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' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The prima facie correct factual findings of the Hearing Officer below indisputably establish that Defendants maintain and apply a policy and practice under which they "upper-level transfer" students with autism precisely because of their disabilities; without prior parental or broader IEP team member input; without prior notice of the transfer decision to parents; excluding even their special education teachers from the process; and without regard to any criteria other than whether the receiving school has enough space in an age-appropriate autistic support classroom. The undisputed facts developed in this case confirm the presumed-correct facts determined below.

Thus, the record overwhelmingly precludes summary judgment for Defendants. In fact, the undisputed material facts demonstrate that summary judgment should be entered in favor of Plaintiffs and the putative class on all claims. *See generally* Pls.' Mot. & Mem. for Summ. J. (Doc. 51). Upper-leveling ignores the central role of parents, teachers, and other IEP team members in the fundamental decision about whether and where a student should be transferred to receive educational programming and related services; eliminates the opportunity for parents and school staff members of 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 disabilities *by definition*[1] involve difficulty with change.

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[1] The implementing regulations of the IDEA, 34 C.F.R. § 300.8(c)(1)(i), define 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

Upper-leveling is neither appropriate, nor a reasonable accommodation, nor anything besides simple discrimination because of disability.

For these reasons, and those set forth below and in Plaintiffs' motion for summary judgment, the court should deny Defendants' motion for summary judgment, and grant judgment in favor of Plaintiffs and the putative class.

II. OVERVIEW OF THE CLASS CLAIMS AND FACTS

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* P-SOF ¶¶ 5-8.[2] 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. and as amended ("Chapter 14") (Count

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> 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.

Pennsylvania's IDEA implementation regulations require as part of the implementation of an IEP for autistic students that IEPs address special considerations, "which may include, as appropriate . . . the child's response to sensory experiences and changes in the environment, daily routine and schedules . . . ." 22 Pa. Code § 14.131(a)(1)(i).

[2] Many of the undisputed material facts pertinent here are set forth in the statement of facts accompanying Plaintiffs' own motion for summary judgment filed on August 3, 2012. *See* Docs. 51 (Pls.' Mot. & Mem. for Summ. J.), 51-1 (Pls.' Stmt. of Facts). To avoid burdening the Court with duplicative filings, the term "P-SOF" used herein refers to the statement of facts filed in support of Plaintiffs' motion for summary judgment. *See* Doc. 51-1. The term "SOF-R" used herein refers to Plaintiffs' separate response to Defendants' statement of fact, filed contemporaneously with this response. Plaintiffs otherwise incorporate by reference herein their memorandum in support of their motion for summary judgment and accompanying statement of facts.

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 and as amended (Count Four). This case constitutes Plaintiffs' appeal of the administrative proceedings to the extent the hearing officers ruled they could not order the general cessation of the District's upper-leveling policy and practice. *See, e.g.*, Compl. (Doc. 1) ¶ 9.b.

III. THE PRIMA FACIE CORRECT FACTS DETERMINED BELOW PRECLUDE SUMMARY JUDGMENT FOR DEFENDANTS

Defendants do not and cannot contest that, in appeals of administrative decisions – such as this case, *see* Compl. (Doc. 1) ¶ 9.b – 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). There is simply no contrary non-testimonial extrinsic evidence in the administrative record to support Defendants' motion.

The prima facie correct facts here already establish, at a minimum, the following:

- Defendants maintain and apply an "upper-leveling" transfer policy and practice to students with autism;
- Nondisabled students are not subject to the policy and practice;
- IEP team members, including parents, are not part of the transfer decision; and
- Prior written notice of the transfer decisions is not sent to parents (or other IEP team members).

See, e.g., P-SOF (Doc. 51-1) at ¶¶ 10, 24, 28-30.

The facts discovered in this case corroborate those found by the Hearing Officer. *See, e.g.*, P-SOF ¶ 10. These facts alone preclude summary judgment for Defendants.

IV. PLAINTIFFS HAVE STANDING

Defendants argue once again that Plaintiffs somehow lack standing because they have not been physically transferred pursuant to the District's upper-leveling policy and practice. *See* Defs.' Mem. (Doc. 49) at 11-12. The Court already rejected this exact argument, finding that:

> Even though Plaintiffs currently attend their preferred school, Plaintiffs will continue to be subject to the District's allegedly IDEA-deficient educational placement process from year to year. As such, Plaintiffs' injuries are imminent, not merely conjectural or hypothetical, and a favorable court decision will likely redress the systemic failures, if any, in the District's practices regarding the educational placement and transfer of autistic students. Therefore, under *Lujan*, Plaintiffs have standing to pursue their claims.

P.V. v. Sch. Dist. of Phila., No. 2:11-cv-04027, 2011 WL 5127850, at *11 (E.D. Pa. Oct. 31, 2011). As the Court further observed, the only reason Plaintiffs were not transferred was because they initiated legal proceedings that triggered the IDEA's "stay put" rule. *See id.* at *1. In addition, Defendants concede that Plaintiffs are currently entering the final grades of a K-5 school. *See* Defs.' Mem. (Doc. 49) at 2-3. R.S. and J.V. enter this school year as fourth graders and P.V. and M.M. begin fifth grade. After fifth grade, Plaintiffs once again will be subject to the District's upper-leveling policy and practice. Other than the present litigation, there is no assurance that Plaintiffs or any other putative class member will not be proposed for transfer again – indeed, the District has transferred students mid-year. *See* SOF-R, at ¶ 29. Plaintiffs continue to be subject to the District's upper-leveling policy and practice each year it remains in effect. There can be no question under these circumstances that Plaintiffs have standing because they are subject to the District's policy and practice year after year.

V. DEFENDANTS' CONDUCT VIOLATES THE IDEA AND CHAPTER 14 OF THE PENNSYLVANIA CODE

There is not any real dispute that Plaintiffs and putative class members are children with disabilities, that the District's receipt of federal funds obligates it to comply with the strictures of

the IDEA and Chapter 14, and that exhaustion would be futile and inadequate. *See* Defs.' Mem. (Doc. 49) at 2, 19-20; Pls.' Mem. Supp. of Pls.' Mot. for Summ. J. (Doc. 51) at 7. The only remaining liability issue is whether the District's upper-level transfer policy and practice violates the substantive and procedural protections afforded to Plaintiffs and putative class members under the IDEA and Chapter 14. The undisputed facts establish that it does. Summary judgment, therefore, must be denied for Defendants and granted for Plaintiffs and the putative class.

A. Overview of the IDEA and Chapter 14

Plaintiffs already provide an overview of Counts One and Two in their memorandum in support of their motion for summary judgment. *See* Pls.' Mem. Supp. of Pls.' Mot. for Summ. J. (Doc. 51) at 4-7. For efficiency's sake, Plaintiffs incorporate those arguments by reference here. It suffices simply to repeat that the IDEA (and, by incorporation, Chapter 14) seeks "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"[3]; that special education and related services must confer "significant learning and meaningful benefit"[4]; that, by statutory decree, a key way to ensure all of this is through meaningful parental involvement;[5] and that programming and related services, including the locations thereof, are part of the placement determinations made by IEP teams.[6]

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[3] 20 U.S.C. § 1400(d)(1)(A).

[4] *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 556 (3d Cir. 2010) (internal quotations and citation omitted).

[5] *See, e.g.*, 20 U.S.C. § 1414(d)(1)(B); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524 (2007); *Anchorage Sch. Dist. v. M.P.*, No. 10-36065, 2012 WL 2927758, at *5 (9th Cir. July 19, 2012).

[6] *See* 20 U.S.C. §§ 1414(d)(1)(A)(i)(IV), (VII) & 1414(e).

B. Defendants' Failure to Provide Prior Written Notice Precludes Summary Judgment In Their Favor.

Defendants exclusively focus on whether the District's upper-leveling policy and practice constitutes a change in "educational placement" under § 1414 of the IDEA. *See* Defs.' Mot. (Doc. 49) at 13-19. They wholly ignore Plaintiffs and the putative class's assertion that Defendants' failure to provide Prior Written Notice separately violates 20 U.S.C. § 1415(b). Such notice must be issued whenever Defendants intend to upper-level putative class members. *See* 20 U.S.C. §§ 1415(b)(3) (Prior Written Notice required whenever school "proposes to . . . change the . . . educational placement of the child *or* the provision of [FAPE] to the child." (emphasis added); 34 C.F.R. § 300.503(a). FAPE has a meaning broader than "educational placement" as Defendants purport to define the latter term. *See* 20 U.S.C. § 1400(d)(1)(A) (FAPE means provision of "special education and related services designed to meet [each child's] unique needs."); *see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89 (1982) (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."); *see also* Pls.' Mem. in Supp. of Pls.' Mot. for Summ. J. (Doc. 51) at 17-20.

The School District concedes that "IEP teams do not make building placement determinations." P-SOF ¶ 28 (citing unappealed prima facie correct findings of Hearing Officer below). Rather, "[a] building assignment is . . . made *after* parents approve the NOREP [i.e., without parental notice or input]." P-SOF ¶ 28 (Hearing Officer findings) (emphasis added); *see* P-SOF ¶ 27 (Hearing Officer findings) ("Placement decisions are made and parents are informed after the fact."); *accord* P-SOF ¶ 29 (undisputed facts discovered in class case). "[T]he 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." P-SOF ¶¶ 10.e, 25-26 (Hearing Officer findings); *accord* P-SOF ¶¶ 30-33 (undisputed facts discovered in class case). The District admits it makes these upper-leveling decisions without involvement of the parents. *See* P-SOF ¶ 10 (Hearing Officer findings); *accord* P-SOF ¶¶ 25-28, 35, 37-40 (undisputed facts discovered in class case).

Defendants claim that a parent's requested building may be taken into consideration. *See* Defs.' Mem. (Doc. 49) at 6. But no informal roadmap, let alone written policy, exists that would inform parents of a process by which they could make their own request or use the IEP team process to do so; when and how District personnel should solicit parental input; or how District personnel should attempt to accommodate parental requests. *See* P-SOF ¶¶ 31-32, 35-36, 52-53; SOF-R ¶¶ 27-28. Holding out a single putative class member, plaintiff Ms. Cruz, as an illustration of how the District "allows parents to participate in choosing the school building that their child will attend" is disingenuous at best. *See* Defs.' Mem. (Doc. 49) at 6. Defendants only afforded Ms. Cruz this opportunity after she had retained counsel, instituted multiple administrative proceedings, and filed this lawsuit; and Defendants conveniently omit that they were ordered by Hearing Officer Ford to provide Ms. Cruz the opportunity to respond to a NOREP that included a building assignment. *See* SOF-R ¶ 28.

Efforts to involve parents only after they institute or threaten legal proceedings appears to be Defendants' pattern. Though Defendants are correct that putative class member Ms. McKinnie was fortunate enough that Defendants just happened to modify her daughter's K-2 autistic support classroom into a 3-5 classroom to avoid having to transfer her, *see* Defs.' Mem. (Doc. 49) at 6-7, they neglect to mention that this only happened after Mr. McKinnie learned of the intended upper-level transfer through a "strip" of paper sent home with her child, after she

herself repeatedly complained about the impending transfer throughout the ensuing summer, and after she retained counsel and filed for a special education hearing, forcing the District to meet with her in a mandated resolution meeting.[7] *See* P-SOF ¶¶ 40, 51. This is one reason why the injunctive relief in this case should be granted. Parents of the several hundreds of students in the District with autism should not each need to retain counsel, take legal action year after year, and badger Defendants to comply with the IDEA and Chapter 14's mandate of meaningful parent involvement and prior written notice.

At best, Defendants claim they sometimes inform parents of transfer decisions after-the-fact through a terse form letter close to the beginning of the new school year that simply declares where a parent's child will be attending school, *see* P-SOF (Doc. 51-1) ¶ 35; and often, that notice is tardy, not sent at all, or simply wrong. *See* P-SOF (Doc. 51-1) ¶ 36-39. Absent any written policy governing these letters' contents and transmission, or even any evidence that these letters are ever sent in the first place, Defendants do not provide statutorily-compliant Prior Written Notice.

In short, Defendants' admitted policy and practice of upper-leveling putative class members without issuing Prior Written Notice precludes summary judgment on the IDEA and Chapter 14 claims in Defendants' favor. In fact, the undisputed facts support entry of judgment in Plaintiffs' favor. *See generally* Pls.' Mem. Supp. of Pls.' Mot. for Summ. J. (Doc. 51).

C. Defendants' General Failure to Provide For Meaningful Parental Involvement Precludes Summary Judgment In Their Favor.

Aside from Defendants' failure to provide Prior Written Notice, Defendants' automatic autism transfer policy more generally violates the IDEA's (and Chapter 14's) mandate that

[7] A resolution meeting is a mandated effort for solving disputes; it is not an IEP meeting. *See* 34 C.F.R. § 300.510; *cf.* 34 C.F.R. § 300.321. A resolution meeting happens only when a hearing has been requested.

parents of students with disabilities be meaningfully involved in decisions to provide special education and related services to their children. For instance, the IDEA requires Defendants "to obtain informed consent from the parent of [a child with a disability] before providing special education and related services to the child." 20 U.S.C. § 1414(a)(1)(D)(i)(II). The IDEA's process is not simply to have parents involved to develop part of the IEP, but also to involve them in the discussion about the child's placement. 34 C.F.R. § 300.324(a)(ii) requires that in developing an IEP, the IEP team must consider the concerns of the parents. 20 U.S.C. § 1414(e) and 34 C.F.R. § 300.327 require that school districts must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

Defendants' interpretation of § 1414(d) is incorrect. Section 1414(d) explicitly provides that IEP team members, including parents, must help determine the "special education and relates services . . . to be provided to the child," with "the anticipated frequency, location, and duration of those services." 20 U.S.C. §§ 1414(d)(1)(A)(i)(IV), (VII). "Special education" and "related services" are both statutorily defined terms that are broader than the narrow – and mistaken – definition Defendants seek to ascribe to "educational placement." *See* 20 U.S.C. § 1401(26) & (29). Similarly, the IEP requirements in Pennsylvania's implementation regulations, § 14.131(a) of Chapter 14, state that: "In addition to the requirements incorporated by reference (see 34 C.F.R. §§ 300.320-300.324), the IEP of each student with a disability must include . . . . [t]he location where the student attends school and whether this is the school the student would attend if the student did not have an IEP." Pennsylvania's state statute (which appears on the state's template IEP form) thus explicitly requires the IEP team, including parents and teachers, to discuss the physical location of the child's school.

This interpretation also harmonizes with the "placement" regulations under the Rehabilitation Act:

> Placement procedures. In interpreting evaluation data and *in making placement decisions*, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, *teacher recommendations*, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) *ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options,* and (4) ensure that the placement decision is made in conformity with § 104.34.

34 C.F.R. § 104.35(c) (emphasis added); *see R.K. ex rel. J.K. v. Bd. of Educ. of Scott Cnty., Ky.*, Nos. 11-5070, 11-5700, 2012 WL 3525403, at *7 (6th Cir. Aug. 16, 2012) (school must make individualized assessment of child's need before "placement" decisions involving assignment to different school).

Defendants are similarly not correct in their interpretation of "educational placement" as it is used in 20 U.S.C. § 1414(e). The IDEA mandates that "[e]ach local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." *Id.* In this Circuit, determining the meaning of "educational placement" necessitates an individualized inquiry through the IEP team process – the very process that the School District refuses to use – and can include consideration of location and setting. *R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 757 (E.D. Pa. 2010) ("identifying a change in placement is something of an exact science, and is, necessarily, fact specific") (internal quotation and alteration marks omitted); *see also George A. v. Wallingford Swarthmore Sch. Dist.*, 655 F. Supp. 2d 546, 550 (E.D. Pa. 2009) ("while educational placement may not be synonymous with location, it cannot be entirely divorced from the inquiry"). In *R.B.*, the court rejected the local education agency's

argument that "location is not a component of 'educational placement.'" 762 F. Supp. at 762. The court recognized that "the Third Circuit gives the term [change in educational placement] an expansive reading," *id.* at 757, and that "the meaning of 'educational placement' falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP," *id.* at 763 (internal quotation and alteration marks omitted). Looking at the specifics of the case, including that the building at issue was "a small school, which [the disabled student was] able to navigate because of her familiarity with the location," the court found that the school's location was relevant to the student's educational placement. *Id.* Other circuits and district courts agree.[8]

Despite Defendants' bold and incorrect assertion that "'educational placement' means educational programming and services – not the location at which a student *receives* educational programming and services," Defs.' Mem. (Doc. 49) at 14, *all* of the non-binding authority cited by Defendants acknowledge that physical location *can be* a consideration in the "educational placement," even if the two terms are not synonymous, or at least that the determination requires a fact-specific inquiry from the court to determine whether or not physical location need be considered.[9] Further, given that the class claims implicate other, broader IDEA provisions

[8] *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."); *Eley v. District of Columbia*, Civ. Action No. 11-309, 2012 WL 3656471, at *8 (D.D.C. Aug. 24, 2012) (failure to identify program location denied FAPE); *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."); *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").

[9] *L.M. v. Pinellas Cnty. Sch. Bd.*, No 8:10-cv-539-T-33TGW, 2010 WL 1439103, at *2 (M.D. Fla. Apr. 11, 2010) ("Although moving the location of the student's services may in some circumstances be a change in the educational placement . . . such circumstances are not present in the case at bar.") (citing *Tilton v. Jefferson Cnty Bd. of Educ.*, 705 F.2d 800, 805 (6th Cir. 1983) and *Hale v. Poplar Bluff R-I Sch. Dist.* 280 F.3d 831, 833-34 (8th Cir. 2002), both cases also cited by Defendants for the proposition that a change in location cannot constitute a change

concerning the provisions of FAPE, *see supra* Part IV.B, the meaning of the narrower term, "educational placement," is essentially moot.

Nevertheless, to the extent "educational placement" is pertinent here, Defendants' authority also is factually distinguishable. Defendants' citations relate to situations involving an abrupt transfer because a facility closed "for reasons beyond the control of the public agency"[10] or "for purely budgetary reasons."[11] Another involved merely a temporary transfer for disciplinary reasons, and in fact the court went to the pains of distinguishing cases that involved a "clear and permanent" change in setting, which would be considered a change in educational placement.[12] Two of the cases were limited to challenges to intra-building (i.e., from one classroom to another) transfers.[13] Puzzlingly, two other cases cited by Defendants found that school's unilateral transfer decision *did* constitute a change in the child's educational placement.[14] In *Tilton v. Jefferson County School Board of Education*, the Sixth Circuit held that

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in "educational placement"); *Weil v. Bd. of Elementary & Secondary Educ.*, 931 F.2d 1069, 1071-73 (5th Cir 1991) (cautioning "that today's ruling is entirely mandated by the facts of this case and is not to be taken as an invitation or condonation of a failure of public officials to comply with the procedural safeguards prescribed by the EHA and resultant federal and state regulations"); *AW v. Fairfax Cnty Sch. Bd.*, 372 F.3d 674, 682 n.9 (4th Cir. 2004) (recognizing that certain aspects of a physical change, like a lengthened commute, can be a factor in an educational placement); *T.Y. v. N.Y.C. Dep't of Educ.*, 584 F.3d 412, 420 (2d Cir. 2009) (only finding that a change in physical location is not a per se violation of the IDEA); *In re Educ. Assignment of Joseph R.*, 318 F. App'x. 113, 119 (3d Cir. Mar. 24, 2009) (fact-specific inquiry required).

[10] *Weil*, 931 F.2d at 1071-73 (predating enactment of IDEA and current amendments).

[11] *Tilton*, 705 F.2d at 805 (also predating enactment of IDEA and current amendments).

[12] *AW,* 372 F.3d at 682-83.

[13] *Id.* at 681; *Joseph R.*, 318 F. App'x at 115.

[14] *Hale*, 280 F.3d at 833-34; *Tilton*, 705 F.2d at 804 ("we conclude that the closing of [the facility] and transfer of these plaintiffs was a change in placement").

a transfer was a change in educational placement, but excused that change because the facility at issue was closing entirely due to fiscal concerns. 705 F.2d at 804-05. The Second Circuit in *T.Y. v. New York City Department of Education*, 584 F.3d 412, 420 (2d Cir. 2009), merely held that "an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA." *But see Eley v. District of Columbia*, Civ. Action No. 11-309, 2012 WL 3656471, at *8 (D.D.C. Aug. 24, 2012) (finding that educational agency was obligated to identify particular location in an IEP and failure to do so constituted denial of FAPE); *but see also A.K.*, 484 F.3d at 681 (same). Moreover, the parents in *T.Y.* received exactly what Plaintiffs seek here and a Hearing Officer already ordered for two Plaintiffs – an opportunity to participate in school selection *before* final assignment, working in cooperation with the school. *See* 584 F.3d at 420.

The Third Circuit's non-precedential opinion in *In re Educational Assignment of Joseph R.*, 318 F. App'x. 113 (3d Cir. Mar. 24, 2009) only involved the IDEA's stay-put provision. Even this unpublished opinion acknowledges the general rule that whether a transfer effects a change in educational placement is a fact-specific inquiry. *See id.* at 119. Further, the district court in *Joseph R.* accepted the "sparse [administrative] findings" that the student received the exact same educational services, with the same special education teacher, but in a different room. *Id.* Surely, Defendants have not presented any contrary non-extrinsic evidence suggesting that this Court should reject Hearing Officer Ford's findings. The findings here show that, contrary to the findings of comparability in *Joseph R.*, the District's unilateral upper-leveling decisions are made without regard to the specific programming and related services for a given student and without the involvement of their parents. *See* P-SOF ¶¶ 26, 28, 33.

The Department of Education's nonbinding publications cited by Defendants either predate the enactment and most recent amendments to the IDEA by a decade or more, *see* Defs.' Mem. (Doc. 49) at 14-15 & Defs.' Ex. S, or use "placement" as shorthand for special education programming and related services – which, as discussed *supra*, is entirely consistent with parental and broader IEP team involvement concerning programming and related services.[15]

The education required for students with different disabilities is not fungible, nor are the treatments for these disabilities. That is a key reason why parents and teachers are required to be included in the decisions about their children's educational placements. *See* 20 U.S.C. § 1414(e). Only one case cited by Defendants, *L.M. v. Pinellas County School Board*, No. 8:10-cv-539-T-33TGW, 2010 WL 1439103, at *1 (M.D. Fla. Apr. 11, 2010), dealt with transfers of students with autism to different physical facilities. In that non-reported case from the Middle District of Florida, however, unlike the present case, the parents were seeking a definition of "then-current educational placement" under the IDEA's stay-put provision, 20 U.S.C. § 1415(j), specifically. *Id*. In its conclusion, that court specifically limited its finding by holding that "difficulty in transition from one location to another . . . . does not amount to a change in . . . educational placement *within the meaning of the stay-put provision*." *Id.* at *2 (emphasis added). That provision is not at issue here.

To the extent *L.M.* represents a broader opposing view, this Court should not adopt its decision, which was based on thin and incorrect reasoning. The *L.M.* court correctly acknowledged that "moving the location of . . . services may in some circumstances be a change

[15] Chapter 14 further enunciates the permissible reasons why a student with a disability can be transferred. 22 Pa. Code § 14.144. None of the enumerated reasons apply here. The closest reason is in § 14.145(2)(v), which sets a floor insofar as an autistic support class must serve "at least" three grade levels (e.g., K-2). This does not mean that Defendants are immunized from the IDEA and Chapter 14's other provisions to upper-level transfer putative class members so long as a student remains in the same building for three consecutive grade levels.

in the educational placement," but placed inadequate weight on the impact of transitions on students with autism. *Id*. It also is unclear, and likely doubtful, whether the *L.M.* court had a satisfactory record on which to make contrary findings. By comparison, this Court has the benefit of not just one, but multiple fully-developed records, multiple proposed class representatives, and a premier expert opinion on the affect of transitions on students with autism, all showing that difficulty with transitions is not just *a* characteristic, but one of the *defining* characteristics of the condition. Klin Rpt. (Ex. 1 to Pls.' Mot. for Summ. J.) at 4. The fact that every District student with autism is at risk of undergoing excessive and unnecessary transitions without so much as a thought to the affect this change can have on them, and without the benefit of parental and teacher input into the decision, militates strongly in favor of a conclusion that, at least under these fact-specific circumstances, the District "shall ensure that the parents of each child with a disability are members of any group that makes decisions" about physically transferring students with autism so they can ensure these transitions are not unnecessarily harmful. *See* 20 U.S.C. § 1414(e).

Defendants mistakenly believe that Plaintiffs seek "veto power" over the final location assignments of putative class members. What Plaintiffs actually seek is the opportunity for pre-notification of potential transfer decisions and an opportunity for parental and broader IEP input into those decisions. *See T.Y.*, 584 F.3d at 420 (denying relief where parents sought "veto" over school choice rather than "input"); *Boston Public Schs.*, 4 ECLPR 562, at *6 (Mass. State Ed. Agency, July 30, 2004) (finding the concern that "parents not be allowed to dictate that their son or daughter be educated in a particular school . . . not inconsistent with the principle that parents have the right to participate in decision-making regarding the identity of student's school."). As Defendants themselves recognize, the hazards of the District's upper-leveling policy and

practice, in violation of the obligations under the IDEA for parental-involvement, would be avoided if the District at least improved its continuity of programming, which would minimize or extinguish the need for excessive transferring of students with autism. *See, e.g.*, Educating Students with Autism Spectrum Disorders, DEF017736-63 (Ex. 34 to Pls.' Mot. for Summ. J.); Klin Rpt. (Ex. 1 to Pls.' Mot. for Summ. J.) at 5-8; Cordero Dep. (Ex. 10 to Pls.' Mot. for Summ. J.) at 48-49; Hunt Dep. (Ex. 16 to Pls.' Mot. for Summ. J.) at 131-34, 158-60; Monras-Sender Hr'g Test. (Ex. 35 to Pls.' Mot. for Summ. J.) at 494. Defendants, however, cite no evidence suggesting that greater continuity of autism-support classes would not be feasible. Greater program continuity would help. But if the District were, for example, to perform a study and determine that it is not feasible to maintain these classrooms in each building they are currently located at the same grade levels that are offered to non-autistic students,[16] it could still solve the primary problem. Namely, it could affirmatively engage parents and teachers in discussion through the IEP process, and offer them lists of available classes, rather than wait for parents to initiate due process hearings to get a seat at the table, as is the District's current practice.

In some cases, an initial proposed assignment might be unsuitable because of students' unique needs. In others, transfer might be avoidable and they could remain in their current school buildings with autistic support. In still other cases, decisions might be made to discontinue autistic support and have students attend mainstream classes in their current school buildings. And in some situations, no doubt, a decision to transfer may be in the best interest of the student, or simply may be the best available option due to other constraints. Whatever the case, the point is the IDEA and Chapter 14 envision meaningful parent, teacher, and general IEP team member input into, and at a minimum a prior awareness of, imminent upper-level transfer

[16] As was the situation in some cases cited by Defendants. *See, e.g. Tilton*, 705 F.2d at 805.

decisions for planning purposes. *See, e.g.*, *Eley*, 2012 WL 3656471, at *8-9 (finding school district's unilateral decision for student to attend particular location, without involving parents, "violated an important procedural safeguard and seriously impaired the right of the parent to participate in the process," and accordingly denying FAPE). Adequate time and formal process for the planning of transitions for children with autism together with adults who know them is essential since children with autism experience resistance to environmental alterations and changes to daily routines. None of Defendants' cases supports the conclusion that parents and teachers should be excluded en masse from any decision relating to the physical location at which children receive services.[17] Yet the record shows the District is doing just that and is not using the IEP process as intended for children with autism.

The uncontested facts show that Defendants do not plan or account for in any way whether their unilateral upper-level transfer decisions are likely to affect the student's learning experience. *See* P-SOF ¶¶ 10, 25. They do not seek input from any IEP team members – be they parents, teachers, or others – into what may be appropriate for a given putative class member at a different school building. Instead, outside of the IEP team process, they unilaterally transfer students to whatever school building they can find with space that happens to have an age-appropriate autistic support class. *See* P-SOF ¶¶ 26, 28.

VI. DEFENDANTS' UPPER-LEVELING POLICY AND PRACTICE VIOLATES THE REHABILITATION ACT AND ADA

Defendants admit there is not any dispute about the threshold elements of the putative class's claims under § 504 of the Rehabilitation Act and the ADA – that is, the children have disabilities, they are otherwise qualified to participate in school activities, and the School District

[17] More precisely, that they be required to institute legal proceedings each and every time they wish to have input.

receives federal financial assistance. *See* Defs.' Mem. (Doc. 49) at 19-20. Summary judgment, therefore, should be granted at least in part for the putative class on these parts of Counts Three and Four. *See id.*; *see also* Pls.' Mem. in Supp. of Pls.' Mot. for Summ. J. (Doc. 51) at 7.

Summary judgment should also be denied to Defendants, and granted for Plaintiffs and the putative class, on the final liability element under both statutes. The undisputed facts compel an inference of discrimination and failure to provide reasonable accommodation. Defendants admit that they apply their upper-leveling policy and practice to putative class members solely because of their disabilities. *See* P-SOF (Doc. 51-1) ¶¶ 10, 25, 33; SOF-R ¶¶ 18-19, 22, 24-25. Notably, because Plaintiffs do not seek individual compensatory damages, Plaintiffs do not need to prove intentional discrimination to state their claims. *See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 253 (3d Cir. 1999), *superseded by statute on other grounds as noted in P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 730 (3d Cir. 2009). Rather, Plaintiffs merely must show Defendants were deliberately indifferent to Plaintiffs' disabilities. *See id.* 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 with the child's parents and teachers how to facilitate such transfer and to mitigate any potential disruptive effects as a result of transfer. P-SOF ¶¶ 10, 25-28, 31-33.

No evidence of this kind existed in *Chambers v. School District of Philadelphia Board of Education*, 827 F. Supp. 2d 409, 425 (E.D. Pa. 2011), which was not about systemic reform, and is Defendants' lone citation on these elements. In contrast, that this case involves a perpetually inadequate transfer process applied solely to students with disabilities and because of their disabilities – as the uncontested facts show here – establishes discrimination. *See, e.g.*, *Adam C. v. Scranton Sch. Dist.*, No. 3:07-cv-532, 2011 WL 4072756, at *5-6 (M.D. Pa. Sept. 13, 2011);

see also 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, at *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.").

Defendants' blanket policy and practice also equates to a failure to accommodate putative class members' disabilities. Much like the IDEA's requirement of meaningful parental involvement, the ADA accommodation process is supposed to be a cooperative one. *See, e.g.*, *Feliberty v. Kemper Corp.*, 98 F.3d 274, 280 (7th Cir. 1996) ("The determination of a reasonable accommodation is a cooperative process in which both the employer and the employee must make reasonable efforts and exercise good faith."); *Thomas v. Bala Nursing & Ret. Ctr.*, Civ. A. No. 11-5771, 2012 WL 2581057, at *9 (E.D. Pa. July 3, 2012) (denying employer's motion for summary judgment where employer could not show interactive process between employer and employee). Here, the District's unlawful policy and practice robs putative class members of even the opportunity to engage in dialogue concerning whether an upper-level transfer will reasonably accommodate a student. *See* P-SOF ¶¶ 31-33.

Summary judgment cannot be granted to Defendants on these uncontested facts. The facts instead show that judgment should be entered for Plaintiffs and the putative class on Counts Three and Four.

VII. CONCLUSION

For the foregoing reasons, as well as those expressed in Plaintiffs' motion for summary judgment and accompanying memorandum (Doc. 51), the Court should deny Defendants' motion for summary judgment, and instead grant summary judgment for Plaintiffs and the putative class on all class claims.

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Respectfully,

/s/ Sonja Kerr

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2012, I caused the foregoing Plaintiffs' Memorandum of Law in Opposition to Defendants' 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