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 SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs respectfully move the Court to enter summary judgment in Plaintiffs' and the putative class's favor on all claims because there are not any genuine issues of material fact in dispute. 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: August 3, 2012

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MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

At its core, this case principally is about whether Defendants' unlawful policy and practice of automatically transferring students with autism, without advance notice to or input from parents, which they term "upper-leveling," constitutes a violation of federal and state education and disability law. The undisputed evidence shows that Defendants unilaterally transfer children with autism from one school to another simply because they have autism, require autistic support, and complete a certain grade. In doing so, they exclude the students' Individualized Education Program ("IEP") team members, most notably the students' parents, but also their teachers, from participation in these significant transfer decisions. The uncontested record also demonstrates that Defendants do not maintain and make available to parents an accurate list identifying the locations of autistic support classrooms.

Summary judgment in Plaintiffs' favor is warranted on the uncontested facts developed to date: There is no factual dispute as to the threshold issues underlying the class claims, *i.e.*, whether all putative class members have a "disability" (they do); whether they are "qualified" to receive educational programs and services (they are); whether the School District of Philadelphia ("SDP" or the "District") is a "public entity" (it is), or receives "federal funds" (it does); and whether putative class members are required to exhaust their claims (they are not). The uncontested facts further demonstrate that Defendants' upper-leveling infringes putative class members' rights as a matter of law. The only criteria District administrators – and not parents, teachers, or other IEP team members who are excluded from the process – reference when making upper-level transfers is whether the student has autism, whether the student requires autistic support, and whether the new location to which the District unilaterally transfers the student is age-appropriate and has enough space.

Whether putative class members still receive some educational programming or services, and whether some putative class members are satisfied with certain of the programs and services at the new or existing location, is immaterial. What matters is that Defendants' automatic autism transfer policy does not comport with the substantive and procedural safeguards enunciated by statute and code. Upper-leveling ignores the central role of parents, teachers, and IEP team members in the fundamental decision about whether and to where a student should be transferred; eliminates the opportunity for parents and the IEP team to meaningfully plan and prepare the child for the major transition of a new school program and setting; and, accordingly, does not take into account the unique needs of students whose very disability involves difficulty with change. Simply put, upper-leveling is not an appropriate way to ensure that putative class members receive a meaningful educational benefit, is not a reasonable accommodation of putative class members' disabilities, and constitutes discrimination insofar as putative class members are subject to Defendants' upper-leveling policy and practice solely because of their disabilities.

For these reasons, and those explained more fully below, Plaintiffs, on behalf of themselves and those similarly situated, move for summary judgment pursuant to Federal Rule of Civil Procedure 56.

II. FACTS

The facts relevant to this motion are set forth in a separate concise statement of material facts ("SOF") as to which Plaintiffs contend there is no genuine issue for trial. Plaintiffs specifically incorporate by reference herein the Expert Report of Dr. Ami Klin (Ex. 1 to SOF).

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Courts may grant summary judgment on individual claims or parts of claims. *See* Fed. R. Civ. P. 56(a). Summary judgment may be granted if "there is no genuine dispute as to any material fact." *Id.* 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.*

A more deferential standard applies in appeals of administrative decisions – such as this case, *see* Compl. (Doc. 1) ¶ 9.b – addressing challenges brought under the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 et seq. *See* 20 U.S.C. § 1415(i)(2). In such cases, the "[f]actual 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. Bayonne Bd. of Educ.*, 602 F.3d 553, 564 (3d Cir. 2010). A court may only disturb a hearing officer's factual findings if it can "point to contrary non-testimonial extrinsic evidence in the record." *D.K. v. Abington Sch. Dist.*, No. 08-cv-4914, 2010 WL 1223596, at *4 (E.D. Pa. Mar. 25, 2010). On the material facts addressed herein, there is not any contrary non-testimonial extrinsic evidence.

IV. OVERVIEW OF THE CLASS CLAIMS

Plaintiffs are students with autism 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. *See* SOF ¶¶ 5-8. 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. and as amended ("IDEA") (Count One), Chapter 14 of the Pennsylvania

Code of Education Regulations, 22 Pa. Code § 14 et seq. ("Chapter 14") (Count Two), Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. and as amended ("ADA") (Count Three), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (Count Four). 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 policy and practice. *See, e.g.*, Compl. (Doc. 1) ¶ 9.b; SOF ¶¶ 9, 11-15.

A. Overview of the Class Claims Under the IDEA (Count One) and Chapter 14 (Count Two)

The primary purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). The Supreme Court has defined FAPE to include "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89 (1982); *see* 20 U.S.C. § 1401(9). "Although a state is not required to supply an education to a handicapped child that maximizes the child's potential, it must confer an education providing 'significant learning' and 'meaningful benefit' to the child." *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 556 (3d Cir. 2010) (quoting *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999), *superseded by statute*, IDEA, *on other grounds as recognized in P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009)).

At the core of the IDEA is the requirement that a collaborative process exist between parents and schools. *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). "The central vehicle for this collaboration is the [Individualized Education Program ("IEP")] process." *Id.* "Each IEP must include an assessment of the child's current educational performance, must articulate measurable

educational goals, and must specify the nature of the special services that the school will provide." *Id.* (citing 20 U.S.C. § 1414(d)(1)(A)). The IEP must be "reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *D.S.*, 602 F.3d at 557; *see Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359, 368 (1985) (describing IEP as "modus operandi" of the IDEA).

Parents, along with the other members of the IEP team, play a critical role in formulating the IEP. 20 U.S.C. § 1414(d)(1)(B); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524 (2007) (ruling that the IDEA grants parents independent, enforceable rights, both procedural and substantive, to ensure that their child receives FAPE). Parents are entitled to participate in the IEP meeting and must be given Prior Written Notice by the school of any changes to their child's intended educational program and related services so they have the opportunity to discuss and potentially to challenge a proposed change. *See* 20 U.S.C. § 1415(b). In Pennsylvania, a Notice of Recommended Educational Placement ("NOREP") is the usual vehicle through which schools comply with the IDEA's Prior Written Notice requirement. *See* 34 C.F.R. § 300.503(a); Pa. Office for Dispute Resolutions, *Procedural Safeguards Notice* (Jan. 6, 2011), http://odr-pa.org/wordpress/wp-content/uploads/Procedural-Safeguards-Notice.pdf ("In Pennsylvania, prior written notice is provided by means of a [local education agency] Prior Written Notice Form/Notice of Recommended Educational Placement.").

The IDEA empowers parents to raise substantive and procedural violations concerning the provision of FAPE. 20 U.S.C. §§ 1415(b)(6), (f). Courts generally conduct a two-step inquiry to assess whether a school district has complied with the IDEA. *See Rowley*, 458 U.S. at 206. First, courts look to whether the state or school district complied with the procedures set forth by the IDEA and state law. Second, the court evaluates whether the IEP is reasonably

calculated to enable the child to receive educational benefit. *Id.* But, it can be unnecessary to address the second prong if the court can identify inadequacies that seriously infringed the parents' opportunity to participate in the IEP formulation process or that caused a deprivation of educational benefits or loss of educational opportunity. *See* 20 U.S.C. § 1415(f)(3)(E); *Winkelman*, 550 U.S. at 525.

Predetermining educational programs for children with disabilities without the involvement of their parents is prohibited by the IDEA. *See, e.g., D.B. v. Gloucester Twp. Sch. Dist.*, 751 F. Supp. 2d 764, 771 (D.N.J. 2010), *aff'd*, 2012 WL 2930226 (3d Cir. July 19, 2012). In *D.B.*, the court found that the student's IEP was predetermined based on conclusions about the student's placement even though parents were present at IEP meetings because there was "no evidence that the comments of the parents were entertained by the members of the IEP team and there was no evidence that the parents concerns were incorporated into the final version of the IEP." 751 F. Supp. 2d at 772 & n.11. Parental involvement is key. As noted recently by the appellate court in *Anchorage Sch. Dist. v. M.P.*, No. 10-36065, 2012 WL 2927758, at*5 (9th Cir. July 19, 2012), the IDEA, its implementing regulations, and case law all emphasize the importance of parental involvement and advocacy. Further,

> the statute is particularly protective of parents' right to participate in the formulation of their child's IEP because parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.

Id.

Though the IDEA "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children," the federal statute "imposes significant requirements to be followed in the discharge of that responsibility." *Schaffer*, 546 U.S. at 53 (citing *Rowley*, 458 U.S. at 183). States, and in turn local educational agencies, must

have sufficient "policies and procedures" to satisfy the IDEA's conditions. 20 U.S.C. §§ 1412(a)(11), 1412(a)(15)(A), 1413(a)(1).

Chapter 14 reflects Pennsylvania's compliance with IDEA requirements, and incorporates federal IDEA regulations. 22 Pa. Code § 14.102. Aside from affording commensurate state protection of federally-guaranteed IDEA rights, Chapter 14 separately requires the provision of quality special services and programs for students with disabilities. *See* 22 Pa. Code § 14.102(a). This includes the facilities that must be made available for educating students with disabilities. *See* 22 Pa. Code § 14.144.

To make out an IDEA claim, plaintiffs must show that: (1) they are students with disabilities entitled to the protections and guarantees of the IDEA, including the provision of FAPE, the crafting and carrying out of IEPs, and meaningful parental involvement; (2) the defendant-school receives IDEA federal funds; (3) administrative remedies have been exhausted; and (4) the defendant-school's actions constitute substantive or procedural violations of the IDEA. *See, e.g.*, *Winkelman*, 550 U.S. at 519, 523; *Sinan L. v. Sch. Dist. of Phila.*, Civ. Action No. 06-1342, 2007 WL 1933021, at *11 (E.D. Pa. July 2, 2007); *see also* 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(11), 1412(a)(15)(A), 1413(a)(1), 1415(i)(2)(A). State incorporation of federal protections and guarantees make these same elements actionable under Chapter 14. *See, e.g.*, 22 Pa. Code § 14.102. There is not any genuine dispute of material fact as to any of these elements.

B. Overview of the Class Claims Under the ADA (Count Three) and Rehabilitation Act (Count Four)

The standards governing Plaintiffs' Rehabilitation Act and ADA claims are substantially similar. *See, e.g.*, *Chambers v. Sch. Dist. of Phila.*, 587 F.3d 176, 189 (3d Cir. 2009), *rev'g in relevant part*, 827 F. Supp. 2d 409. The Rehabilitation Act provides that "[n]o otherwise

qualified individual with a disability . . . shall, solely by reasons of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" that receives federal funds. 29 U.S.C. § 794(a). Section 504 of the Rehabilitation Act ("§ 504") extends this prohibition to public schools. 29 U.S.C. § 794(b)(2)(B). To establish a violation of § 504, plaintiffs must prove that: (1) they are disabled, and the defendants know or reasonably should know of the disability; (2) they are "otherwise qualified" to participate in educational programs and related services; (3) the defendant-school receives federal financial assistance; and (4) plaintiffs were excluded from participation in, denied the benefits of, or subject to discrimination in the school district. *Ridgewood Bd. of Educ.*, 172 F.3d at 253.

The ADA provides, in relevant part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "A prima facie case of discrimination under the ADA requires proof of the same elements" required under the Rehabilitation Act, except for the requirement that the school receive federal funding. *Chambers v. Sch. Dist. of Phila.*, 827 F. Supp. 2d 409, 417 (E.D. Pa. 2011), *rev'd in part*, 587 F.3d 176. Instead, the ADA "extends the nondiscrimination rule of section 504 of the Rehabilitation Act to services provided by any 'public entity.'" *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 279 (3d Cir. 1996). There are no genuine issues of material fact as to whether putative class members have disabilities (and whether Defendants know or should know putative class members have disabilities); whether putative class members are qualified to participate in the District's educational programs and related services; whether the District receives federal funding or is a public entity; and whether Defendants fail to

reasonably accommodate putative class members and discriminate against them because of their disabilities.

V. SUMMARY JUDGMENT SHOULD BE GRANTED FOR THE PUTATIVE CLASS ON THE THRESHOLD PARTS OF THE CLASS CLAIMS.

Summary judgment should be entered for the putative class on the parts of the class claims antecedent to the ultimate liability issues, *see infra* Part VI, because no genuine issue of material fact exists.

A. Defendants Know or Have Reason to Know That All Putative Class Members Have a "Disability."

A threshold issue under each of the class claims is whether all putative class members have disabilities.[1] Plaintiffs and other putative class members are all children with disabilities (and their parents or guardians), which Defendants know or should know, for purposes of the IDEA, Chapter 14, the Rehabilitation Act, and the ADA.

The IDEA and its implementing regulations each define a "[c]hild with a disability" to include children with autism. Section 1401(3)(A)(i) of the IDEA, 20 U.S.C. provides that the "term 'child with a disability' means a child – with . . . autism." Section 300.8(c)(1)(i), 34 C.F.R., also explicitly defines autism as a disability under the IDEA:

> Definitions of disability terms. The terms used in this definition of a child with a disability are defined as follows:
> . . .
> Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age

[1] *See, e.g.*, 20 U.S.C. § 1400(d)(1)(A) (IDEA ensures "that all children with disabilities have available to them a free appropriate public education . . . ."); 29 U.S.C. § 794(b)(2)(B) (§ 504 of Rehabilitation Act prohibits discrimination against "otherwise qualified individual with a disability . . ."); 42 U.S.C. § 12131 (ADA prohibits discrimination against "qualified individual with a disability . . . ."); 22 Pa. Code § 14.102(a) (adopting federal IDEA regulations "to satisfy the statutory requirements under the [IDEA] and to ensure that . . . [c]hildren with disabilities have available to them a free appropriate public education . . . .").

> three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

Because all putative class members are students with autism, Plaintiffs satisfy the first element of each of their claims. *See, e.g., Winkelman*, 550 U.S. at 519 ("[Student at issue] has autism spectrum disorder and is covered by the [IDEA]."); *Adam C. v. Scranton Sch. Dist.*, No. 3:07-CV-532, 2011 WL 996171, at *1-4 (M.D. Pa. Mar. 17, 2011) (student with autism, "was disabled and otherwise qualified to attend school" for purposes of ADA and Rehabilitation Act); *see also* 22 Pa. Code § 14.102(a)(1) (adopting federal IDEA regulations, including definitions).

There is no genuine factual dispute that Plaintiffs and other putative class members have autism. Plaintiffs' proposed class includes:

> 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.

Compl. (Doc. 1) ¶ 23 (emphasis added).

Moreover, Defendants know or have reason to know that all putative class members have autism because the IDEA requires Defendants to evaluate children and to determine if they are eligible for special education programs and services as a "child with a disability, including autism." *See, e.g., P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009) ("School districts have a continuing obligation under the IDEA and § 504 to identify and evaluate all students who are reasonably suspected of having a disability under the statutes."); *Ridgewood Bd. of Educ.*, 172 F.3d at 253 (finding that school has "duty to identify a disabled child within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.") (internal quotation marks omitted). Federal and state law requires the

District to make an evaluation of each student who may shows signs of autism. 20 U.S.C. § 1412(a)(3); *see* 20 U.S.C. § 1401(3)(A)(i) (defining "child with a disability" to include autism); *D.P. v. Council Rock Sch. Dist.*, No. 11-2747, 2012 WL 1450528, at *3 n.2 (3d Cir. Apr. 27, 2012) (indicating that "child find" obligations maintain for a student with autism); *see also* SOF ¶ 19. For instance, the District must conduct early intervention evaluations of all incoming students prior to their enrollment in kindergarten. *See* 20 U.S.C. §§ 1433-39; 34 C.F.R. §§ 300.34(a), (c)(3). This assessment identifies, among other things, whether an incoming student has autism (or some other disability) that might require special educational assistance. *See* 20 U.S.C. §§ 1412(a), 1433-39. All Plaintiffs and putative class members have been (or should be) identified by the District as having autism.

The District must convene individual IEP meetings to determine whether to provide autistic support, a form of special educational support, for students diagnosed with autism. *See* 34 C.F.R. § 300.320. It also must convene periodic IEP meetings and re-evaluations to assess the development and progress of students previously diagnosed with autism through the District's K-8 schools. *See* 20 U.S.C. § 1414(a)(2). The District annually reports to the Commonwealth of Pennsylvania the number of students diagnosed with autism, as well as the number of students requiring autistic support. *See* SOF ¶ 17; *see also id.* ¶ 16 (defense records identifying number of students with autism in the District). Again, all Plaintiffs and putative class members have been (or should be) identified by the District as students who do or may need autistic support or other special education services because they experience autism.

Given all of this, it is unsurprising that Defendants, as well as the hearing officers below, recognize autism to be a legally-recognized disability. *See* SOF ¶ 18. There simply is no genuine dispute of fact as to whether Defendants know or should know that putative class

members have disabilities qualifying them for protection under the IDEA and Chapter 14, and from discrimination under § 504 of the Rehabilitation Act and the ADA.

B. Putative Class Members Qualify to Receive Educational Programming and Services From the District.

Putative class members must be qualified to participate in the educational activities provided by the District.[2] There is no genuine dispute that, as students with disabilities who have IEPs from the District, putative class members are entitled to receive and participate in the educational activities and services provided by the District. *See, e.g.*, SOF ¶ 20. Courts of this district agree. *See, e.g.*, *Sinan L.*, 2007 WL 1933021, at *3 (noting that the IDEA "requires every public school system receiving federal funds" to develop an IEP for disabled children, and applying IDEA requirements to the School District of Philadelphia); *James S. v. Sch. Dist. of Phila.*, 559 F. Supp. 2d 600, 621-22 (E.D. Pa. 2008) (applying § 504 and ADA requirements to the School District of Philadelphia).

C. The District is a Public Entity That Receives Federal Funding.

Receipt of federal financial assistance or status as a public entity obligates a defendant to comply with the strictures of the special education and disability laws at issue in this case.[3]

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[2] *See, e.g.*, 42 U.S.C. § 794(a) (under § 504 of Rehabilitation Act, "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . ."); 42 U.S.C. § 12132 (under ADA, "no qualified individual with a disability shall . . . be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity . . . "); *Sinan L.*, 2007 WL 1933021, at *11 (under IDEA, class members must be "entitled to the protections and guarantees of the IDEA"); *see also* 22 Pa. Code § 14.102 (adopting pertinent federal IDEA requirements and standards).

[3] *See, e.g.*, 42 U.S.C. § 794(a) (under § 504 of Rehabilitation Act, "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program . . . ."); 20 U.S.C. §§ 1412(a)(11), 1412(a)(15)(A), 1413(a)(1) (conditioning federal funds on state and local agencies' compliance with IDEA provisions); 42 U.S.C. § 12132 (under

Centennial Sch. Dist. v. Phil L., 799 F. Supp. 2d 473, 481 (E.D. Pa. 2011). Defendants cannot plausibly contest that the District neither receives federal funding, including IDEA funding, nor is a public entity. Defendants admit in their Answer that the District receives federal funds. *See* SOF ¶ 21. The record – not to mention a substantial body of case law from within this Circuit – indisputably establishes that the District receives federal funds and is a public actor. *See* SOF ¶¶ 1, 21; *see also Sinan L.*, 2007 WL 1933021, *3 (applying IDEA requirements to the School District of Philadelphia); *James S.*, 559 F. Supp. 2d at 621-22 (assuming that the School District of Philadelphia is a public entity and allowing ADA claim to proceed to trial).

D. Exhaustion is Not Required, and In Any Event Would Be Futile And Inadequate.

This Court previously held that the class claims are exempt from administrative exhaustion requirements of the IDEA[4] because the alleged facts "illustrate the prototypical case in which a court should permit IDEA plaintiffs to bypass IDEA's administrative dispute resolution process." *P.V. v. Sch. Dist. of Phila.*, No. 2:11-CV-04027, 2011 WL 5127850, at *8 (E.D. Pa. Oct. 31, 2011). In so holding, the Court rightly relied on the fact that "the hearing officer admittedly cannot order the District to make the structural changes to the District's autistic student transfer procedures that Plaintiffs' seek. Therefore, exhaustion would be 'futile or inadequate.'" *Id.* (quoting *Honig v. Doe*, 484 U.S. 305, 326-27 (1988)); *see Irene B. v. Phila.*

ADA, defendant need not receive federal funding but must be public actor); 14 Pa. Code § 14.102 (adopting pertinent federal IDEA requirements and standards).

[4] *See* 20 U.S.C. §§ 1415(i)(2)(A) (exhaustion standard for IDEA claims). Presumably, the same principles apply to the Chapter 14 claim. The ADA and § 504 discrimination claims are not subject to exhaustion. *See, e.g.*, *Freed v. Consol. Rail Corp.*, 201 F.3d 188, 194 (3d Cir. 2000); *Roe v. Cnty. Cmm'n of Monongalia Cnty.*, 926 F. Supp. 74, 77 (N.D. W. Va. 1996). Even if they were, exhaustion would be futile and inadequate for the same reasons discussed above. *See, e.g.*, *D.E. v. Central Dauphin Sch. Dist.*, No. 1:06-CV-2423, 2009 WL 904960, at *7 (M.D. Pa. Mar. 31, 2009); *N.J. Protection & Advocacy, Inc. v. N.J. Dept. of Educ.*, 563 F. Supp. 2d 474, 491 (D.N.J. 2008).

Acad. Charter Sch., No. 02-1716, 2003 WL 24052009, at *7 (E.D. Pa. Jan. 29, 2003) ("where exhaustion would be futile because the relief sought in the civil action cannot be obtained through IDEA administrative proceedings, the exhaustion requirement is excused."); *Hicks v. Purchase Line Sch. Dist.*, 251 F. Supp. 2d 1250, 1252-53 (W.D. Pa. 2003) (not requiring exhaustion when student already graduated and sought only retrospective money damages which were not available administratively).[5]

No intervening development suggests the Court should revisit its prior holding and alter the law of this case. The record shows that Defendants apply their automatic autism transfer policy district-wide. *See* SOF ¶ 23. The hearing officers below in Plaintiffs' administrative proceedings did not believe they had the power to effect the district-wide relief sought in this action. *See* SOF ¶¶ 12, 15, 22. Indeed, one of the hearing officers even specifically encouraged Plaintiffs to seek systemwide relief in federal court because he lacked jurisdiction. *See* SOF ¶ 14. Exhaustion remains futile and inadequate because this litigation is the only avenue through which putative class members can assert a systemwide challenge to upper-leveling. Defendants have no evidence to the contrary.

VI. DEFENDANTS' CONDUCT VIOLATES THE IDEA, CHAPTER 14, THE ADA, AND THE REHABILITATION ACT AS A MATTER OF LAW.

Aside from the technical elements of the class claims discussed *supra* Part V, summary judgment also should be granted for Plaintiffs and the putative class on the remaining parts of the class claims as well. There is no genuine issue of material fact that upper-leveling, and

[5] *See also Chester Upland Sch. Dist. v. Pennsylvania*, Civ. A. No. 12-132, 2012 WL 895445, at *13-14 (E.D. Pa. Mar. 16, 2012) (permitting putative class action challenging systemic funding failures under IDEA to proceed without requiring exhaustion); *Cordero v. Pa. Dep't of Educ.*, 795 F. Supp. 1352, 1363 (M.D. Pa. 1992) (widespread, recurring delays could not be rectified through existing hearings process).

Defendants' failure to maintain and publish an accurate list identifying the locations of autistic support classrooms, constitutes (a) a denial of FAPE and other protections afforded under the IDEA and Chapter 14, (b) an unreasonable accommodation under the ADA, and (c) discrimination based on disability under § 504 of the Rehabilitation Act.

A. Defendants' Failure to Provide Prior Written Notice or For Meaningful Parental Involvement Violates the IDEA and Chapter 14.

Defendants' undisputed conduct described below violates both the IDEA and Chapter 14. The IDEA requires IEP teams to convene, with parents and teachers, and settle upon "educational and other options and services [that] shaped to fit the needs of each individual handicapped child." *Cordero*, 795 F. Supp. 2d at 1356 This is not happening with respect to upper-leveling.

1. Defendants Do Not Provide Prior Written Notice or Otherwise Involve Parents Prior to Upper-Leveling Putative Class Members.

The *prima facie* correct facts below establish that "IEP teams do not make building placement determinations," and that "[a] building assignment is . . . made *after* parents approve the NOREP [i.e., without parental notice or input]." SOF ¶ 28 (emphasis added); *see* SOF ¶ 27 ("Placement decisions are made and parents are informed after the fact."). "The District's divisional directors make the building assignment 'pretty much unilaterally' and inform parents of their decisions by letter shortly before the start of the school year." SOF ¶¶ 9.e, 25-26. More explicitly, the hearing officer found that "the District violated the Parent's right to participation by reassigning the Student to a different school building without sending IDEA-compliant prior written notice." SOF ¶ 11. The District admits it makes these upper-leveling decisions without involvement of the parents. *See* SOF ¶¶ 10, 25-28.

Irrespective of the presumptively valid findings below, it is undisputed that the District maintains a longstanding policy and practice of upper-leveling students with autism who require

autistic support. *See* SOF ¶ 29. Non-disabled students are not subject to the same policy and practice. *See* SOF ¶ 30. 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* SOF ¶¶ 24-28.

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 (other than the fact that the student requires autistic support). *See* SOF ¶ 33. The only criteria District administrators apparently reference when making these unilateral decisions are whether the student has autism, requires autistic support, and the receiving class location has space and is age-appropriate. *See id.*

Defense witnesses openly concede that they do not provide Prior Written Notice in any form, including NOREPs, to putative class members' parents (or other IEP team members) when they decide to upper-level a student with autism. *See* SOF ¶ 24; *see also id.* ¶¶ 25-34. District administrators unilaterally decide to transfer putative class members without discussing the matter beforehand with students' parents, special education teachers, or other IEP members. *See* SOF ¶ 25, 31-32. Parents and other IEP team members only learn of transfer decisions after the fact, close to or even at the beginning of the school year. *See id.* ¶¶ 35, 37-40.

Instead of issuing a NOREP or any form of Prior Written Notice, the District claims it sends a terse form letter or conveys transfer decisions through other informal means. *See* SOF ¶ 35. Defendants do not have any written procedure governing when to issue any communications, their contents, or maintenance of record that such communications are even sent in the first place. *See* SOF ¶ 36. 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. *See* SOF ¶ 37. When she asked where, she received different answers each time. *See* SOF ¶ 38. 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. *See* SOF ¶ 39. Yet another parent (and putative 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. *See* SOF ¶ 40.

2. Defendants' Failure To Provide Prior Written Notice or For Meaningful Parental Involvement Constitutes a Denial of FAPE.

The IDEA requires the issuance of Prior Written Notice that informs parents whenever a school district "proposes to . . . change the . . . educational placement of the child *or* the provision of FAPE to the child." 20 U.S.C. §§ 1415(b)(3) (emphasis added); 34 C.F.R. § 300.503(a). FAPE requires "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Rowley*, 458 U.S. at 188-89. "Although a state is not required to supply an education to a handicapped child that maximizes the child's potential, it must confer an education providing 'significant learning' and 'meaningful benefit' to the child." *D.S.*, 602 F.3d at 556 (FAPE entails provision of "significant learning and meaningful benefit to the child") (internal quotations and citation omitted). FAPE also means the provision of "special education and related services designed to meet [each child's] unique needs." 20 U.S.C. § 1400(d)(1)(A); *see Polk v. Centr. Susquehanna Inter. Unit*, 853 F.2d 171, 172-73 (3d Cir. 1988) (IDEA requires "individual attention to the needs of each handicapped child").

Upper-leveling constitutes a denial of FAPE, and a commensurate failure to pre-notify parents of such denial beforehand, because it does not account for the unique needs of each putative class member. Federal law explicitly defines autism as a disability that "adversely

affects a child's educational performance," and provides that children with autism can display "resistance to environmental change or change in daily routines." 34 C.F.R. § 300.8(c)(1)(i). Significant, unplanned transfers can have substantial effects on the educational and behavioral progress of students with autism. *See* SOF ¶ 41 (citing report of Dr. Ami Klin, which Plaintiffs incorporate herein by reference). The IEP process, including parental involvement, is instrumental to removing or diminishing impediments to a student's learning. *See* SOF ¶ 42. 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." *See* SOF ¶ 43. 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." *See* SOF ¶ 44. 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." *See* SOF ¶ 45.

The undisputed facts further confirm that continuity of programming and managing changes are important aspects to minimize the negative consequences of change for students with autism, including transitions between educational settings. *See* SOF ¶ 45. 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* SOF ¶ 47. As case-in-point, former superintendent Ackerman openly acknowledges that this "just makes sense." *Id.*

Upper-leveling completely 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. Defendants' policy and practice does not assess whether the upper-level transfer of a putative class member will adversely affect the child's educational and behavioral progress. *See* SOF ¶¶ 10, 31. For instance, Defendants effectuate upper-level transfers 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* SOF ¶ 31; *see also* 20 U.S.C. § 1415(b), (f)-(i) (recognizing implicit need to help parents with the challenges associated with raising children with special needs); 34 C.F.R. § 300.322 (same). Not even the sending or receiving special education teachers are involved. *See* SOF ¶ 32.

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. *See* SOF ¶¶ 43, 48. Moreover, as a result of the total absence of appropriate procedures to solicit input from parents and the IEP team to evaluate such a transfer, the District is incapable of conducting the type of comparability analysis needed to comport with the IDEA, or to enable an IEP to plan accordingly. *See* SOF ¶¶ 43, 48. 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), parents – not to mention special education teachers, who presumably have important and direct critical knowledge of the students' needs – have absolutely 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. This is wholly inconsistent with the process of school officials and parents "jointly" developing a child's program as envision by the IDEA. *See, e.g.*, *Burlington Sch. Comm.*, 471 U.S. at 368.

Defendants therefore violate the IDEA by not providing Prior Written Notice about a transfer decision that can affect the provision of FAPE to putative class members.

3. Defendants' Failure to Provide Prior Written Notice or For Meaningful Parental Involvement Fails to Comport With IEP Requirements.

As a matter of law, the District must include in each student's IEP "a statement of the special education and related services . . . to be provided to the child" with "the anticipated . . . frequency, *location*, and duration of those services." *See* 20 U.S.C. §§ 1414(d)(1)(A)(i)(IV), (VII) (emphasis added); 34 C.F.R. §§ 300.320(a)(4), (7); *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 680 (4th Cir. 2007) ("In light of the fact that the school at which special education services are expected to be provided can determine the appropriateness of an education plan, it stands to reason that it can be a critical element for the IEP to address."); *Madison Metro. Sch. Dist. v. P.R.*, 598 F. Supp. 2d 938, 949-50 (W.D. Wis. 2009) ("The physical placement or location determination is an element of the overall educational placement determination."); *see also Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866, 880 (D.D.C. 1972) (requiring school district provide notice to parents before transferring students "in need of a program of special education").[6] In addition, "educational placement of a child with a disability . . . [must be] made

[6] *Mills* was brought at the same time as the *Pa. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) ("PARC") decision, both of which were relied upon by Congress in enacting the IDEA. *See Rowley*, 458 U.S. at 180 n.2 (noting that these two cases were "identified as the most prominent of the cases contributing to Congress' enactment of the Act and the statutes which preceded it").

by a group of persons, including the parents," and that a "child's placement . . . is as close as possible to the child's home." 34 C.F.R. §§ 300.116(a)-(b). Defendants' failure to involve IEP team members (including parents) in these decisions, including location decisions,[7] constitutes a violation of the IDEA and Chapter 14.

More fundamentally, IEP teams must be involved in the selection of, and contemplated changes in, "programs" and "related services" as well. 20 U.S.C. § 1414(d)(1)(A)(i)(IV); 20 USC § 1401(26) (defining related services). Putative class members are entitled to receive a bevy of programming and related services, including, for example, transportation. *See, e.g.*, 20 U.S.C. § 1401(26). The record shows that Defendants' automatic autism transfer policy entails poorly executed changes to the transportation services for putative class members. *See, e.g.*, SOF ¶¶ 49-50; *see also* SOF ¶ 51 (unplanned transportation changes are "too much" for putative class member). IEP members (including parents), therefore, must have the opportunity to understand the programs and related services and consent (or object) to their implementation beforehand. *See* 20 U.S.C. § 1414(d)(1)(B)(i). Failure to provide Prior Written Notice violates this edict.

[7] This is consistent with the IDEA's purpose and legislative history. For instance:

> The Committee also intends that parent participation be equal to that of school personnel in every instance where the placement decision reviewed. Parents must have a right to know that their child is in the most appropriate location, and know that they had a part in deciding where that location would be. The most appropriate location will be different from child to child and should be decided based on the individual needs of that child.

H.R. Rep. No. 104-614, at 15 (1996).

4. Defendants' Failure To Maintain and Make Available a List of Autistic Support Classrooms Thwarts Meaningful Parental Involvement.

Undisputedly, Defendants do not maintain and make available to parents a list of the building locations of autistic support classrooms. *See* SOF ¶ 52. One of the remedies that Plaintiffs seek is the creation and public dissemination of such a list so that parents may be on equal footing with District staff to discuss any upper-level transfer at IEP meetings. Without such information, parents (and other IEP team members) are deprived of being the equal partners in the IEP process envisioned by the IDEA (and Chapter 14), and their children are subject to discriminatory treatment because of their disabilities under the Rehabilitation Act and ADA. *See, e.g., D.B.*, 751 F. Supp. 2d at 771 (holding that student's placement must be based on the IEP, with parental involvement, and therefore it is "essential that the IEP is created prior to any final placement decisions" and should not be predetermined by school administrators outside of the IEP process").

Plaintiffs do not argue that Defendants cannot move, modify, or shutter autistic support classrooms and programs (provided they adhere to pertinent federal and state procedures for doing so). Rather, Plaintiffs simply argue that parents of putative class members cannot meaningfully be involved at the most basic level of their education process – where their individual children *may* attend school – without knowing where various autistic support classrooms and programs are located.

Parents of non-disabled children, for instance, have access to what buildings their children may attend school, and what types of special programs in music or sports or other areas may be available at various schools. Plaintiffs simply ask that parents of putative class members be afforded the same type of basic information and information that is critically important to the collaborative development of a successful IEP for their child with autism. Some large schools

may have autistic support programs but a child may not tend to do well in a large school setting. Other schools may have autistic support programs but be far from the child's home necessitating a bus trip for a student with autism who does not do well riding a bus. Still other schools may have a former teacher on staff or be attended by siblings which may be of assistance for a child with autism.

There are a myriad of examples but the concept is simple: parents need to have information about where the classrooms are so that they can assist in the collaborative IEP process. Importantly, Defendants may argue that parents (and other IEP team members) are not entitled to be such partners or the lack of a list does not constitute discrimination, and claim they have exclusive control over building location assignment. But nothing in the IDEA suggests parents are to be excluded from the collaborative IEP process, and much in the statute and case law weighs the other way to ensure that parents are part of the decision-making process, (at least at some level, even if they are not the ultimate decisionmakers), and be equipped with sufficient information to smooth any transition that does become necessary. Indeed, Defense witnesses, including their expert, cannot articulate why parents of putative class members should not have this information. *See* SOF ¶ 53.

B. Defendants' Conduct Violates the ADA and § 504 of the Rehabilitation Act.

The uncontested facts concerning Defendants' upper-level policy and practice and related conduct described above, *see supra* Part VI.A, also establish violations of the ADA and § 504 as a matter of law. Defendants do not consider how an upper-level transfer may affect the education and behavior of a putative class member, nor do they plan in any meaningful way for how to facilitate such transfer and any attendant disruptive effects. *See* SOF ¶¶ 10, 25-28, 31-33. Further, upper-leveling putative class members for administrative ease (and bypassing IDEA requirements in the process) is inconsistent with Defendants' obligation and admitted aspiration

to mainstream or provide continuity or services and programming for all students regardless of disability to the best, most practical extent. *See* SOF ¶¶ 46-47. 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. *See, e.g.*, *Christopher S. v. Stanislaus Cnty. Office of Educ.*, 384 F.3d 1205, 1212 (9th Cir. 2004) (blanket policy of shortened days for students with autism violated § 504); *Barr-Rhoderick v. Bd. of Educ. of Albuquerque Pub.Sch.*, No. Civ. 04-0327 MCA/ACT, 2005 WL 5629693, *7 (D.N.M. Sept. 30, 2005) ("In the absence of a legal justification for such a blanket policy or practice [of shortening school days for students with disabilities], or express language in the relevant IEPs to explain and document the need for . . . [such practice], it is reasonable to infer that there has been a structural or systemic failure to provide the individualized consideration and parental participation required under the IDEA, which in turn may provide the basis for a claim of discrimination under Section 504 of the Rehabilitation Act and Title II of the ADA.").

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant summary judgment for Plaintiffs and putative class members on all class claims.

Dated: August 3, 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 Summary Judgment, and any response or reply thereto, it is hereby **ORDERED** that the Motion is **GRANTED**. Judgment shall be entered in favor of Plaintiffs and the putative class, and against Defendants, on all claims.

_____
Davis, J.

CERTIFICATE OF SERVICE

I hereby certify that on August 3rd 2012, I caused the foregoing Plaintiffs' Motion for Summary Judgment 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