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.	)	

REPLY MEMORANDUM IN FURTHER SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

I. INTRODUCTION

The Third Circuit and district courts therein widely recognize that class certification is the ideal device for a civil rights challenge to a systemically deficient education policy and practice. This is especially so when, in the first instance, that policy and practice impedes a student's receipt of appropriate and meaningful educational benefits *before* that child's individual programming needs are even implemented.

Such is the case here. More than 1,600 putative class members are subject to Defendants' upper-leveling policy and practice solely because of their disabilities, and without regard to their unique educational needs and requisite individual programming. The putative class seeks to enjoin this policy and practice. The class is numerous, cohesive, has no material conflicts, and shares predominating common questions of law and fact. Class adjudication is far superior to what would otherwise be hundreds of individual trials directed at the same unlawful policy and practice. This case does not present a novel class certification question. Plaintiffs, whom this Court has previously found to have standing, easily satisfy Rule 23's criteria.

II. 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.' Resp. (Doc. 50) 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.' Resp. (Doc. 50) at 2. After fifth grade, Plaintiffs once again will be subject to the District's upper-leveling policy and practice. 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.[1]

III. PLAINTIFFS SATISFY RULE 23(a)'s CRITERIA

Defendants fail to overcome Plaintiffs' showing that all Rule 23(a) prerequisites are met. Defendants did not appeal the administrative decision and do not contest the prima facie correct administrative findings below, which establish that the District's unlawful policy and practice cannot be remedied on an individualized basis. *See* Pls.' Mem. (Doc. 48) at 4-5. This alone demonstrates the suitability – and, indeed, the necessity – of Plaintiffs' claims being adjudicated on a class basis. Were that not enough, the independent record developed in this case also shows the appropriateness of class treatment. *See id.* at 6-11. Plaintiffs' satisfaction of Rule 23(a)'s criteria can be summarized as follows:

Numerosity. Defendants do not dispute that there are more than 1,600 students "requiring access to[] autism support classroom[s]" who attend grades K-8 in the District, *see* Defs.' Resp. (Doc. 50) at 3, nor do they dispute that Defendants can and do "'upper-level

[1] Indeed, Hearing Officer Ford concluded that he lacked authority to order wholesale changes to the district's procedures and encouraged the District to alter its procedures on a broader scope, if only to avoid a plethora of identical claims from similarly-situated students.

transfer'" such students, *see id.* at 5. Defendants' contention that "there is no way to determine whether *any* students have ever been transferred," *see* Defs.' Resp. (Doc. 50) at 13, not only is factually preposterous,[2] but misses the point. The very nature of the District's upper-leveling policy and practice means each putative class member is at risk of being affected by it. This is true now more than ever, in the wake of the District and SRC's plan to close a number of schools, *see* Sch. Dist. of Phila. Facilities Master Plan: Summ. of Recs. (Ex. 34), which obviously will entail student transfers. Further, consistent with well-established law on injunctive-relief classes, Plaintiffs seek to represent all putative class members, and not just some narrower subset of them (e.g., students with autism entering a certain grade). *See* Pls.' Mem. (Doc. 48) at 12-13 (proposing class definition and citing cases). Defendants do not explain, much less cite any authority concerning, how joinder would be a practical alternative to class treatment.

Commonality. Plaintiffs have already identified a host of unrebutted common questions of law and fact. Pls.' Mem. (Doc. 48) at 14-15. The central tenet of Plaintiffs' complaint is that the District's upper-leveling policy and practice does not even provide an opportunity for meaningful parental (or broader IEP team) involvement prior to an upper-level transfer, let alone any consideration of individual students' needs beyond the minimal criterion that they require autistic support. *See id.* at 7-10. Defendants' litany of purported individualized issues, *see* Defs.' Resp. (Doc. 50) at 15, is simply irrelevant. Their reliance on *Blunt v. Lower Merion*

[2] Defense witnesses, including the District and SRC's Rule 30(b)(6) designee, admit that they upper-level students with autism every year. *See* Pls.' Mem. (Doc. 48) at 3-4 (citing prima facie correct facts), 7 (citing defense testimony in this case); *see also, e.g.*, Exs. 35, 36 ("upper-level transfer" spreadsheets tracking upper-leveled putative class members for upcoming school years).

School District, 262 F.R.D. 481 (E.D. Pa. 2009) is misplaced. The *Blunt* court refused to certify a class that would have included students with and without disabilities, or alternatively just a subset of students (African-Americans) with disabilities. *See id.* at 492. Thus, the proposed class in *Blunt* was both broader and narrower than that alleged here.

Typicality. Plaintiffs seek equitable redress for the same unlawful conduct, to be established by the same evidence under the same legal theories, as that which would be challenged individually by each putative class member. *See* Pls.' Mem. (Doc. 48) at 15-16. Contrary to Defendants' assertion, *see* Defs.' Resp. (Doc. 50) at 16, Plaintiffs have standing and, resultantly, the minimal requisite typicality. *See supra* Part II. Defendants also are correct that the most appropriate classroom location for a particular student may vary. *See* Defs.' Resp. (Doc. 50) at 16-17. This is exactly why Plaintiffs seek to enjoin the District's upper-leveling policy and practice. The District's unlawful policy and practice bypasses any parental, teacher, or other IEP team member input on what may be an appropriate setting and without regard to other salient factors. *See* Pls.' Mem. (Doc. 48) at 3-4, 7-10.[3] Instead, the typical practice is for District administrators to unilaterally assign students wherever they can find age-appropriate space. *See id.*

[3] That the District's upper-leveling policy and practice may not have been a formal "agenda" item for the Philadelphia Local Right to Education Task Force, *see* Defs.' Resp. (Doc. 50) at 17, is immaterial, even if true. The undisputed facts show that upper-leveling has been a long-time concern of the Task Force. *See, e.g.*, Roccia-Meier, Former Task Force Chair, Hr'g Test. (Ex. 5) at 48-51, 56 (upper-leveling policy and practice a "top" concern of the Task Force); Roccia-Meier Dep. (Ex. 22) at 20, 73 ("[N]umerous, unlimited amounts of parents have called me with this issue over the years."); Thompson, Current Task Force Chair, Dep. (Ex. 24) at 26-27 (the Task Force and Ms. Thompson personally have raised concern over upper-leveling policy and practice with District officials); PLF 02332-41, May 3, 2005 Autism Committee Rpt. (Ex. 37) (noting, in 2005, the Task Force's concerns with issues concerning lack of continuity of programming for students with autism and other disabilities).

Adequacy. Defendants do not dispute the qualifications of proposed class counsel. Instead, Defendants attempt to manufacture an intraclass conflict by suggesting that some putative class members may not want to "attend schools that have autism support for all grades." Defs.' Resp. (Doc. 50) at 18. As with the arguments regarding typicality, this is one of Plaintiffs' points. Putative class members may want or need to attend different schools for various reasons. The District's current policy and practice lacks any mechanism for parents and other IEP team members to even voice those reasons. This Court already put it best:

> Parents may or may not take advantage of the opportunity to participate in the decisions that affect their children's education. However, merely giving parents the option to do so, as well as the information necessary to make informed decisions, would not appear to be a particularly controversial or divisive issue among the autistic community.

P.V., 2011 WL 5127850, at *6. Plaintiffs have and continue to litigate zealously the class claims, and will continue to adequately represent the putative class.[4]

IV. THE PUTATIVE CLASS IS COHESIVE UNDER RULE 23(b)(2)

The Third Circuit has held that a class action suit seeking injunctive relief to remedy an alleged systemic violation of rights – just like the suit here – "almost automatically satisfie[s]" Rule 23(b)(2). *Baby Neal v. Casey,* 43 F.3d 48, 58 (3d Cir. 1994); *see also Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2557-58 (2011) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what (b)(2) is meant to capture."). Faced with this binding precedent, Defendants try to spin Plaintiffs' claims into something they are not.

[4] Unlike Plaintiffs here, the plaintiffs in *McClendon v. Sch. Dist. of Phila.*, No. 04-1250, 2005 WL 549532, at *4 (E.D. Pa. Mar. 7, 2005) (cited at pages 18-19 of Defendants' response), sought to enforce individual settlement agreements and to recover individually-determined compensatory damages.

They argue that the putative class is not cohesive because certification will force putative class members "to cede to the named plaintiffs and their counsel control over critical decisions regarding their children's education." Defs.' Resp. (Doc. 50) at 20. This is a gross distortion of Plaintiffs' claims. The equitable, classwide relief Plaintiffs seek will vest putative class members with *more* input into the process by which Defendants effectuate upper-level transfers, as well as basic related information about locations or settings. Again, as the Court previously observed, merely affording parents the opportunity to participate in transfer decisions, and "the information necessary to make informed decisions, would not appear to be a particularly controversial or divisive issue among the autistic community." *P.V.*, 2011 WL 5127850, at *6.

Plaintiffs are not trying to dictate "where to locate the autism support programs provided to their children." *See* Defs.' Resp. (Doc. 50) at 23. Rather, they seek to enforce the putative class's statutory rights to be part of the joint planning process envisioned by the IDEA and Pennsylvania Code, and to be free of disability discrimination. As noted in the above discussion concerning typicality, the same divisive concerns presented in *Blunt* are not present here. This case is on all fours with those in which courts certified similar classes seeking to remedy systemic failures of education policy or practice. *See Chester Upland Sch. Dist. v. Pennsylvania*, No. 12-132, 2012 WL 1450415, at *1 (E.D. Pa. Apr. 25, 2012) (certifying class to remedy educational funding failures for students with disabilities); *Rivera v. Lebanon Sch. Dist.*, No. 1:11-cv-147, 2012 WL 2504926, at *1 (M.D. Pa. June 28, 2012) (certifying class challenging process of truancy fines); *D.L. v. District of Columbia*, 277 F.R.D. 38, 48 (D.D.C. 2011) (granting systemic relief to ensure delivery of services to preschoolers with disabilities); *C.G. v. Pennsylvania*, No. 1:06-cv-1523, 2009 WL 3182599, at *2 (M.D. Pa. Sept. 29, 2009)

(certifying class of students in districts "with high population of special-education students"); *Petties v. District of Columbia*, No. 95–CV–00148, 1995 WL 153023, at *1 (D.D.C. Mar. 17, 1995) (certifying class of disabled students concerning failure to pay for private school placements); *Gaskin v. Pennsylvania*, No. Civ. A. 94-4048, 1995 WL 355346, at *1 (E.D. Pa. June 12, 1995) (certifying class of disabled students seeking systemic relief); *Cordero ex rel. Bates v. Pa. Dep't of Educ.*, 795 F. Supp. 1352, 1364 (M.D. Pa. 1992) (granting relief to class of thousands of children with disabilities who sought change to Pennsylvania's system for private school placements under the IDEA). The putative class should be certified under Rule 23(b)(2).

V. PLAINTIFFS SATISFY RULE 23(b)(3)

Defendants also do not and cannot rebut Plaintiffs' showing that class certification is proper under Rule 23(b)(3), not just under Rule 23(b)(2).

A. Common Issues of Law and Fact Predominate

Common issues of law and fact abound in this case. *See* Pls.' Mem. (Doc. 48) at 21-24; *see also supra* Part III. Defendants do not seriously dispute this. Instead, they appear to suggest that predominance does not exist because only Plaintiffs and one other putative class member[5] have stepped forward to complain about the District's upper-leveling policy and practice. *See* Defs.' Resp. (Doc. 50) at 22. It generally is not a prerequisite to class certification in these types of cases, let alone a function of the predominance criterion, that an unspecified critical mass of putative class members first "complain" about the challenged policy or practice. *See Chester Upland*, 2012 WL 1450415, at *1 (class represented by single representative);

[5] Plaintiffs did not depose this putative class member, Defendants did. Plaintiffs had identified her in their disclosures because she had previously made herself known to Plaintiffs' counsel.

Chester Upland Sch. Dist. v. Pennsylvania, No. 12-132, 2012 WL 3536320, at *6 (E.D. Pa. Aug. 15, 2012) ("only one member of the class must demonstrate a sufficiently real and immediate threat of injury" to satisfy standing requirement).

Even if the number of prior "complaints" by putative class members was at all relevant, a random sampling of the record clearly shows Plaintiffs are neither alone in deriding the District's upper-leveling policy and practice, nor are they necessarily aware of the arbitrary and clumsy implementation of the policy and practice:

- An August 2009 internal District email reports: "Linda [Williams, then-director of OSIS, and the District and SRC's Rule 30(b)(6) designee] received a call from [a parent] about a change of placement from an AS class at Farrell to Thomas Holme." DEF007183 (Ex. 38).

- A July 27, 2010 internal District email states: "I received a call from the parent of an AS student/he is part of the upper level process//no one sent the father a letter stating where his son will attend in September///shall we send him a letter///please advise." The response notes "the [transfer] letters have not gone out yet" as of July 27. *See* DEF036537 (Ex. 39).

- In August 2010, a parent recounts in a letter to District personnel that her child was assigned to a different school to continue receiving autistic support on "such short notice there was no way possible for me to determine whether his future school would be suitable to meet all of [the child's] needs." DEF011405-06 (Ex. 40)

- An August 15, 2011 internal District email reads: "There is a parent calling to find out where her child will attend come the fall. [The student] attended Feltonville Intermediate in the AS program last year and needed an upper level transfer for this coming school year. The parent was concerned because she was told her son would attend Feltonville Arts & Sciences, but received info from Penn Treaty which she was very opposed to. I checked in the book Joyce Hill has for upper level transfers, I saw he was scheduled for Feltonville Arts & Sciences and called the parent to let her know. After that I was looking up another student and found [the student] on another form having him going to Penn Treaty. Joyce Hill looked him up in the SCN and he is listed at Willard. Can you confirm where this student will be attending? If it is not Feltonville Arts & Sciences, the parent will have to be notified ASAP as she has already purchased those uniforms. Let me know." DEF043017 (Ex. 41)

- On August 23, 2011, District personnel internally discussed that State Representative Evans' office had an inquiry about "a rising third-grade at Lowell ES. [Child] has an IEP and is autistic. The parent contacted the Rep.'s office because of her concerns that Lowell does not have a third grade autism class." DEF025638-39 (Ex. 42).

- A District employee wrote in an August 27, 2011 internal email about the "havoc" concerning the "upper-level transfer assignments." "Principals are turning students away because they are not listed on the SCN [the main student database], Transportation is still doing routing based on the SCN. What can we do?" DEF034935 (Ex. 43).

- A parent with a child enrolled in a K-8 school received a letter in June 2010 that her child was being assigned to a different school. The child did not do well at the new school. The parent is interested in finding a school at which the child can stay without being transferred again, but has been unable to find information about options. PLF02479 (Ex. 44).

- Weeks after the start of the school year, a parent emailed on October 6, 2011 to follow-up on her child's autistic support class: "I haven't heard anything. No placement was found. I wasn't notified with any information. No letters, calls, or emails." DEF058242 (Ex. 45).

Clearly, Plaintiffs are not alone. Defendants apply their upper-leveling policy and practice district-wide to students requiring autistic support, without meaningful involvement from parents and IEP members, just as their Rule 30(b)(6) testified. *See* SDP Rule 30(b)(6) Dep. (Ex. 23) at 55-56, 82-84, 86; *see also* Roccia-Meier Dep. (Ex. 22) at 20, 73 ("[N]umerous, unlimited amounts of parents have called me with this issue over the years.").

Finally, Defendants contend that predominance does not exist because Plaintiffs "have already gotten what they wanted." Defs.' Resp. (Doc. 50) at 22. Aside from being factual and legally incorrect, this contention ignores the reality that Plaintiffs will once again be subject to the District's upper-leveling policy and practice once they complete the final grades in their current school building. In any event, whether Plaintiffs have "gotten what they wanted" – which is not the case here – does not automatically disqualify them as class representatives. *See, e.g., Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004) (plaintiff suing under

Fair Debt Collection Practices Act allowed to pursue class action even after defendant made offer of judgment in full amount of plaintiff's individual claims); *Bamgbose v. Delta-T Grp., Inc.*, 724 F. Supp. 2d 510, 516 (E.D. Pa. 2010) (applying *Weiss* to putative class action under Fair Labor Standards Act); *Smolow v. Hafer*, 353 F. Supp. 2d 561, 567-68 (E.D. Pa. 2005) (applying *Weiss* where plaintiff sought, but was offered, interest on mistakenly confiscated property).

B. Class Treatment Remains a Superior Means of Adjudication

The "administrative remedies" Defendants claim are available to each putative class member, *see* Defs.' Resp. (Doc. 50) at 24-25, are wholly inadequate and are an inferior substitute for the class device. This Court has already found that the administrative hearing process is inadequate and futile. *See P.V.*, 2011 WL 5127850, at *8. Even were that not the case, it would be grossly inefficient for hundreds of individual putative class members to invoke such proceedings each time they were threatened with transfer pursuant to the District's upper-leveling policy and practice. Litigating the claims here on a class basis is the only way to enjoin Defendants' systemic violations on a district-wide basis and in an efficient manner.

VI. CONCLUSION

For these reasons, as well as those expressed in Plaintiffs' opening memorandum, the Court should certify the proposed class and appoint class counsel.

Dated: August 30, 2012

Respectfully,
/s/ Sonja Kerr

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2012, I caused the foregoing Reply Memorandum in Further Support of Plaintiffs' Motion for Class Certification to be filed and served on all counsel of record by operation of the CM/ECF system for the United States District Court for the Eastern District of Pennsylvania

/s/ David J. Stanoch
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