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

P.V., a minor, by and through his Parents, **Pedro Valentin** and **Yolanda Cruz**, individually, and on behalf of all others similarly situated, et al.,	)	Civil Action No. 2:11-cv-04027
Plaintiffs,	)	
v.	)	
The School District of Philadelphia, et al.,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Pursuant to Federal Rule of Civil Procedure 23, Plaintiffs respectfully move for an order granting class certification and appointing the Public Interest Law Center of Philadelphia ("PILCOP") and Dechert LLP as class counsel. The reasons for this motion are set forth in the accompanying memorandum of law, which is incorporated herein by reference.

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Dated: July 13, 2012

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
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I. INTRODUCTION

Plaintiffs are students with autism in the School District of Philadelphia ("SDP" or the "District") and their parents who bring this case on behalf of themselves and similarly situated students with autism and their parents, to enjoin Defendants' unlawful policy and practice of "upper leveling" students with autism because of their disability, and to require the creation of an appropriate plan to provide continuity of programming for students with autism.

Defendants are the District itself, District administrators responsible for ensuring that students with autism receive a meaningful education, and the School Reform Commission ("SRC"), the District's governing body. Defendants maintain and enforce an Automatic Autism Transfer Policy ("AATP"), which Defendants refer to as "upper leveling." Pursuant to this policy and practice, the District unilaterally transfers children with autism from one school to another simply because they have autism, require autistic support, and complete a certain grade. Defendants do not permit the students' Individualized Education Program ("IEP") team members, including the students' parents, to participate in these significant transfer decisions. Instead, parents (and other IEP team members) learn of transfer decisions substantially after the fact, close to or even at the start of the impending school year, and without meaningful opportunity to discuss, contest, or most importantly plan for the students' transitions from one educational setting to another.

Defendants' policy and practice violates federal and state substantive and procedural rights afforded to students and parents of students with disabilities, as well as federal prohibitions against discrimination based on disability. Plaintiffs seek declaratory and prospective injunctive relief; principally, an order enjoining Defendants (i) to discontinue their

unlawful policy and practice of automatically transferring students with autism, (ii) to create and adhere to an appropriate written plan to provide continuity of programming for and better manage the transfer of students with autism, and (iii) to create, publish, and update a list of autistic support classrooms for grades K-8 so parents can at least have an idea of where their children may be assigned to receive autistic support within the District.

Plaintiffs' claims are well-suited for class treatment. Courts consistently hold that cases alleging systemic violations in an educational setting and seeking class-wide declaratory and injunctive relief clearly fit the mold for class certification. Plaintiffs' claims will be proven through common evidence focused on Defendants' unlawful conduct. Proof of the existence, scope, implementation, and enforcement of Defendants' unlawful policy and practice centers on defense documents and testimony. This proof, including direct statements from defense witnesses and documents, is what all putative class members would use to prove their claims. Moreover, as demonstrated by the Expert Report of Dr. Ami Klin (Ex. 32), Defendants' unlawful actions can be assessed class-wide because the pertinent features of autism spectrum disorder associated with resistance to change and transition are virtually universal, even if specific expressions may vary from child to child.

For these and other reasons, explained more fully below, Plaintiffs, on behalf of themselves and those similarly situated, move for an order certifying this suit for class treatment under Federal Rule of Civil Procedure 23. Plaintiffs also request appointment of the Public Interest Law Center of Philadelphia ("PILCOP") and Dechert LLP as class counsel.

II. OVERVIEW OF PLAINTIFFS' CLAIMS

There are more than 1,000 students with autism – putative class members – in the District. *See, e.g.*, Students with Autism Chart, DEF000993 (Ex. 26); Students with Autism Chart, DEF008039 (Ex. 28); Cordero, SDP Autism Coordinator, Dep. (Ex. 18) at 31-32, 36. Plaintiffs here are four such students by and through their respective parents: P.V. and his parents Pedro Valentin and Yolanda Cruz; M.M. and his parent Carla Murphy; J.V. and his parents Sharon Vargas and Ismael Vargas; and R.S. and his parents Heather Sanasac and Matthew Sanasac. Plaintiffs bring these claims on behalf of themselves and putative class members alleging violations of the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 et seq. ("IDEA"), Chapter 14 of the Pennsylvania Code, Section 504 of the Rehabilitation Act, 42 U.S.C. § 794, and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. ("ADA").

A. Defendants' Unlawful Automatic Autism Transfer Policy As Established Through the Administrative Hearing Process.

Each of the four named Plaintiffs previously availed themselves of the administrative hearing process available to them. *See* Compl. (Doc. 1) ¶¶ 15-18. In the course of a combined hearing, P.V. and M.M. jointly challenged the District's Automatic Autism Transfer Policy at issue in this case. In a consolidated ruling, *see* Hr'g Dec. No. 01541-1011 AS (Ex. 2), Hr'g Dec. No. 1539-1011 AS (Ex. 1), the Hearing Officer found, among other things, that:

- The District serves students with autism, in part, through autistic support ("AS") classrooms that generally serve students who, age-wise, are in grades K-2, 3-5, or 6-8. Hr'g Dec. No. 01541-1011 AS (Ex. 2) at 3, ¶2.
- When a student requiring autistic support reaches the end of his or her AS classroom age level, he or she is moved to another building. This process is referred to as "upper leveling." *Id.* at 5, ¶ 14-16.

- Nondisabled students are only transferred if the "family moves, the parents request a building transfer or the student is moved for disciplinary reasons." *Id.* at 5, ¶ 17.

- "IEP teams do not make building placement determinations," and "parents are not involved in the [building selection] process." *Id.* at 6, ¶ 22-23.

- "Rather, the District's division directors make the building assignment 'pretty much unilaterally' and inform parents of their decisions by letter shortly before the start of the school year." *Id.* at 6, ¶ 23.

- "Neither a NOREP [Notice of Recommended Educational Placement] nor a procedural safeguards letter is sent" when a transfer decision is made. *Id.*

The only reason child-Plaintiffs were not transferred was because their parents' initiation of administrative proceedings triggered the IDEA's stay-put provision, *see* 20 U.S.C. § 1415(j), thus barring their upper-level transfer. *See* Hr'g Dec. No. 01541-1011 AS (Ex. 2) at 15.

1. The Administrative Hearing Officer Found That the District's Upper-Leveling Policy and Practice Violates the IDEA.

The Hearing Officer determined that the District's upper-leveling process "violated the Parents' right to participation by reassigning the Student to a different school building without sending IDEA-compliant prior written notice." Hr'g Dec. No. 01541-1011 AS (Ex. 2) at 15. The Hearing Officer did not believe he could order district-wide relief. *See id.*; *see also* J.V. Hr'g Test. No. 1925-10111-AS (Ex. 10) at 10-11 (different hearing officer in other Plaintiff's case noting but not deciding district-wide challenge to upper leveling). The Hearing Officer could, and did, however, order the adherence to procedural safeguards with respect to the students before him, ordering among other things "the District to issue a NOREP and a Procedural Safeguards Notice" prior to transferring the students before him. Hr'g Dec. No. 01541-1011 AS (Ex. 2) at 15. The Hearing Officer also "encouraged [the District] to alter its

procedures on a broader scope, if only to avoid a plethora of identical claims from similarly situated students." *Id.*

2. The Administratively-Determined Facts Are *Prima Facie* Correct.

This case constitutes Plaintiffs' appeal of the administrative proceedings to the extent the Hearing Officers believed they could not order the general cessation of the District's upper-leveling process. *See, e.g.*, Compl. (Doc. 1) ¶ 9.b. Defendants did *not* cross-appeal. Thus, Defendants waived their right to contest the Hearing Officers' findings below. Regardless, at a minimum, 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); *see D.S. v. Bayonee Bd. of Educ.*, 602 F.3d 553, 564 (3d Cir. 2010).

Those findings included testimony from Cathy Roccia-Meier, member and former chair of the Philadelphia Right to Education Local Task Force.[1] One of the Task Force's "top" concerns is how the District's upper-leveling policy and practice disrupts continuity of programming for students with autism. *See, e.g.*, Roccia-Meier Hr'g Test. (Ex. 5) at 48-51, 56. Leah Taylor, a 23-year veteran special education teacher, further described that the District's upper-leveling policy and practice "automatically" applies to all students requiring autistic support. Taylor Hr'g Test. (Ex. 6) at 413. Neither Ms. Taylor, nor a full IEP team, are part of any upper-leveling transfer decision. *Id.* at 118-19, 132-33, 166-68.

[1] The Task Force arose out of the *PARC* consent decree. *See Pa. Ass'n for Retarded Children (PARC) v. Pennsylvania.*, 334 F. Supp. 1257 (E.D. Pa. 1972). It is charged with systematically monitoring and advocating programs for students with disabilities. Roccia-Meier Hr'g Test. (Ex. 5) at 34.

B. Discovery In This Case Confirms the Same Upper-Leveling Policy and Practice Found By the Administrative Hearing Officer to Violate the IDEA.

Discovery in this case corroborates the Hearing Officer's findings of fact.

1. The District Subjects All Putative Class Members to Its Upper-Leveling Policy and Practice.

Defense documents and testimony unearthed in discovery not only corroborate the existence of the upper-leveling policy and transfer practice alleged by Plaintiffs and previously found by the Hearing Officer, but also Defendants' application of it to putative class members in a strikingly systematic manner that discriminates against students with autism.

As found by the Hearing Officer below, the District does not offer a continuity of autistic support programming. Whereas various schools may house grades K-5, K-8, or 6-8, those schools generally do not house AS classrooms for those same grades. *See, e.g.*, AS Teacher List, DEF013637-51 (Ex. 30); Monras-Sender, Exec. Dir. of the Office of Specialized Instructional Servs. ("OSIS"), Hr'g Test. (Ex. 7) at 488-89. Thus, while non-disabled students attending a K-5 school usually continue at that school for all six grade levels, a student requiring autistic support may only attend for grades K-2, and is then transferred to another school for grades 3-5. *See, e.g.*, Monras-Sender Dep. (Ex. 21) at 46, 53-54; Hunt, Dir. of Spec. Educ., Dep. (Ex. 19) at 109-10.

Continuity of programming is an important aspect of educating students with autism to minimize negative consequences of transitions between educational settings. *See, e.g.*, Educating Students with Autism Spectrum Disorders, DEF017736-63 (Ex. 31); Klin Rpt. (Ex. 32) at 5-8. District personnel agree. *See, e.g.*, Cordero Dep. (Ex. 18) at 48-49; Hunt Dep. 131-34, 158-60; Monras-Sender Hr'g Test. (Ex. 19) at 494. Even the District's documents reflecting

best practices recognize, and indeed affirmatively recommend, that students requiring autistic support should enjoy continuity of programming equivalent to their non-disabled peers. *See, e.g.*, SDP Special Educ. Facilities Master Plan, DEF006493-99 (Ex. 27) at 1; OSIS Upper-Level Transfers for Sept. 2011, Continuity of Programs, DEF012234 (Ex. 28); *see also* Imagine 2014 Presentation, DEF000172-237 (Ex. 25) at 26 (plan to "[p]rovide for a continuum of services in K-5 and K-8 schools"); Ackerman, Former Superintendent, Dep. (Ex. 17) at 26 (continuity of programming for students requiring autistic support just "makes sense").

Notwithstanding this, the District does not provide continuity of programming to the same extent as it does for non-disabled students. *See, e.g.*, Monras-Sender Dep. (Ex. 21) at 46, 53-54; Hunt Dep. (Ex. 19) at 109-10. The District does not publish, and has been unable or unwilling to provide, an accurate and current list identifying where autistic support classrooms are located within the District, and the grade levels served by each. *See, e.g.*, Monras-Sender Dep. (Ex. 21) at 97; Hunt Dep. (Ex. 19) at 89-90; Cordero Dep. (Ex. 18) at 42-43.

District officials and third parties openly acknowledge the District's longstanding policy and practice of upper-leveling students with autism who require autistic support. *See* Williams, Deputy Chief of OSIS, Decl. (Ex. 33); SDP Rule 30(b)(6) Dep. (Ex. 23) at 40, 82-86.[2] Non-disabled students are not subject to the same policy and practice. *See* Hr'g Dec. No. 01541-1011 AS (Ex. 2) at 5, ¶ 17; Monras-Sender Dep. (Ex. 21) at 46-47, 171, 185.

[2] *See also* Taylor Hr'g Test. (Ex. 6) at 348 ("Because we lack a three to five placement, an eight to eleven-year-old class, at Richmond, [P.V.] would be leaving. That's always been the case with children who reach the age of eight."); Roccia-Meier Dep. (Ex. 22) at 20, 73 ("[N]umerous, unlimited amounts of parents have called me with this issue over the years."); Thompson, Phila. Right to Educ. Local Task Force, Current Chair, Dep. (Ex. 24) at 52 (student with autism could be transferred "three times before getting to high school").

Per the District's longstanding policy and practice, students requiring autistic support who "level out" at their current location are automatically transferred to a different educational location without parental or broader IEP team input. *See* Monras-Sender Dep. (Ex. 21) at 56-57. Instead, a District administrator simply assigns the student to any other location that can be found with space without reference to the student's IEP. *See id.*; SDP Rule 30(b)(6) Dep. (Ex. 23) at 55. This is done without arranging for the student to visit the receiving school; without arranging for the sending and receiving teachers to discuss the student; without conducting a comparability assessment of whether the receiving educational setting will sufficiently approximate the student's prior setting to ensure continued, meaningful educational and behavioral progress; and without informing the student's parents until after the fact. *See* Williams Decl. (Ex. 33); SDP Rule 30(b)(6) Dep. (Ex. 23) at 55-56, 82-84. Not even the sending or receiving special education teachers are involved. Taylor Hr'g Test. (Ex. 6) at 413.

The only criteria District administrators apparently reference when making these unilateral decisions are whether the student requires autistic support in the first place, and whether the receiving location is age-appropriate. SDP Rule 30(b)(6) Dep. (Ex. 23) at 82-84; Monras-Sender Dep. (Ex. 21) at 42-43. The District applies its upper-leveling policy and practice district-wide. *See* SDP Rule 30(b)(6) Dep. (Ex. 23) at 86.

Meaningful parental involvement is a major component of the IDEA. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06, 208-09 (1982). The statute recognizes the importance of parents' participation in their children's education, as well as the implicit need to help parents with the challenges associated with raising children with special needs. 20 U.S.C. § 1415(b), (f)-(i); 34 C.F.R. § 300.322; Klin Rpt. (Ex. 32) at 9-10.

Accordingly, the IDEA expressly mandates parental involvement to foster "discussions on optimal strategies to promote learning and decrease disruptive behaviors while advancing generalization of skills across settings." Klin Rpt. (Ex. 32) at 10.

Yet, the District does not pre-notify parents of transfer decisions, such as by issuing a NOREP. A NOREP is the IDEA-compliant procedural device through which parents can initiate an appropriate dialogue about a proposed change to their child's special education programming, if they so choose. *See* 20 U.S.C. § 1415(b)(3), (c)(1); *Honig v. Doe*, 484 U.S. 305, 311-12 (1988). Any IEP team member may wish to engage in a dialogue about a potential transfer decision to minimize potentially deleterious effects a transfer may have on a student's educational and behavioral progress.[3] By not informing parents or other IEP team members about a transfer decision until after the fact, and even then only through rote or informal means (if at all), teachers – who presumably have direct knowledge of the students' needs – have no voice in the process. Parents effectively are left without any meaningful recourse to address their child's transfer and its ramifications for the child's educational and behavioral progress.

Instead of issuing NOREPs, the District claims it sends a terse form letter or conveys transfer decisions through other informal means. Monras-Sender Dep. (Ex. 21) at 66-68, 73. Defendants do not have any written procedure governing when to issue any communications,

[3] *See* Klin Rpt. (Ex. 32) at 11; *see also, e.g.*, Hunt Dep. (Ex. 19) at 195 (acknowledging potential disruptive effects of upperleveling on students with autism); Roccia-Meier Dep. (Ex. 22) at 20 (stressing importance of familiar school environments for students with autism); Thompson Dep. (Ex. 24) at 27-28 (same); M. Sanasac Dep. (Ex. 14) at 31 (describing child-Plaintiff's difficulty with transitions); Murphy Dep. (Ex. 12) at 32 (same); Cruz Dep. (Ex. 11) at 9-10, 48 (same).

their contents, or maintenance of record that such communications are even sent in the first place. Monras-Sender Dep. (Ex. 21) at 72, 87-88; Hunt Dep. (Ex. 19) at 166-67, 173.

Discovery in this case confirms that transfer decisions are conveyed to parents in a disorganized, haphazard fashion. For instance, M.M.'s mother received a handwritten note stating that her child would not be attending his same school the following year, but not stating where. Murphy Hr'g Test. (Ex. 8) at 623-25. When she asked where, she received different answers each time. *Id.* at 625-26. P.V.'s mother similarly received only an oral comment from her child's teacher, and then started receiving transportation letters; the comment and letters identified different schools. Cruz Hr'g Test. (Ex 9) at 583-84. Yet another parent (and absent class member) received a literal "strip" of paper stating that her child would be going to a different school, but was not told where until August, shortly before the new school year and only after she herself pressed the issue. McKinnie Dep. (Ex. 20) at 50-51; PLF 03037 (Ex. 16).

2. Plaintiffs' Experiences Are Characteristic of Those of the Class.

Each Plaintiff experienced the District's upper-leveling policy and transfer practice in the precise manner in which defense witnesses describe its general application to all students requiring autistic support. Each child-Plaintiff has autism and was determined to require autistic support. The District attempted to upper-level each Plaintiff after the second grade (even though their school building at the time was a K-5 school) to a new school building without convening an IEP meeting; without issuing a NOREP; and without consulting the students' sending teacher, receiving teacher, or parents. *See, e.g.*, H. Sanasac Dep. (Ex. 13) at 91-94; Murphy Dep. (Ex. 12) at 30-31; Cruz Dep. (Ex. 11) at 42-64; S. Vargas Dep. (Ex. 15) at 98-99; *see also* Monras-Sender Dep. (Ex. 21) at 56-57. In each Plaintiff's case, the upper-level

transfer was temporarily avoided only after the parents' institution of legal action. *See generally* Hr'g Dec. No. 01541-1011 AS (Ex. 2) at 15; Hr'g Dec. No. 1539-1011 AS (Ex. 1) at 15; Hr'g Dec. No. 2663-1112 AS (Ex. 3) at 4. Defendants' own discovery confirms similar experiences by other students requiring autistic support, besides Plaintiffs. *See* McKinnie Dep. (Ex. 20) at 52-55 (proposed transfer decision made unilaterally without IEP team or parental involvement; no NOREP issued; parent learned of proposed location shortly before new school year; transfer aborted only through parent's initiation of administrative legal action).

III. LEGAL STANDARD FOR CLASS CERTIFICATION

"'[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion.'" *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 n.6 (3d Cir. 2008) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982)) (further quotations, alterations, and citations omitted). Plaintiffs seeking to certify a properly defined class under Federal Rule of Civil Procedure 23 must satisfy all four elements of Rule 23(a), and at least one of the three categories described in Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2011).

The four elements of Rule 23(a) are numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a); *see, e.g.*, *Gaskin v. Pennsylvania*, No. Civ. A. 94-4048, 1995 WL 355346, at *2 (E.D. Pa. June 12, 1995). The "numerosity" prong ensures that enough persons with similar claims exist to justify the class. *See, e.g.*, *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994). The remaining criteria serve as guideposts for whether the plaintiffs' and putative class members' claims are sufficiently interrelated, and whether it is economical to

maintain a class. *See, e.g.*, *Falcon*, 457 U.S. at 158 n.13; *Baby Neal*, 43 F.3d at 55-56. Once Rule 23(a)'s criteria are met, a movant must satisfy one of the subcategories of Rule 23(b).

A court may look beyond the pleadings to conduct a "rigorous analysis" to satisfy itself that the Rule 23 criteria are met. *In re Hydrogen Peroxide*, 552 F.3d at 309. This does not mean a court should determine whether plaintiffs will or may prevail on their claims. *See id.* Rather, a court should preview the merits and make findings only to ensure that evidence common to all class members will be used to prove the merits of plaintiffs' case. *See, e.g.*, *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 305 (3d Cir. 2011). Plaintiffs are not required to establish the validity of their claims at the class certification stage, and the court's merits findings may not be binding on subsequent merits inquiries at trial. *See id.* at 306.

Plaintiffs here seek class certification pursuant to Rules 23(b)(2) and (b)(3). Plaintiffs seek to certify a class that consists of:

> All children with autism in the School District of Philadelphia in grades kindergarten through eight ("K-8") who have been illegally transferred, are in the process of being transferred, or are at risk of being illegally transferred, as a result of the District's Automatic Autism Transfer Policy, the parents and guardians of those children, and future members of the class.

Consistent with Rule 23(c)(1)(B), Plaintiffs' proposed definition objectively defines a class "in a way that enables the court to determine whether a particular individual is a class member." *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 175 (E.D. Pa. 2009). Courts recognize similar definitions as sufficiently particular. *See, e.g.*, *Chester Upland Sch. Dist. v. Pennsylvania*, No. 12-132, 2012 WL 1450415, at *1 (E.D. Pa. Apr. 25, 2012) (certifying class of "[a]ll parents of students attending Chester Upland School District, including students obtaining or eligible to obtain services pursuant to the [IDEA], and students with a disability protected by the

[Rehabilitation Act]."); *C.G. v. Pennsylvania*, No. 1:06-cv-1523, 2009 WL 3182599, at *2 (M.D. Pa. Sept. 29, 2009) (certifying class of "all students . . . in Pennsylvania school districts with a high population of special-education students"); *Gaskin*, 1995 WL 355346 at *1 (certifying class of "all present and future school age students with disabilities").

IV. PLAINTIFFS SATISFY RULE 23(a)

Plaintiffs clearly satisfy each of the four prerequisites of Federal Rule of Civil Procedure 23(a) (numerosity, commonality, typicality, and adequacy).

A. The Class Is Numerous.

Under Rule 23(a)(1), a class must be so numerous that joinder of all members would be "impracticable." "No minimum number of plaintiffs is required to maintain a suit as a class action." *Stewart v. Abraham*, 275 F.3d 220, 226 (3d Cir. 2001); *see Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 410 (E.D. Pa. 2007) ("[n]o single magic number exists satisfying the numerosity requirement"). "[C]ommon sense assumptions" may guide a court's decision of whether a class is sufficiently large to render joinder impracticable. *Clarke v. Lane*, 267 F.R.D. 180, 195 (E.D. Pa. 2010).

Common sense reveals Plaintiffs' class is numerous. More than 1,000 putative class members have attended grades K-8 in the District for at least the last four school years. *See* Students with Autism Chart, DEF000993 (Ex. 26); SDP Rule 30(b)(6) Dep. (Ex. 23) at 27; Monras-Sender Dep. (Ex. 21) at 33. There are currently more than 130 autistic support classes in the District, *see* Monras-Sender Dep. (Ex. 21) at 35-37, each of which is supposed to accommodate up to eight students. 22 Pa. Code § 14.105(c)(2). Even if each class

accommodated only one student each – which absolutely is not the case – there would still be at least 130 putative class members. Plainly, joinder is impracticable in these circumstances.

B. Common Questions of Law or Fact Exist.

The second prong of Rule 23(a) requires there to be "questions of law or fact common to the class." Commonality does not mean identicality. *Hassine v. Jeffes*, 846 F.2d 169, 176-77 (3d Cir. 1988). Commonality exists so long as Plaintiffs share "*at least one* question of fact or law with the grievances of the prospective class." *Baby Neal*, 43 F.3d at 56 (emphasis added).

Factual differences between the claims of individual class members do not negate common questions of law or fact among their claims. *See id.* at 56-57. "This is especially true where [as here] plaintiffs request declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them, and there is therefore no need for *individualized* determinations of the propriety of the injunctive relief." *Id.* at 57 (emphasis in original). In such cases, a movant must merely establish that the harm complained of is common to the class and presents a threat of injury that is "real and immediate." *Hassine*, 846 F.2d at 177. A school-wide policy and practice that does or may subject putative class members to a common harm represents a "real and immediate" threat of injury for the purposes of commonality. *See, e.g.*, *C.G.*, 2009 WL 3182599 at *3; *J.S. ex rel. N.S. v. Attica Cent. Schs.*, No. 00 CV 513S, 2006 WL 581187, at *5 (W.D.N.Y. Mar. 8, 2006).

Many common issues of law or fact exist here, including:

- Whether the District has a policy and practice of upper leveling putative class members;
- Whether the District upper-levels putative class members because of a disability;

- Whether the District upper-levels putative class members without regard to each student's educational and behavioral goals;
- Whether the District upper-levels putative class members without meaningful IEP team and parental involvement;
- Whether the District upper-levels putative class members without appropriate notice to parents and other IEP team members, including their special education teachers;
- Whether the District's challenged conduct deprives putative class members of a free appropriate public education ("FAPE"); and
- Whether the District refuses to provide information about the location of autistic support classrooms within the District.

These questions are common to each putative class member.

C. Plaintiffs' Claims Are Typical.

Plaintiffs' claims also must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality requirement ensures that a movant's interests are aligned with those of other putative class members. *Baby Neal*, 43 F.3d at 55. Typicality exists when plaintiffs contest the same unlawful conduct that affects themselves and putative class members. *Id.* at 57; *see Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 394 (E.D. Pa. 2011) (typicality satisfied if claims arise "from the same event or practice or course of conduct").

The specifics of each putative class member's disability, or even injury, "is irrelevant" in cases such as this one. *See Gaskin*, 1995 WL 355346, at *3; *see also Baby Neal*, 43 F.3d at 58. What matters in class actions seeking declaratory and injunctive relief under the IDEA, Chapter 14 of the Pennsylvania Code, the ADA, and the Rehabilitation Act is whether the various injuries stem from a common pervasive violation. *Baby Neal*, 43 F.3d at 58; *see C.G.*, 2009 WL 3182599, at *6 (certifying class under Rehabilitation Act; typicality existed because

the "systemic challenge is equally important" to all putative class members); *J.S.*, 2006 WL 581187, at *6 (certifying class under IDEA and Rehabilitation Act; typicality established through alleged numerous systemic violations in defendant's special education program that potentially affect each disabled student); *Gaskin*, 1995 WL 355346, at *4 (certifying class under IDEA; typicality satisfied given "alleged failure to comply with their duties under the IDEA affects the entire proposed class").

Plaintiffs' claims here are typical of the claims of the entire putative class. Each Plaintiff alleges potential harm from Defendants' unlawful policy and practice of upper leveling students with autism. Each Plaintiff alleges a course of conduct against all putative class members, based on the same legal theories. Further, each Plaintiff seeks declaratory and injunctive relief to curb Defendants' unlawful policy and practice. Class actions such as this one seeking nonmonetary relief to remedy systemic deficiencies "clearly fit t[he] mold." *Baby Neal*, 43 F.3d at 58. While there may be differences in each putative class member's circumstances, that does not render Plaintiffs' claims atypical. *See id.* at 57-58. Even though each putative class member may manifest autism spectrum disorder differently, or may have experienced a slightly varied change in educational environment or routine, all class members are subject to the same detrimental upper-leveling policy and practice. *See, e.g.*, SDP Rule 30(b)(6) Dep. (Ex. 23) at 86. That is more than enough to establish typicality.

D. Plaintiffs and Plaintiffs' Counsel Will Protect the Interests of the Class.

The fourth and final prong of Rule 23(a) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To establish adequacy of representation, a movant must show that: (i) the named plaintiffs do not have

"interests antagonistic to those of the class;" and (ii) plaintiffs' counsel is "qualified, experienced, and generally able to conduct the proposed litigation." *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007) (citation omitted). The adequacy requirement tends to overlap with the commonality and typicality ones because each focuses on "'whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (quoting *Falcon*, 457 U.S. at 157 n.13).

Plaintiffs' interests are aligned with those of the proposed class. They will fairly and adequately protect their collective interests. Each Plaintiff is committed to prosecuting this matter vigorously. Each parent-Plaintiff has a child-Plaintiff who has been affected by Defendants' policy and practice of upper leveling students with autism. *See* Compl. (Doc. 1) ¶¶ 15-18. Each Plaintiff family has litigated their claims through administrative proceedings, and in some cases multiple administrative proceedings, for the past couple of years. *See id.*; Hr'g Dec. No. 01541-1011 AS (Ex. 2); Hr'g Dec. No. 1539-1011 AS (Ex. 1); Hr'g Dec. No. 2663-1112 AS (Ex. 3); Hr'g Dec. No. 1912-10-KE (Ex. 4). They have been assisting counsel with this lawsuit and show a continued interest to prosecute the case.

In addition, there is no intra-class antagonism. Plaintiffs do not seek money damages or compensatory education for themselves or individual putative class members. They appropriately seek systemwide, non-monetary relief. *See, e.g., Beth V. ex rel. Yvonne V. v. Carroll*, 87 F.3d 80, 89 (3d Cir. 1996) (reversing denial of class certification in IDEA case seeking systemwide injunctive relief); *Cordero ex rel. Bates v. Pa. Dep't of Educ.*, 795 F. Supp. 1352, 1362 (M.D. Pa. 1992) (ordering class-wide injunctive relief for systemic violation of

IDEA); *see also, e.g.*, *Kerrigan v. Phila. Bd. of Election*, 248 F.R.D. 470, 477 (E.D. Pa. 2008) (certifying class under ADA and Rehabilitation Act where plaintiffs "share[d] the same injuries and seek the same declaratory and injunctive relief as the class members they seek to represent and, therefore, their interests do not conflict with those of other class members.").

Finally, proposed class counsel, The Public Interest Law Center ("PILCOP") and Dechert LLP, will adequately represent the interests of the class. As both firms have demonstrated to date, they will zealously represent the interests of the class. PILCOP has litigated many federal class actions to protect the civil rights of individuals with disabilities, including litigation extremely similar to this one. PILCOP also is a fixture in Philadelphia and greater Pennsylvania communities as a student advocate. Dechert is an international law firm with 26 offices in the United States, Europe, Asia and the Middle East. Dechert is highly experienced in handling complex litigation and class action matters.

PILCOP has already invested considerable resources into representing each of the Plaintiffs in their due process hearings and prevailing with favorable decisions on their behalves. Both PILCOP and Dechert have expended substantial time and resources to litigate this case, including the retention of a preeminent international expert on autism. *See generally* Dr. Klin Rpt. (Ex. 32). In short, the Court can and should appoint PILCOP and Dechert as class counsel. *See* Fed. R. Civ. P. 23(g)(1)-(2), (4).

V. PLAINTIFFS SATISFY RULE 23(b)

Besides Rule 23(a)'s criteria, a proposed class must satisfy at least one subcategory of Rule 23(b). Plaintiffs meet the prerequisites to maintain a class under Rule 23(b)(2) or (b)(3).

A. Plaintiffs Satisfy Rule 23(b)(2).

A proposed class fits within Rule 23(b)(2) if the defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b). The "proper role" of a Rule 23(b)(2) class action is to remedy "systemic violations of basic rights of large and often amorphous classes." *Baby Neal*, 43 F.3d at 64. When a class action suit primarily seeks injunctive relief for the alleged systematic violations of rights, Rule 23(b)(2)'s elements are "almost automatically satisfied." *Id.* at 58; *see, e.g.*, *M.A. ex rel. E.S. v. Newark Pub. Schs.*, Civ. A. No. 01-3389, 2009 WL 4799291, at *12 (D.N.J. Dec. 7, 2009) ("The allegations of wrongdoing by Defendants, which concern their non-compliance with the IDEA as to the class of potentially eligible and eligible students, and the injunction sought to remedy those IDEA violations make this case well-suited to (b)(2) certification").

Plaintiffs allege a systemic violation of the rights of all putative class members, and seek declaratory and injunctive relief to the benefit of the entire class. They allege an overarching policy and practice according to which Defendants "transfer[] students with autism automatically from one school to another simply because they complete a certain grade." Compl. (Doc. 1) ¶ 1. Defendants use this to routinely transfer students with autism to different schools based on their status as children with autism, while "[n]on-disabled children enjoy continued and uninterrupted attendance in K-5 schools or K-8 schools." *Id.*

Plaintiffs seek certain injunctive and declaratory relief to stop Defendants from continuing their illegal activity, including among other things a declaration or order that:

- Defendants' "Automatic Autism Transfer Policy" violates the IDEA, the Rehabilitation Act, the ADA, and Chapter 14 of the Pennsylvania Code.

- The District establish a new written plan to provide continuity of programming for students with autism, and for prior notice of intended decisions to transfer a child with autism to another school.
- The District create, maintain, and publicly disseminate an accurate list of where the autism support classrooms are currently located within the District for grades K-8, and each classroom's grade levels.

See Compl. (Doc. 1), Pt. VII, ¶¶ 2-7.

This structural relief will benefit all putative class members. Defendants have and continue to use their unlawful upper-leveling policy and practice to deny putative class members free appropriate public education ("FAPE") by arbitrarily subjecting them to transfer because of their disability. Declaring this policy and practice to be void and preventing Defendants from engaging in similar policies or practices in the future will help restore FAPE for putative class members and prevent unlawful discrimination because of disability. Courts have certified classes under Rule 23(b)(2) in similar circumstances. *See, e.g.*, *C.G.*, 2009 WL 3182599, at *8 (Rehabilitation Act); *M.A.*, 2009 WL 4799291, at *12 (IDEA); *J.S.*, 2006 WL 581187, at *7 (IDEA and Rehabilitation Act); *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 114 (D. Mass. 1997) (ADA and Rehabilitation Act); *Gaskin*, 1995 WL 355346, at *5 (IDEA).

B. Plaintiffs Satisfy Rule 23(b)(3).

Although Plaintiffs need only satisfy one subparagraph of Rule 23(b), this action satisfies Rule 23(b)(3) as well as Rule 23(b)(2). Rule 23(b)(3) permits certification where "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Plaintiffs meet Rule 23(b)(3)'s requirements.

1. Common Questions of Law and Fact Predominate.

The predominance inquiry tests whether a proposed class is "sufficiently cohesive to warrant adjudication by representation." *Sullivan*, 667 F.3d at 297 (internal quotations omitted). Predominance exists if the cause of action can be proved "through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide*, 552 F.3d at 311-12.

Plaintiffs allege that Defendants' policy and practice of transferring students with autism infringes upon the rights of meaningful parental involvement, and other mandates and safeguards of the IDEA and Chapter 14 of the Pennsylvania Code, including the IEP team process. *See* Compl. (Doc. 1) ¶¶ 56, 59. Plaintiffs further allege that Defendants' policy and practice violates the ADA and Rehabilitation Act because transfer decisions are made categorically on the basis of disability. *See* Compl. (Doc. 1) ¶¶ 62, 65.

Plaintiffs will rely on common evidence to prove these claims. The focus of Plaintiffs' complaint is Defendants' systemic non-compliance with IDEA provisions and discriminatory treatment because of disability. Proof of this will turn on evidence of Defendants' policy and practice of upper leveling students with autism whereas non-disabled peers are not subject to the same policy and practice. For instance, Defendants do not offer continuous autistic support programming for students with autism in grades K-8, *see, e.g.*, Monras-Sender Dep. (Ex. 21) at 53-54, Hunt Dep. (Ex. 19) at 109-10, despite affording continuity of services for non-disabled students, *see* Monras-Sender Dep. (Ex. 21) at 46-47, and despite acknowledging the benefits and logic of such continuity for disabled and non-disabled students alike. *See, e.g.*, Ackerman Dep. (Ex. 17) at 26 (continuity "makes sense"); Monras-Sender Hr'g Test. (Ex. 7) at 494.

Significantly, Defendants' upper-leveling policy and practice applies to all students with autism requiring autistic support, without regard to each student's individualized needs or circumstances. *See* SDP Rule 30(b)(6) Dep. (Ex. 23) at 55-56. Defendants apply their policy and practice district-wide. *See id.* at 86. Third-party witnesses confirm that Defendants have long-applied the upper-leveling policy and practice challenged in this lawsuit. *See* Roccia-Meier Dep. (Ex. 22) at 20, 73; Thompson Dep. (Ex. 24) at 52. Non-disabled students are not subject to this policy and practice. They are not transferred "unless the family moves, the parents request a building transfer or the student is moved for disciplinary reasons." Hr'g Dec. No. 01541-1011 AS (Ex. 2) at 5; *see* Monras-Sender Dep. (Ex. 21) at 46-47.

Defendants do not meaningfully involve a student's IEP team, including parents, when upper leveling a student requiring autistic support. Rather than consult with IEP team members – the group of teachers, specialists, and parents who are statutorily charged with ensuring that the special education services are individualized to meet the unique needs of students with disabilities and are provided in the least restrictive environment – District administrators simply shunt a student to whatever building they can find with available space. *See, e.g.*, Monras-Sender Dep. (Ex. 21) 42-23; Hunt Dep. (Ex. 19) at 137. Without formal written procedures, however, this process predictably results in arbitrary, tardy, and haphazard transfers. *See, e.g.*, M. Sanasac Dep. (Ex. 14) 35-36; Murphy Dep. (Ex. 12) at 92; Cruz Dep. (Ex. 11) at 36-37; S. Vargas Dep. (Ex15) at 88-89; McKinnie Dep. (Ex. 20) at 51-52. This is unsurprising, given that Defendants do not even appear to maintain a current, accurate list of schools with autistic support classrooms. *See* Monras-Sender Dep. (Ex. 21) at 97.

Furthermore, Defendants lack an appropriate protocol for informing parents of students with autism that their children will be upper leveled. In fact, Defendants do not follow *any* written protocol for disseminating notice to parents in such circumstances. SDP Rule 30(b)(6) Dep. (Ex. 23) at 57-58, 87. Defendants admit they neither send IDEA-compliant prior written notice before attempting to upper-level students with autism, *see* Monras-Sender Dep. (Ex. 21) at 68, SDP Rule 30(b)(6) Dep. (Ex. 23) at 96-97, 130, Hunt Dep. (Ex. 19) at 145, nor have they any written procedures for when and how to complete and disseminate NOREPs or any other less formal notice. *See* SDP Rule 30(b)(6) Dep. (Ex. 23) at 87, 95. Though Defendants claim they send after-the-fact transfer notices to parents (without regard to the IEP process), Defendants admittedly do not maintain any records that any such notices are ever sent, and do not have any policy concerning such communications' contents or transmission. *See, e.g.*, SDP Rule 30(b)(6) Dep. (Ex. 23) at 87; Monras-Sender Dep. (Ex. 21) 72, 87-88.

Defendants' significant, unplanned transfers can have substantial effects on the educational and behavioral progress of students with autism. *See* Klin Rpt. (Ex. 32) at 4-9. The IEP process, including parental involvement, is instrumental to removing or diminishing impediments to a student's learning. *See id.* at 9. 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." *Id.* at 11. Moreover, "the IEP process not only determines a child's needs relative to an undetermined future program, but, in order to consider the potentially deleterious effects of transitions, the IEP process also considers the adequacy of placements AND operationalizes a plan for achieving successful transitions." *Id.* Defendants' upper-leveling policy and practice bypasses this central

tenet of the IDEA by simply transferring students with autism to any building they can find with an age-appropriate autistic support classroom, without regard to any other salient factors.

The above illustrates that common evidence revealing the nature and consequences of Defendants' challenged policy and practice will be used to prove Plaintiffs' claims. This evidence speaks to the common legal questions of whether Defendants' actions constitute systemic violations of the IDEA or Chapter 14 of the Pennsylvania Code, or class-wide discrimination under the Rehabilitation Act or ADA.

2. Class Treatment Is Superior To Other Available Methods For Fairly And Efficiently Adjudicating This Controversy.

A class action must be superior to other methods for "fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In assessing superiority, a Court should consider:

> (A) the class members' interests in individually controlling the litigation of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability of concentrating the litigation of the claims in a particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

A class action is a superior device for litigating the claims presented here. To proceed on a class-wide basis and to obtain class-wide declaratory and injunctive relief will be far more efficient and economical for all parties than individual trials. Repeatedly litigating the same issues in duplicative lawsuits will waste resources, unduly burden the judicial system, and may result in inconsistent results. Individual administrative proceedings are not a workable substitute, either. As the two Hearing Officers indicated below, administrative officers lack the power to effectuate the systemwide relief necessary to remedy Defendants' violations. Hr'g Dec. No. 01541-1011 AS (Ex. 2) at 15; J.V. Hr'g Test. No. 1925-10111-AS (Ex. 10) at 10-11.

Further, putative class members are students with autism and their parents. Many simply will not have the means to prosecute their claims on their own. Indeed, PILCOP and Dechert's representation here is without charge to the parents. Plaintiffs, through PILCOP and now Dechert, have litigated their claims for years through administrative hearings and now this lawsuit. They have litigated this lawsuit through fact and expert discovery. Requiring each putative class member to start over and bring their own individual suit will not "secure the just, speedy, and inexpensive determination of" the issues presented here. Fed. R. Civ. P. 1; *see Barel v. Bank of Am.*, 255 F.R.D. 393, 400 (E.D. Pa. 2009) ("A class action is superior here because it provides a forum for class members unlikely to bring separate claims."). The class device is perfectly suited for adjudicating nonmonetary claims involving challenges to systemic deficiencies in an educational setting. *See, e.g., Baby Neal*, 43 F.3d at 56-58; *see also DL v. District of Columbia*, 277 F.R.D. 38, 47-48 (D.D.C. 2011) (certifying IDEA class as superior method of adjudicating both monetary and nonmonetary claims). Class action treatment simply is superior to alternative means of adjudicating putative class members' claims.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion and issue an order certifying this suit as a class action pursuant to Rule 23, and appointing PILCOP and Dechert LLP as class counsel.

Dated: July 13, 2012

Respectfully,

/s/ Sonja Kerr

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

P.V., a minor, by and through his Parents, **Pedro Valentin** and **Yolanda Cruz**, individually, and on behalf of all others similarly situated, et al.,	)	Civil Action No. 2:11-cv-04027
Plaintiffs,	)	
v.	)	
The School District of Philadelphia, et al.,	)	
Defendants.	)	

[PROPOSED] ORDER

AND NOW, this _____ day of _____, 2012, upon consideration of Plaintiffs' Motion for Class Certification, and any response or reply thereto, it is hereby **ORDERED** that the Motion is **GRANTED**.

It is further **ORDERED** that The Public Interest Law Center of Philadelphia and Dechert LLP will represent the class in this matter. The class shall be comprised of:

> All children with autism in the School District of Philadelphia in grades kindergarten through eight ("K-8") who have been illegally transferred, are in the process of being transferred, or are at risk of being illegally transferred, as a result of the District's Automatic Autism Transfer Policy, the parents and guardians of those children, and future members of the class.

_____
J.

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2012, I caused the foregoing Plaintiffs' Motion for Class Certification to be filed and served on all counsel of record by operation of the CM/ECF system for the United States District Court for the Eastern District of Pennsylvania

/s/ David J. Stanoch
David J. Stanoch