

**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 ) Civil Action No. 2:11-cv-04027  
similarly situated, et al., )  
)  
Plaintiffs, )  
)  
v. )  
**The School District of Philadelphia**, et al., )  
)  
Defendants. )

**CONCISE STATEMENT OF UNDISPUTED MATERIAL  
FACTS IN SUPPORT OF PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT**

Plaintiffs hereby submit this concise statement of undisputed materials facts in support of their motion for summary judgment.

**I. BACKGROUND**

**A. The Parties**

1. Defendant the School District of Philadelphia (“SDP” or the “District”) “is organized for the purpose of providing a program of public education to serve the needs of the students of the Commonwealth.” *See* SDP Policies (Ex. 33) at 1.

2. Defendant the School Reform Commission (“SRC”) is the five-member governing body of the District. It acts as the School Board and was established in December 2001 when oversight of the District shifted to the Commonwealth of Pennsylvania. *See* Compl. (Doc. 1) ¶ 20; Ans. (Doc. 29) ¶ 20.

3. Defendant Arlene Ackerman was the Superintendent of the District from June 2008 through August 2011. *See* Ackerman Dep. (Ex. 2) at 7.

4. Defendant Linda Williams was the Deputy Chief for the District's Office of Specialized Instructional Services until June 15, 2012. As such, she was directly responsible for the District's compliance with the requirements of the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 et seq. as amended ("IDEA"), and Chapter 14 of the Pennsylvania Code. *See* Compl. (Doc. 22) ¶ 22; Ans. (Doc. 29) ¶ 22.

5. Plaintiff P.V. resides and attends K-5 school in the District. P.V. has autism and receives autistic support from the District. *See* Compl. (Doc. 1) ¶ 15; Ans. (Doc. 29) ¶ 15.

6. Plaintiff M.M. resides and attends K-5 school in the District. M.M. has autism and receives autistic support from the District. *See* Compl. (Doc. 1) ¶ 16; Ans. (Doc. 29) ¶ 16.

7. Plaintiff J.V. resides and attends K-5 school in the District. J.V. has autism and receives autistic support from the District. *See* Compl. (Doc. 1) ¶ 17; Ans. (Doc. 29) ¶ 17.

8. Plaintiff R.S. resides and attends K-5 school in the District. R.S. has autism and receives autistic support from the District. *See* Compl. (Doc. 1) ¶ 18; Ans. (Doc. 29) ¶ 18.

**B. Defendants' Unlawful Upper-Leveling Policy and Practice As Established Through the Administrative Hearing Process.**

9. Plaintiffs P.V. and M.M. challenged the District's upper-leveling policy and practice through administrative proceedings. *See generally* Hr'g Dec. No. 01541-1011 AS (Ex. 3); Hr'g Dec. No. 1539-1011 AS (Ex. 4).

10. The hearing officer found, among other things, that:

a) The District serves students with autism, in part, through autistic support ("AS") classrooms that generally serve students who, age-wise, are in grades K-2, 3-5, or 6-8. Hr'g Dec. No. 01541-1011 AS (Ex. 3) at 3, ¶ 2.

b) When a student requiring autistic support reaches the end of his or her AS classroom age level, he or she is moved to another building. This process is referred to as “upper leveling.” *Id.* at 5, ¶¶ 14-16.

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

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

e) “Rather, the District’s division directors make the building assignment ‘pretty much unilaterally’ and inform parents of their decisions by letter shortly before the start of the school year.” *Id.* at 6, ¶ 23.

f) “Neither a NOREP [Notice of Recommended Educational Placement] nor a procedural safeguards letter is sent” when a transfer decision is made. *Id.*

g) The only reason child-Plaintiffs were not transferred was because their parents’ initiation of administrative proceedings triggered the IDEA’s stay-put provision, *see* 20 U.S.C. § 1415(j), thus barring their upper-level transfer. *Id.* at 15; *see* Compl. (Doc. 1) ¶¶ 15-18; Ans. (Doc. 29) ¶¶ 15-18.

h) Non-disabled students are not subject to the same policy and practice. *See* Hr’g Dec. No. 01541-1011 AS (Ex. 3) at 5, ¶ 17.

11. The hearing officer determined that the District’s upper-leveling policy and practice “violated the Parents’ right to participation by reassigning the Student to a different school building without sending IDEA-compliant prior written notice.” *Id.* at 15.

12. The hearing officer did not believe he could order district-wide relief. *Id.*

13. The hearing officer could, and did, however, order the adherence to procedural safeguards with respect to the students before him, ordering among other things “the District to issue a NOREP and a Procedural Safeguards Notice” prior to transferring the students before him. Hr’g Dec. No. 01541-1011 AS (Ex. 3) at 15.

14. The hearing officer also “encouraged [the District] to alter its procedures on a broader scope, if only to avoid a plethora of identical claims from similarly situated students.” *Id.*

15. Plaintiffs J.V. and R.S. instituted administrative proceedings as well. The hearing officers noted but refused to decide any challenge to the District’s upper-level policy and practice. *See, e.g.*, J.V. Hr’g Test. No. 1925-10111-AS (Ex. 5) at 10-11; Hr’g Order No. 1912-10-11-KE (Ex. 6); Aug. 12, 2011 Kerr Ltr. to Hr’g Officer (Ex. 7).

## **II. SUMMARY JUDGMENT SHOULD BE GRANTED FOR THE PUTATIVE CLASS ON THE THRESHOLD PARTS OF THE CLASS CLAIMS.**

### **A. Defendants Know or Have Reason to Know That All Putative Class Members Have a “Disability.”**

16. There are more than 1,000 students with autism in the District. *See, e.g.*, Students with Autism Chart, DEF000993 (Ex. 8); Students with Autism Chart, DEFS008039 (Ex. 9); Cordero, SDP Autism Coordinator, Dep. (Ex. 10) at 31-32, 36.

17. The District annually reports to the Commonwealth of Pennsylvania the number of students with autism enrolled in the District, as well as the number of students requiring autistic support. *See, e.g.*, Pa. Dep’t of Educ. 2010-2011 Spec. Educ. Data Rpt. for SDP (Ex. 11).

18. Defendants consider autism to be a disability. Hr’g Dec. No. 01541-1011 AS (Ex. 3) at 7, ¶ 26; *see, e.g.*, SDP Rule 30(b)(6) Dep. (Ex. 12) at 128; Cordero Dep. (Ex. 10) at 20;

Pa. Dep't of Educ. Glossary of Terms (Ex. 13) at 3 (defining autism as a developmental disability); SDP Special Educ. Facilities Master Plan, DEF006493-99 (Ex. 14) at 1 (summarizing special education mandates for students with disabilities, including the provision of autistic support).

19. The District conducts child find activities for children who may be eligible for special education services, including children with autism. *See, e.g.*, SDP Annual Notice of Spec. Servs. & Programs, Servs. for Gifted Students, & Servs. for Protected Handicapped Students (Ex. 15).

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

20. Students with disabilities are entitled to receive and participate in the educational activities and services provided by the District. *See, e.g.*, SDP Rule 30(b)(6) Dep. (Ex. 12) at 19; Hunt, Dir. of Spec. Educ., Dep. (Ex. 16) at 28; SDP Annual Notice of Spec. Servs. & Programs, Servs. for Gifted Students, & Servs. for Protected Handicapped Students (Ex. 15); SDP 2012-13 Consol. Budget (Apr. 2012) (Ex. 17) at 12.

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

21. The District receives federal funds. Compl. (Doc. 1) ¶ 19; Ans. (Doc. 29) ¶ 19 (“the School District receives federal funds”); *see, e.g.*, SDP Rule 30(b)(6) Dep. (Ex. 12) at 19; Hunt Dep. (Ex. 16) at 28, 42; SDP Intermediate Unit Spec. Educ. Plan 2011-2012, DEF000633-61 (Ex. 18) at 9; SDP 2012-13 Consol. Budget (Apr. 2012) (Ex. 17) at 12.

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

22. 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, e.g.*, Hr'g Dec. No. 01541-1011 AS (Ex. 3) at 15; J.V. Hr'g Test. No. 1925-10111-AS (Ex. 5) at 10-11

(different hearing officer in other Plaintiff's case noting but not deciding district-wide challenge to upper leveling).

23. Defendants apply their upper-leveling policy and practice district-wide. *See* SDP Rule 30(b)(6) Dep. (Ex. 12) at 86.

**III. DEFENDANTS' CONDUCT VIOLATES THE IDEA, THE PENNSYLVANIA CODE, THE ADA, AND THE REHABILITATION ACT AS A MATTER OF LAW.**

24. Defendants do not issue Prior Written Notice, including a Notice of Recommended Educational Placement (NOREP), when they intend to upper-level transfer a student with autism in connection with the provision of autistic support. *See* Hr'g Dec. No. 01541-1011 AS (Ex. 3) at 6, ¶ 23; *see also* SDP Rule 30(b)(6) Dep. (Ex. 12) at 55-56, 82-84 (describing upper-leveling policy and practice in a way that does not involve issuance of Prior Written Notice); Williams Decl. (Ex. 19) at ¶¶ 8-10 (same).

25. 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, e.g.,* Monras-Sender Dep. (Ex. 20) at 56-57.

26. District administrators assign an upper-leveled student to any other location that can be found with space. *See* Monras-Sender Dep. (Ex. 20) at 56-57; SDP Rule 30(b)(6) Dep. (Ex. 12) at 55.

27. "Placement decisions are made and parents are informed after the fact." Hr'g Dec. No. 01541-1011 AS (Ex. 3) at 2.

28. IEP teams, including parents, do not participate in upper-level transfer decisions. Hr'g Dec. No. 01539-1011 AS (Ex. 4) at 6 ("IEP teams do not make building placement determinations," and that "[a] building assignment is ... made *after* parents approve the NOREP") (emphasis added), 9 at ¶15 ("[T]he transfer was not discussed with the Parent."); *see,*

*e.g.*, Monras-Sender Dep. (Ex. 20) at 56-57 (stating that no one on the IEP team is involved in the decision of what building to place a child in); Hunt Dep. (Ex. 16) at 118-19, 145; DEF006425 (Ex. 21) (reflecting that child was assigned to school without parental involvement in IEP meeting); PLF03037 (Ex. 22) (letter informing parent after the fact that child will be upper-level transferred to “a school in [academic district] #6”); *see also* H. Sanasac Dep. (Ex. 23) at 91-94 (Defendants attempted to upper-level transfer student without convening IEP meeting, issuing NOREP, or consulting with student’s sending teacher, receiving teacher, or parents); Murphy Dep. (Ex. 24) at 30-31 (same); Cruz Dep. (Ex. 25) at 42-64 (same); S. Vargas Dep. (Ex. 26) at 98-99 (same).

29. The district has maintained its policy and practice of upper-leveling students with autism who require autistic support for some time. *See* Williams Decl. (Ex. 19) at ¶¶8-10; SDP Rule 30(b)(6) Dep. (Ex. 12) at 40, 82-86; *see also* Taylor Hr’g Test. (Ex. 27) at 348 (“Because we lack a three to five placement, an eight to eleven-year-old class, at Richmond, [P.V.] would be leaving. That’s always been the case with children who reach the age of eight.”); Rocchia-Meier, Phila. Right to Educ. Local Task Force, Former Chair, Dep. (Ex. 28) at 20, 73 (“[N]umerous, unlimited amounts of parents have called me with this issue over the years.”); Thompson, Phila. Right to Educ. Local Task Force, Current Chair, Dep. (Ex. 29) at 52 (student with autism could be transferred “three times before getting to high school”).

30. Non-disabled students are not subject to the same policy and practice. *See* Hr’g Dec. No. 01541-1011 AS (Ex. 3) at 5, ¶ 17; Monras-Sender Dep. (Ex. 20) at 46-47, 171, 185.

31. Upper-level transfers occur without arranging for the student to visit the receiving school; without arranging for the sending and receiving teachers to discuss the student; without conducting a comparability assessment of whether the receiving educational setting will

sufficiently approximate the student's prior setting to ensure continued, meaningful educational and behavioral progress; and without informing the student's parents until after the fact. *See Williams Decl.* (Ex. 19) at ¶¶ 8-10; SDP Rule 30(b)(6) Dep. (Ex. 12) at 55-56, 82-84.

32. Not even the sending or receiving special education teachers are involved in the upper-leveling decision. *See Taylor Hr'g Test.* (Ex. 27) at 413.

33. The only criteria District administrators apparently reference when making these unilateral decisions are whether the student has autism, requires autistic support, and whether the receiving location has space and is age-appropriate. *See SDP Rule 30(b)(6) Dep.* (Ex. 12) at 82-84; *Monras-Sender Dep.* (Ex. 20) at 42-43.

34. The District applies its upper-leveling policy and practice district-wide. *See SDP Rule 30(b)(6) Dep.* (Ex. 12) at 86.

35. 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 Monras-Sender Dep.* (Ex. 20) at 66-68, 73.

36. 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 Monras-Sender Dep.* (Ex. 20) at 72, 87-88; *Hunt Dep.* (Ex. 16) at 166-67, 173.

37. 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 Murphy Hr'g Test.* (Ex. 30) at 623-25.

38. When she asked where, she received different answers each time. *See Murphy Hr'g Test.* (Ex. 30) at 623-25.



39. P.V.'s mother received only an oral comment from her child's teacher, and then started receiving transportation letters; the comment and letters identified different schools. *See Cruz Hr'g Test.* (Ex. 31) at 583-84.

40. Another parent received a "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 McKinnie Dep.* (Ex. 32) at 50-51; PLF 03037 (Ex. 22).

41. Significant, unplanned transfers can have substantial effects on the educational and behavioral progress of students with autism. *See Klin Rpt.* (Ex. 1) at 4-9; *Roccia-Meier Dep.* (Ex. 28) at 11-17.

42. The IEP process, including parental involvement, is instrumental to removing or diminishing impediments to a student's learning. *See Klin Rpt.* (Ex. 1) at 9; *see also Roccia-Meier Dep.* (Ex. 28) at 79-83.

43. 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 Klin Rpt.* (Ex. 1) at 11; *see also id.* at 8 ("IDEA requires that interventions must show demonstrable benefits to be continued. For these conditions to hold, the IEP process needs to be implemented, and, for a child about to move school setting, the transition elements of this IEP need to be carefully conceived, in an individualized fashion . . . with integration of past information . . . and future setting."); *Klin Dep.* (Ex. 40) at 75-84.

44. 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.” Klin Rpt. (Ex. 1) at 11.

45. Parental involvement fosters “discussions on optimal strategies to promote learning and decrease disruptive behaviors while advancing generalization of skills across settings.” Klin Rpt. (Ex. 1) at 10.

46. Continuity of programming and managing changes can minimize the negative consequences of change for students with autism, including transitions between educational settings. *See, e.g.*, Educating Students with Autism Spectrum Disorders, DEF017736-63 (Ex. 34); *see also* Klin Rpt. (Ex. 1) at 5-8; Cordero Dep. (Ex. 10) at 48-49; Hunt Dep. (Ex. 16) 131-34, 158-60; Monras-Sender Hr’g Test. (Ex. 35) at 494; Thompson Dep. (Ex. 29) at 6-26, 42.

47. District personnel have planned or recommended that students requiring autistic support should be provided continuity of programming. *See, e.g.*, SDP Special Educ. Facilities Master Plan, DEF006493-99 (Ex. 14) at 1; OSIS Upper-Level Transfers for Sept. 2011, Continuity of Programs, DEF012234 (Ex. 36); *see also* Imagine 2014 Presentation, DEF000172-237 (Ex. 37) at 26 (plan to “[p]rovide for a continuum of services in K-5 and K-8 schools”); Ackerman Dep. (Ex. 2) at 26 (continuity of programming for students requiring autistic support just “makes sense”)

48. 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* Klin Rpt. (Ex. 1) at 11; *see also, e.g.*, Hunt Dep. (Ex. 16) at 195 (acknowledging potential disruptive effects of upper leveling on students with autism); Roccia-Meier Dep. (Ex. 28) at 20 (stressing importance of familiar school environments for students with autism); Thompson Dep. (Ex. 29) at 27-28 (same); M. Sanasac Dep. (Ex. 38) at

31 (describing child-Plaintiff's difficulty with transitions); Murphy Dep. (Ex. 24) at 32 (same); Cruz Dep. (Ex. 25) at 9-10, 48 (same).

49. M.M.'s mother experienced confusion concerning the busing for her child when the District attempted to upper-level transfer him. *See* Hr'g Dec. No. 1539-1011 AS (Ex. 4) at 8-9, ¶¶ 15-16 (M.M. assigned to school located two hours away without discussion with parent or teacher, and "[o]n the first day of school, transportation did not arrive to bring the Student to the assigned school"); Murphy Dep. (Ex. 24) at 54-58, 85-89.

50. J.V.'s mother received incorrect transportation information when the District attempted to upper-level transfer him. *See* Cruz Dep. (Ex. 25) at 63-65, 67-68.

51. Unplanned transportation changes can be "too much" for a student with autism. *See* McKinnie Dep. (Ex. 32) at 68-69 ("You can't do that in August and expect her to jump on a bus, strapped in a harness, going somewhere else with some new kids, with a new bus driver. Like that's too much."); *see also* Klin Dep. (Ex. 40) at 38-43 ("Sometimes the child's challenges are expressed in [a] very dramatic way during the period of time that the child has to withstand a bus ride, because there are specific things that happen during that bus ride that if they're not well-managed, that's going to destroy the child's day.").

52. Defendants do not maintain an accurate list of the building locations of autistic support classrooms, and the grade levels served by each classroom, that is readily available to parents of students with autism. *See, e.g.*, SDP Rule 30(b)(6) Dep. (Ex. 12) at 66-67; Monras-Sender Dep. (Ex. 20) at 97; Hunt Dep. (Ex. 16) at 89-90; Cordero Dep. (Ex. 10) at 42-43.

53. Defense witness cannot articulate any reason why parents of putative class members should not have access to a list of locations of autistic support classrooms. *See*

Monras-Sender Dep. (Ex. 20) at 91-93, 100-101; Dr. Mitchell Yell Dep. (Ex. 39) at 63-66, 75;  
Cordero Dep. (Ex. 10) at 43.

Dated: August 3, 2012

Respectfully,

*/s/ Sonja Kerr*

---

Sonja Kerr (I.D. No. 95137)

skerr@pilcop.org

PUBLIC INTEREST LAW CENTER OF  
PHILADELPHIA

1709 Benjamin Franklin Parkway, Second Floor  
Philadelphia, PA 19103

Telephone: (215) 627-7100

Facsimile: (215) 627-3183

*Co-Counsel for Plaintiffs*

Cheryl Krause (I.D. No. 90297)

cheryl.krause@dechert.com

David J. Stanoch (I.D. No. 91342)

david.stanoch@dechert.com

Darla D. Woodring (I.D. No. 306866)

darla.woodring@dechert.com

DECHERT LLP

Cira Centre

2929 Arch Street

Philadelphia, PA 19104-2808

Telephone: (215) 994-4000

Facsimile: (215) 994-2222

*Co-Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 3<sup>rd</sup>, 2012, I caused the foregoing Concise Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment was 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