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.	:	

MEMORANDUM OF DEFENDANTS SCHOOL DISTRICT OF PHILADELPHIA, ARLENE ACKERMAN, LINDA WILLIAMS AND THE SCHOOL REFORM COMMISSION IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

David Smith (Attorney I.D. 21480)
Benjamin D. Wanger (Attorney I.D. 209317)

Attorney for Defendants,
The School District of Philadelphia, Arlene Ackerman, Linda Williams and the School Reform Commission

SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103-7286
Telephone: 215-751-2000
Facsimile: 215-751-2205

Of Counsel.

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I. INTRODUCTION

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 opposition to plaintiffs' motion for summary judgment.[3]

Plaintiffs' motion for summary judgment should be denied because their claims under: (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") and (d) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), all fail as a matter of law. The reasons plaintiffs' claims fail as a matter of law are:

1. Neither the IDEA nor Chapter 14 requires that the School District provide prior written notice or otherwise involve parents in decisions concerning the school building in which their child will receive the educational programming and services set forth in his or her Individualized Education Program ("IEP"); and

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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.

[3] In support of this memorandum, the School District hereby incorporates the Motion For Summary Judgment of Defendants School District of Philadelphia, Arlene Ackerman, Linda Williams and the School Reform Commission as well as the School District's memorandum in support thereof. (Doc. 49).

2. Plaintiffs have not identified *any* evidence that transferring a student requiring autism support from a school building at which the autism support required by the student's IEP *is not available*, to a school building at which the autism support required by the IEP *is available*, deprives the student of a free appropriate public education ("FAPE"). Indeed, plaintiffs' expert witness, Dr. Ami Klin, testified that he was directed by plaintiffs not to evaluate whether any students actually were deprived of FAPE. Ex. 16, at 49:18 – 50:12.

II. FACTS

The facts relevant to this motion are set forth in: (a) the Statement of Undisputed Facts in the School District's Motion for Summary Judgment (Doc. 49); (b) the School District's Memorandum in Support of its Motion for Summary Judgment (Doc. 49); (c) the School District's Memorandum Opposing Plaintiffs' Motion for Class Certification (Doc. 50); and (d) the School District's Response to Plaintiffs' Concise Statement of Undisputed Facts, filed contemporaneously with this memorandum. Rather than repeat those facts here, the School District incorporates the facts as set forth in those documents.

III. OVERVIEW OF PLAINTIFFS' CLAIMS

Contrary to their summary judgment argument, there is absolutely no evidence that these plaintiffs – or any other students requiring autism support – have been denied FAPE as a result of being transferred from a school building at which the autism support required by their IEPs is not available, to a school building at which the autism support required by their IEPs is available. Indeed, plaintiffs do not so allege in their complaint. Similarly, plaintiffs do not allege in their complaint that the School District is predetermining educational programs for

children requiring autism support without the involvement of their parents. Rather, plaintiffs allege in their complaint the following four discrete legal claims:

1. "The District's Automatic Autism Transfer Policy is established and implemented in a manner that is completely contrary to the IDEA because decisions about placement of children into different schools and classes are made without regard to the individual unique needs of each child, substantially infringe upon meaningful parental involvement in the process and are made wholly outside of the procedural safeguards and requirements of the IDEA. 20 U.S.C. § 1414(d); 20 U.S.C. § 1415." Ex. 14, at ¶ 56.

2. "The District's Automatic Autism Transfer Policy is established and implemented in a manner that is completely contrary to the IDEA because decisions about placement of children into different schools and classes are made without regard to the individual unique needs of each child, substantially infringe upon meaningful parental involvement in the process and are made wholly outside of the procedural safeguards and requirements of Chapter 14. The policy is contrary as well to the requirements of Chapter 14 of the Pennsylvania Code, specifically that children be educated in the least restrictive environment." *Id*. at ¶ 59.

3. "The defendants have violated the rights of the Plaintiffs and Class by the establishment and implementation of the Automatic Autism Transfer Policy resulting in the random assignment of students into various autistic support classes. By requiring the Plaintiffs and Class to transfer to different schools at ages when non-disabled students are not required to transfer to new schools because of age, the District has discriminated against the Plaintiffs and Class because of their disability of autism." *Id*. at ¶ 62.

4. "The defendants violate Plaintiffs' and the Class' Section 504 rights by requiring students with autism to transfer to a different school at a certain age solely because they are disabled as a result of the autism. The defendants have admitted that non-disabled students are not subjected to the Policy." *Id*. at ¶ 65.

Contrary to plaintiffs' arguments, neither the facts nor the law supports their request for summary judgment. Indeed, as set forth in the School District's motion for summary judgment (Doc. 49), plaintiffs' claims are without merit and should be dismissed.

IV. 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) (emphasis added).[4] A dispute is "material" if it might affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A dispute is not genuine unless "a reasonable jury could return a verdict for the nonmoving party." *Id*.

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. Mar. 24,

[4] Rule 56's requirement that the movant be entitled to "judgment as matter of law" is conspicuously absent from the legal standard for summary judgment set forth in Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment ("Pl. Memo."). *See* Pl. Memo., at 3.

2009) (emphasis added; non-precedential); *Ridley Sch. Dist. v. M.R.*, No. 09-2503, 2011 U.S. Dist. LEXIS 14188 at *19 (E.D. Pa. Feb. 14, 2011); *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 82 (2d Cir. 2005) (holding that "state hearing officers are not more experienced or expert than courts in interpreting federal statutes or the federal constitution, and, therefore, deference [to their conclusions of law] is not warranted"). Although the factual findings from the administrative proceedings are to be considered prima facie correct, *S-H v. State-Operated Sch. Dist. of City of Newark*, 336 F.3d 260, 270 (3d Cir. 2003), "district courts have discretion to determine how much deference to accord the administrative proceedings." *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 527 (3d Cir. 1995) (stating that although a district court must consider administrative findings of fact, it is "free to accept or reject them").

For all of plaintiffs' claims, **plaintiffs bear the burdens of proof and persuasion**. This is true with respect to the IDEA. *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. Mar. 15, 2006); *Greenwood v. Wissahickon Sch. Dist.*, No. 04-3880, 2006 U.S. Dist. LEXIS 4274 at *2 (E.D. Pa. Feb. 3, 2006); *Ridley*, 2011 U.S. Dist. LEXIS 14188 at *19 (noting that "because parents challenged the IEP, they bear the burden before this Court"). And it also is true in actions brought under the ADA and the Rehabilitation Act. *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).

V. ARGUMENT

Because plaintiffs' claims all fail as a matter of law, this Court should deny plaintiffs' motion for summary judgment and, instead, grant the School District's motion for summary judgment (Doc. 49).[5]

A. Plaintiffs' Claims Under the IDEA and Chapter 14 Have No Support in Law or Fact.

Plaintiffs have not and cannot cite to any legal authority supporting their claim that the School District has violated either the IDEA or Chapter 14.[6] To the contrary, when the well-established law interpreting the IDEA is applied to the undisputed facts of this case, plaintiffs' claims all fail as a matter of law.

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[5] The School District does not dispute that: (a) it receives federal funding; (b) the IDEA considers the plaintiffs to have a "disability;" and (c) pursuant to the IDEA, the plaintiffs are qualified to participate in the educational programs and services provided by the School District. Plaintiffs' assertions regarding alleged members of an as-yet uncertified class are premature and not relevant to this motion. In response to plaintiffs' argument that exhaustion is not required, the School District incorporates by reference the argument in its Motion to Dismiss Plaintiffs' Complaint (Doc. 11), at pp. 6-18.

[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).

1. Neither the IDEA Nor Chapter 14 Require that the School District Provide Prior Written Notice or Otherwise Involve Parents in Decisions Concerning the School Building in Which Their Child Receives the Educational Programming and Services Set Forth in His or Her IEP.

Plaintiffs do not contend that they have been deprived of the right to participate in the development of an IEP or that the School District has not been providing their children with education in the autism support classes that they require. The complaint instead is about the specific school building in which that education is provided. That issue is not governed by the IDEA.

The IDEA provides that parents are entitled to participate in their child's IEP meeting and that they must be given prior written notice by the school of any changes to their child's intended educational program and related services so that they may have the opportunity to discuss and potentially to challenge a proposed change. *See* 20 U.S.C. § 1415(b); *see also* 20 U.S.C. § 1414(e) ("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"). But neither the IDEA nor Chapter 14 requires that the School District provide prior written notice or otherwise involve parents in decisions concerning the selection of the ***particular school building*** in which their child will receive the educational programming and services set forth in his or her IEP.

It is well-established that in the context of the IDEA, "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.*, 2009 U.S. App. LEXIS 6287 at *15 (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'"); *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"); *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 programs offered at the student's current school).

There is no evidence in this case to suggest that by transferring a student requiring autism support from a school building at which the appropriate autism support is not available to another school building at which such support is available, the School District is doing anything more than changing the location at which that student's IEP is implemented. Plaintiffs have not identified any evidence (expert or otherwise) suggesting that the School District's upper-level transfers have had any impact on students' learning experiences, let alone resulted in a denial of FAPE. Indeed, the only evidence in this case is that the four plaintiffs (none of whom was transferred) have been extremely pleased with the quality of their education.[7] *See, e.g.,* Ex. 3, at

[7] 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 autism support. Plaintiffs have also not shown that 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. 16, at 77:19 – 79:4 (concession by Dr. Klin that he has not evaluated the

...Continued

82:14 – 83:11; Ex. 4, at 78:14 – 84:12; Ex. 5, at 7:11-14; Ex. 6, at 10:7-15. Accordingly, because it is not required by either the IDEA or Chapter 14, it is immaterial to plaintiffs' claims whether the School District provides prior written notice or otherwise involves parents prior to conducting upper-level transfers. Therefore, any failure to provide such notice does not give rise to a cause of action under these laws.

2. Plaintiffs' "New" Claim That They Have Been Denied FAPE Has No Basis in Fact or Law.

Despite neither alleging a denial of FAPE in their complaint nor citing any facts or expert opinion demonstrating that upper-level transfers have caused a denial of FAPE, plaintiffs argue that the School District's "failure to provide prior written notice or for meaningful parental involvement constitutes a denial of FAPE." Pl. Memo., at 17. The only explanation that plaintiffs provide concerning *why* or *how* upper-level transfers lead to a denial of FAPE is a conclusory assertion that the transfers do "not account for the unique needs of each putative class member." *Id*.

Plaintiffs, however, have not identified a single student whose academic or behavioral progress has been adversely affected by an upper-level transfer. Rather, plaintiffs cite only the broad, general opinion of their expert witness, Dr. Klin, that "significant, *unplanned*

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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.

transfers *can have* substantial effects on the education and behavioral progress of students with autism." Pl. Memo., at 18. Plaintiffs ignore that Dr. Klin testified that he was not asked to study – and therefore does not opine on – whether the academic or behavioral progress of plaintiffs or of any other students requiring autism support actually were adversely affected by an upper-level transfer. *See* Ex. 16, at 18:5 – 19:4, 89:25 – 91:10. Dr. Klin conceded that the scope of his engagement did not include determining whether the School District adequately manages transitions of students with autism from one school building to another or whether the academic or behavioral progress of any students requiring autism support have been adversely affected by upper-level transfers. *Id.* at 49:5 – 50:12, 89:13 – 91:10.[8]

Although plaintiffs argue that "continuity of programming and managing changes are important aspects to minimize the negative consequences of changes for students with autism, including transitions between educational settings," Pl. Memo., at 18, they have not identified any evidence of any student in the School District whose academic or behavioral progress has been adversely affected by a supposed lack of continuity of programming. Without any supporting evidence of "negative consequences of changes for students with autism,"

[8] Plaintiffs also cite Dr. Klin's statement that "a blanket policy that a student should be administratively placed in any 'autism-ready school' or another school from year to year means that they are not being programmed for as individual learners." Pl. Memo., at 18. But there is no evidence of such a "blanket policy" here. When asked about this statement at his deposition, Dr. Klin conceded that it was not part of his consultation to "ascertain that there was such a [blanket] policy or [that] there is such a policy in the School District of Philadelphia." Ex. 16, at 71:20 – 72:14. Dr. Klin also conceded that he did not review any of the plaintiffs' IEPs and, consequently, cannot speak to whether the School District's programs for plaintiffs or other students requiring autism support, generally – address their needs as "individual learners." *Id*. at 17:20-22 (Dr. Klin concedes that he has not seen any of the plaintiffs' IEPs), 113:7-22 (Dr. Klin states that he did not have sufficient information and it was "not the purpose of his consultation" to determine whether the plaintiffs were "placed in an autism support classroom without appropriate individual attention to their needs").

plaintiffs' broad generalization about what they believe to be theoretically possible cannot be sufficient to warrant either (a) judgment in favor of the plaintiffs or (b) denial of the School District's summary judgment motion.[9]

Plaintiffs also contend that the School District's supposed "policy and practice" is unlawful because it "does not assess whether the upper-level transfer of a putative class member will adversely affect the child's educational and behavioral progress." Pl. Memo., at 19. Plaintiffs do not cite any authority in support of the proposition that the School District is required to conduct such an assessment, and, in fact, there is none. Nothing in the IDEA provides that, before changing the location at which a student receives the educational programming and services set forth in his or her IEP, the School District must conduct an assessment as to whether the transfer will adversely affect the child's educational and behavioral progress. This contention therefore fails as a matter of law.

It also fails as a matter of fact. ***There is no evidence whatsoever of <u>any</u> student whose educational or behavioral progress has <u>ever</u> been adversely affected by an upper-level transfer***. *See, e.g.*, Ex. 16, at 27:15 – 31:22 (Dr. Klin' testimony that to determine whether an upper-level transfer adversely affected a student's academic or behavioral progress, one would

[9] Plaintiffs' additional argument, that "the IEP process, including parental involvement, is instrumental to removing or diminishing impediments to a student's learning," Pl. Memo., at 18, is immaterial to this dispute. By definition, the function of the IEP process is to determine the educational programming and services that each individual student will receive. *See* 20 U.S.C. § 1414(d). This Court has held, however, that a school district may unilaterally make changes in the physical location where a student receives his or her educational programming and services if it does not significantly affect the provision of those programs and services. *R.B. v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 760 (E.D. Pa. 2010) (noting that a school district may exercise discretion over how and where a student's IEP is implemented). There is no evidence in this case that a change in location has "significantly affect[ed]" the provision of said program and services.

have to analyze data showing the student's academic and behavioral progress for a reasonable time before and after the transfer, and that, although such an analysis could be done, he was not asked to do it here). To the contrary, plaintiffs' parents are pleased with their children's education. *See* Ex. 3, at 82:14 – 83:11 (R.S.'s mother notes that R.S. is behaving well in school and academically she "really see[s] him blossoming"); Ex. 4, at 78:14 – 84:12 (J.V.'s mother notes that with the exception of math, which is very difficult for him, J.V. has excelled academically); Ex. 5, at 7:11-14 (P.V.'s mother states that she thinks the School District is providing P.V. with a "good education"); Ex. 6, at 10:7-15 (M.M.'s mother states that she has "no complaints" about M.M.'s teacher, Miss S). Indeed, by relying on this contention to bolster their argument that they have been denied FAPE without presenting any evidence that the School District's supposed "policy and practice" actually had any adverse effect on any student's education, plaintiffs are trying to flip the burden of proof. The School District does not bear the burden of proving that students *were not* denied FAPE; rather, it is plaintiffs' burden to prove that they ***were*** denied FAPE. *See L. E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 392 (3d Cir. 2006). Because plaintiffs have failed to offer any evidence or expert opinion of adverse affects to the educational or behavioral progress of P.V., M.M., J.V., R.S., or any other student in the School District, plaintiffs cannot satisfy their burden.

In sum, because plaintiffs have not: (a) alleged a denial of FAPE in their complaint; (b) identified any student in the School District whose academic or behavioral progress has been adversely affected by the School District's alleged "failure to provide prior written notice or for meaningful parental involvement," or (c) identified any legal authority linking upper-level transfers to the denial of FAPE, plaintiffs are not entitled to summary judgment. Indeed, given their claim's lack of *legal support*, plaintiffs cannot be entitled to

"judgment as a matter of law." Accordingly, plaintiffs' motion for summary judgment should be denied, and this Court should grant summary judgment in favor of the School District.

3. The Requirements of the IDEA and Chapter 14 are Not Implicated By Decisions Relating to Upper-Level Transfers.

In arguing that they have a right to be involved in the selection of the school building in which the autism support services required by their child's IEP will be provided, plaintiffs rely on Section 614(d) of the IDEA, 20 U.S.C. § 1414(d), which states what must be included in a child's IEP. Among the required items is "the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications." 20 U.S.C. § 1414(d)(1)(A)(i)(VII).[10] Plaintiffs contend that by including the word "location" in that provision, Congress required that the IEP include the physical location of the school building where the services will be provided and, therefore, that parents and IEP teams be involved in selection of that school building.

Plaintiffs' contention is incorrect. The term "location" in that context refers to the environment in which the services will be provided (for example, a regular classroom or an autism support classroom). In an oft-cited case on the issue, *T.Y.*, 584 F.3d at 419-20, the court considered plaintiffs' argument and, after examining both the legislative history and its administrative construction by the U.S. Department of Education, rejected it. The court held, "the term 'location' does not mean the specific school location, but the general environment of

[10] Subclause (IV) requires the IEP to include a statement of special education services and supplementary aids and services and of program modifications or supports for school personnel. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

the overall program" where the special education services are provided. *See id.* (*citing* S. Rep. No. 105-17, at 21 (1977)) (explaining that legislation requires IEPs to specify "location" to make clear whether services will be provided in a "regular classroom" or elsewhere); U.S. Dep't of Educ., *Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities*, 64 Fed. Reg. 12406, 12594 (Mar. 12, 1999) (explaining that "location . . . refers to the type of environment that is the appropriate place for provision of the service," such as a "regular classroom or resource room").

Plaintiffs also rely on a regulation, 34 C.F.R. § 300.116, that specifies what a school district must consider in making an education "placement." Section 300.116(a)(1) says that a placement decision must be "made by a group of persons, including the parents, and other persons knowledgeable about the child," and Section 300.116(b)(3) says the placement must be "as close as possible to the child's home."[11] But as the court explained in *T.Y.*, "the term 'educational placement' in these regulations refers only to the general type of educational program in which the child is placed," and the regulations therefore do not give parents any say in picking the program's physical location. 584 F.3d at 419-20. Thus, "[T]he physical location for implementing an IEP need not be included in the IEP." *Brad K. v. Bd. of Educ.*, 787 F. Supp. 2d 734, 740 (N.D. Ill. 2011) (noting that "location of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For

[11] The complaint makes no allegation that any plaintiff was provided services in violation of Section 300.116(b) because the school building was not as close as possible to the child's home.

example, is the related service to be provided in the child's regular classroom or resource room?"); *In re: Educational Assignment of Joseph R,* 2009 U.S. App. LEXIS 6287 at *15.[12]

The cases cited by plaintiffs are not to the contrary. In both *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 680 (4th Cir. 2007), and *Madison Metro. Sch. Dist. v. P.R.*, 598 F. Supp. 2d 938, 949 (W.D. Wisc. 2009), the respective courts held that a change in the location at which special education services are provided only causes a change in "educational placement if the location change results in a dilution of the quality of a student's education or a departure from the student's least restrictive environment-compliant setting [internal quotations omitted]." Here, because plaintiffs have not identified any evidence concerning any student who was ever transferred, there is no evidence that upper-level transfers have resulted in a dilution of the quality of any student's education or a departure from any student's least restrictive environment-compliant setting. Consequently, even under the standard set forth in the cases that they cite, plaintiffs cannot maintain that upper-level transfers result in anything more than a change in the location where students receive the educational programs and services set forth in their IEPs.

In sum, because: (a) the identification of the school building in which an IEP will be implemented is not required to be included in the IEP, and (b) plaintiffs have not identified

[12] The U.S. Department of Education also distinguishes between "educational placement" and location. *See Letter to Fisher*, 21 IDELR 992 (OSEP 1994) (attached as Ex. 17), 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. 18), 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").

any evidence that upper-level transfers amount to anything more than a change in the school building where students receive the educational programming and services set forth in their IEPs – as opposed to a change in their "educational placement" – there is no basis for this Court to conclude that plaintiffs are entitled to "judgment as a matter of law." To the contrary, because plaintiffs' claims fail as a matter of law, this Court should grant the School District's motion for summary judgment (Doc. 49).[13]

4. There is No Legal Support for Plaintiffs' Claim That They are Entitled to a List of the School District's Autism Support Classrooms.

Summary judgment also should be denied on plaintiffs' claim that they are entitled to a list of the School District's autism support classes, because there is no requirement in the IDEA, Chapter 14, the ADA or Section 504 that the School District "maintain and make available to parents a list of the building locations of autistic support classrooms." Pl. Memo., at 22. The School District is not required to involve parents in its selection of the school building in which autism support will be provided. Accordingly, giving parents "access to a list of locations of autistic support classrooms" would "serve no purpose." Ex. 8, at 71:6-24.

Citing absolutely no authority, plaintiffs argue that the School District must "maintain and make available to parents a list of the building locations of autistic support classrooms" because "defense witnesses, including their expert, cannot articulate why parents of putative class members should not have this information." Pl. Memo., at 23. Put another way,

[13] Although they also make an argument about "poorly executed changes to the transportation services for putative class members," *see* Pl. Memo., at 21, plaintiffs have not alleged any injury-in-fact or injury to their statutory rights that they suffered from administrative errors concerning bus transportation, which were promptly remedied after the first day of school.

plaintiffs argue that by virtue of the School District's witnesses' supposed failure to articulate why parents "should not have this information," this Court should conclude that parents are *legally entitled* to this information. This flawed logic is emblematic of plaintiffs' entire argument.

In sum, because the School District is not, as a matter of law, required to "maintain and make available to parents a list of the building locations of autistic support classrooms," plaintiffs' motion for summary judgment must be denied. Summary judgment should be entered in favor of the School District.

B. Plaintiffs' Discrimination Claims Under the ADA and Section 504 Have No Support in Law or Fact.

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 transferring a student requiring autism support from a school building at which the autism support required by the student's IEP *is not available*, to a school building at which the autism support required by the IEP *is available*, 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' unsupported contention that they have proven, as a matter of law, that the School District has violated the ADA or Section 504. To establish a violation of these statutes, plaintiffs

must prove that: (1) they are disabled; (2) they are "otherwise qualified" to participate in school activities; (3) they were excluded from participation in, denied the benefits of, or subject to discrimination by the School District; and, for the Section 504 claim only, (4) the School District received federal financial assistance. *See Ridley Sch. Dist. v. M.R.*, No. 11-1447, 2012 U.S. App. LEXIS 9908 at *51 (3d Cir. May 17, 2012); *Spieth v. Bucks Cnty. Housing Authority*, 594 F. Supp. 2d 584, 594 (E.D. Pa. 2009). The controlling issue here is whether plaintiffs can prove the third element. Because plaintiffs do not make any allegation that students with autism have been excluded from participation or denied benefits by the School District, the only question is whether the School District has discriminated against plaintiffs.

There are three bases on which a plaintiff can bring a claim for 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). Here, plaintiffs do not allege intentional discrimination or disparate impact. They allege only that "failing to reasonably accommodate and account for the well-recognized characteristics of putative class members' statutorily recognized disabilities, and instead subject them to a discriminatory policy and practice solely because they experience autism, violates the ADA and § 504." Pl. Memo., at 24. This argument is unavailing.

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. Plaintiffs cannot meet that burden. Indeed, they directed their expert witness, Dr. Klin, not to analyze

whether any student's meaningful participation or access to benefits has been affected by upper-level transfers. Ex. 16, at 49:18 – 50:12

Plaintiffs' citation of *Christopher S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205, 1212 (9th Cir. 2004), adds nothing to their argument. Although plaintiffs cite *Christopher S.* for the proposition that a "blanket policy of shortened days for students with autism violated § 504" (Pl. Memo., at 24), that is not actually the holding of the case (the holding was limited to whether plaintiffs had sufficiently exhausted their administrative remedies). Moreover, having failed to provide any evidence that participation or access to benefits has been affected by upper-level transfers, *Christopher S.* provides no support for their claim here that prohibition of such transfers is necessary for them to have meaningful participation in or access to specific educational benefits.[14]

In sum, because plaintiffs have not presented *any* evidence that assigning students with autism to school buildings that have autism support classrooms for students in their grade but not for students in other grades is, somehow, necessary for the provision of a free appropriate public education, plaintiffs are not entitled to judgment as a matter of law on their discrimination claims. To the contrary, in light of the complete lack of evidentiary support for plaintiffs' claims under the ADA and Section 504 of the Rehabilitation Act, this Court should grant the School District's motion for summary judgment (Doc. 49) on this and all other counts.

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[14] Plaintiffs also cite *Barr-Rhoderick v. Bd. of Educ. of Albuquerque Pub. Schs.*, No. 04-0327, 2005 U.S. Dist. LEXIS 43691 at *21 (D.N.M. Sept. 30, 2005), another case addressing shortened school days for students with disabilities. In *Barr-Rhoderick*, the court held that exhaustion of administrative remedies was not required on the facts presented. That holding has no bearing on the issues presented by plaintiffs' motion for summary judgment.

VI. CONCLUSION

For the foregoing reasons, the School District respectfully requests that this Court deny plaintiffs' motion for summary judgment and, instead, enter summary judgment in favor of the School District on all counts.

Respectfully submitted,

/s/ *David Smith*
David Smith (Attorney I.D. 21480)
Benjamin D. Wanger (Attorney I.D. 209317)

Attorney for Defendants,
The School District of Philadelphia, Arlene Ackerman, Linda Williams and the School Reform Commission

SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103-7286
Telephone: 215-751-2000
Facsimile: 215-751-2205

Of Counsel.

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