Fla. April 11, 2010). In *L.M.*, the plaintiffs argued that for a student with autism, "educational placement" includes the student's particular school building. *Id*. at *2. The plaintiffs maintained that:

> Any transition for C.G. that is not properly planned and implemented significantly affects her ability to learn. The transition here is from one school to another. This difficulty with transition manifested itself when she attended summer school at a different school [S.H. school]. By failing to prepare her for the move, she arrived at a new school, new classroom and new teacher that were totally foreign to her. She experienced significant difficulties caused by the change in schools.

Id. at *4. Despite acknowledging the plaintiffs' contention that "this difficulty in transition from one location to another affected C.G.'s ability to learn," the court rejected plaintiffs' argument. *Id*. at *5. The court concluded that C.G.'s relocation to a new school and her difficulty in transitioning thereto did not amount to a change in her educational placement because: (1) plaintiffs did not argue that "the two locations differ in any material way," and (2) "plaintiffs do not assert that C.G.'s general educational program (other than location) is being materially altered by the change in location." *Id*.

Akin to the plaintiffs in *L.M.*, plaintiffs in this case have neither garnered evidence nor taken discovery concerning any material differences that may or may not exist in the quality or nature of the autism support programming in different schools in the School District. *See* Ex. Q, at 77:19 – 79:4 (concession by Dr. Klin that he has not evaluated the

comparability of autism support programs at the various elementary and middle schools within the School District). Likewise, plaintiffs have not offered any expert opinion to suggest that plaintiffs' academic or behavioral progress – or the academic or behavioral progress of any of the School District's students requiring autism support – has been significantly affected by a change in location. *Id.* at 17:20-22 (testimony by Dr. Klin that he has not reviewed any of the plaintiffs' IEPs), 89:25 – 91:10 (acknowledgment by Dr. Klin that he cannot testify as to the manner in which transferring from one school in the Philadelphia School District to another affects students requiring autism support).

Plaintiffs have not identified *any* evidence suggesting that assigning students requiring autism support to school buildings that do not have autism support classrooms for all grades in the school building is likely to affect the academic or behavioral progress of students requiring autism support in any "significant way." They did not even ask their expert to make such an assessment. *See, e.g.*, *id*. at 65:4-13. Plaintiffs, therefore, have no basis on which to argue that in deciding where to locate its autism support classrooms, the School District is violating Section 614(e) of the IDEA's requirements concerning "educational placement." And because the IDEA is not implicated by the School District's assignment of students with autism to school buildings that do not have autism support classrooms for all grades housed in them, plaintiffs' claims under the IDEA fail as a matter of law. Consequently, the School District is entitled to summary judgment.

2. Nothing in Chapter 14 is Supportive of Plaintiffs' Claims.

Similarly, the School District does not violate the "Least Restrictive Environment" mandates of Chapter 14 by assigning students with autism to school buildings that

do not have autism support classrooms for all grades in the school building. In accordance with its requirement that students with disabilities be educated in the least restrictive environment, Chapter 14 provides that school districts must ensure that:

> (1) To the maximum extent appropriate, and as provided in the IEP, the student with a disability is educated with nondisabled peers.
>
> (2) Special classes, separate schooling or other removal of a student with a disability from the regular education class occurs only when the nature or severity of the disability is such that education in the regular education class with the use of appropriate supplementary aids and services cannot be achieved satisfactorily.
>
> (3) A student may not be determined to require separate education because the child cannot achieve at the same level as classmates who do not have disabilities if the child can, with the full range of supplementary aids and services, make meaningful progress in the goals included in the student's IEP.
>
> (4) A student may not be removed from or determined to be ineligible for placement in a regular education classroom solely because of the nature or severity of the student's disability, or solely because educating the student in the regular education classroom would necessitate additional cost or for administrative convenience.
>
> (5) School entities shall be required to provide access to a full continuum of placement options.

22 PA. CODE § 14.145. Nothing in this section prohibits a school district from educating a student in an autism support classroom appropriate for that student's grade merely because the school building does not also include autism support classrooms appropriate to educate students in other grades.

As discussed above, plaintiffs were not transferred to another school location after they completed the second grade at Richmond, so they could not claim a violation of Chapter 14

even if the chapter did apply to the situation they allege. But Chapter 14 does not apply here at all, and there is absolutely no authority for plaintiffs' argument to the contrary. The School District therefore is entitled to summary judgment on the claims under Chapter 14.

C. Nothing in the ADA or Section 504 of the Rehabilitation Act is Supportive of Plaintiffs' Claims.

The Third Circuit has recognized that, outside of the context of retaliation claims, "complying with the IDEA is sufficient to disprove educational discrimination." *K.R. v. Sch. Dist. of Philadelphia*, No. 09-1234, 2010 U.S. App. LEXIS 7426 at *10 (3d Cir. April 12, 2010) (citing *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Schs.,* 565 F.3d 1232, 1246 (10th Cir. 2009)) (non-precedential). Accordingly, because the School District does not violate the IDEA by assigning students with autism to school buildings that do not have autism support classrooms for all grades in that building, plaintiffs' discrimination claims under the ADA and Section 504 of the Rehabilitation Act fail as a matter of law.

Even apart from the School District's compliance with the IDEA, there is no merit to plaintiffs' claims under these statutes. Section 504 prohibits recipients of federal funds, such as schools, from discriminating on the basis of disability. 29 U.S.C. § 794(a). Section 202 of the ADA extends the anti-discrimination principles of Section 504 to all public entities. *Helen L. v. DiDario*, 46 F.3d 325, 332 (3d Cir. 1995); 42 U.S.C. § 12132. To establish a violation Section 504,[8] plaintiffs must prove that: (1) they are disabled; (2) they are "otherwise qualified" to

[8] The elements of a claim under Section 504 are nearly identical to the elements of a claim under the ADA, with the only difference being Section 504's additional requirement that the entity against whom the violation is alleged receive federal financial assistance. *Spieth v. Bucks Cnty. Housing Authority*, 594 F. Supp. 2d 584, 594 (E.D. Pa. 2009).

participate in school activities; (3) the School District received federal financial assistance; and (4) they were excluded from participation in, denied the benefits of, or subject to discrimination by the School District. *See Ridley Sch. Dist. v. M.R.*, No. 11-1447, 2012 U.S. App. LEXIS 9908 at *51 (3d Cir. May 17, 2012). The parties do not dispute the first three elements. On the fourth, plaintiffs do not make any allegation in their complaint that students with autism have been excluded from participation or denied benefits by the School District. The only question at issue, then, is whether the School District has discriminated against plaintiffs. *See* Ex. A, at ¶¶ 62, 65.

There are three bases on which a plaintiff can bring a claim for such discrimination: (1) disparate treatment through intentional discrimination; (2) disparate impact; and (3) failure to provide reasonable accommodations. *Tsombanidis v. West Haven Fire Dept*., 352 F.3d 565, 573 (2d Cir. 2003); *see also Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003). None of those three apply here. Nothing in the extensive paper and electronic discovery produced in connection with this action evidences discrimination on the part of the School District.

This Court has observed that "intentional discrimination can be 'inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights.'" *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 827 F.Supp.2d 409, 425 (E.D. Pa. 2011) (internal citations omitted) (granting summary judgment to school district where the plaintiff was unable to identify any evidence to create an inference that the school district "acted with deliberate indifference toward [the plaintiff's] rights because of her disability"). Given that the neither the IDEA nor Chapter 14 regulate where the School District locates its autism support classrooms, there are no "federally protected rights" at issue for the School District to violate. Consequently, here, as in *Chambers*,

there is no evidence sufficient to create a genuine issue of material fact concerning intentional discrimination.

To prevail under a disparate impact claim, a plaintiff must show that a facially neutral policy or practice has a significantly adverse or disproportionate impact on a protected class. *Tsombanidis*, 352 F.3d at 574-75. A plaintiff must present statistical evidence of a kind and degree sufficient to show that the practice in question has caused the disparate impact because of their membership in a protected group." *McCutchen v. Sunoco, Inc*., No. 01-2788, 2002 U.S. Dist. LEXIS 15426 at *20 (E.D. Pa. Aug. 19, 2002). Here, plaintiffs have presented no evidence, statistical or otherwise, that plaintiffs' – or any other student's – academic or behavioral progress has been adversely affected by the School District's assignment of students with autism to school buildings that do not contain autism support classrooms for all grades in the school.[9] Accordingly, they cannot maintain a discrimination claim based upon a disparate impact.

Finally, to prove discrimination through a failure to accommodate, a plaintiff must show that its requested modification is necessary for meaningful participation in or access to the program's benefits. *Ridley School Dist.*, 2012 U.S. App. LEXIS 9908 at *40-41. Because plaintiffs have not presented *any* evidence that assigning students with autism to school buildings

[9] Plaintiffs have not even presented statistical evidence showing that students with autism are transferred any more frequently than students without disabilities. Nor could they, since plaintiffs never even sought discovery concerning transfers of non-disabled students. *See* Pl. 1st Req. for Prod. of Docs. & 1st Set of Interrogs. (attached as Exhibits U and V, respectively). Indeed, if students requiring autism support at a K-5 school, such as Richmond, are transferred to a K-8 school (where they can remain through the eighth grade) after completing the second grade, those students would not be required to transfer *any more frequently* than non-disabled students who transfer to a K-8 or 6-8 school after completing the fifth grade.

that have autism support classrooms for all grades in the school building is, somehow, necessary for the provision of a free appropriate public education, there is no evidence sufficient to create a genuine issue of material fact concerning the failure to accommodate.

Because the assignment of students with autism to school buildings that do not have autism support classrooms for all grades in the school building does not constitute discrimination, this Court should grant summary judgment in favor of the School District on plaintiffs' claims under both the ADA and Section 504 of the Rehabilitation Act.

IV. CONCLUSION

For the foregoing reasons, the School District respectfully requests that this Court enter summary judgment in its favor.

Respectfully submitted,

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Dated: August 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2012, a true and correct copy of the foregoing Motion for Summary Judgment, Memorandum of Law in Support Thereof, and Statement of Material Facts Which are Not in Dispute, of Defendants School District of Philadelphia, Arlene Ackerman, Linda Williams and The School Reform Commission in Support of their Motion for Summary Judgment, was served electronically through the Court's ECF system upon:

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