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
Plaintiffs,	:	
v.	:	NO. 2:11-cv-04027
The School District of Philadelphia, et al.	:	
Defendants.	:	

ORDER

AND NOW, on this 14th day of August 2013, upon consideration of Defendants' Motion for Reconsideration of this Court's Summary Judgment Order (Doc. No. 76), Plaintiffs' response in opposition thereto (Doc. No. 79), Defendants' Notice of Supplemental Authority in Support of its Motion for Reconsideration (Doc. No. 89), Plaintiffs' response thereto (Doc. No. 90), and following a hearing attended by counsel for all parties regarding Defendants' Motion for Reconsideration held on April 16, 2013, it is hereby ORDERED that Defendants' Motion for Reconsideration (Doc. No. 76) is DENIED for the reasons stated herein.

I. RELEVANT BACKGROUND

On February 19, 2013, this Court granted Plaintiffs' Motion for Summary Judgment in part, and accordingly, ordered Defendants School District, et. al (the "School District") to "alter

its upper-leveling process for students with autism such that it provides class members[1] with prior written notice and a level of parental participation consistent with the procedural requirements of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. (1996)."[2] (Doc. No. 75). In our Memorandum accompanying the summary judgment ruling (Doc. No. 74), we also stated that the School District retains significant authority to select the school site and "[b]y no means does our holding suggest that parents of children with autism are entitled to any type of 'veto power' over the final location decision. We simply conclude that under the IDEA, the School District cannot categorically deny parents the opportunity to provide input and receive notice about the educational placement of their autistic child." (Doc. No. 74, at 16).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 59(e) and Local Civil Rule 7.1(g) allow motions for reconsideration of a judgment. Rule 59(e)'s purpose is to correct manifest errors of law or fact or to present newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir.1985). Accordingly, a party seeking reconsideration must generally demonstrate: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not

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[1] The class is defined as:

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

[2] As we stated in our recent Order, this Court has yet to determine the appropriate and specific contours of injunctive relief in this matter.

available when the court entered judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir.1999) (citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir.1995)). A motion for reconsideration may not be used as a means to reargue unsuccessful theories, or argue new facts or issues that were not presented to the court in the context of the matter previously decided. "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." Continental Cas. Co. v. Diversified Indus., Inc., 884 F.Supp. 937, 943 (E.D. Pa.1995).

III. DISCUSSION

In support of its Motion for Reconsideration, the School District sets forth three separate arguments for why this Court should reconsider our decision and grant summary judgment in its favor. First, the School District argues that an opinion released by the Third Circuit on April 26, 2013, mandates this Court to conclude that Plaintiffs lacked standing to bring their claim under the IDEA. Second, the School District requests the Court to reconsider our determination that the process of upper-leveling autistic students constitutes a change in "educational placement" under the IDEA. Third, the School District argues that we should "reconsider or clarify" our Order because it creates a de facto "veto power" for parents to determine the location of their child's school building, which is exactly what this Court's Opinion sought to prevent. We address each argument in turn, and find none persuasive.

A. Standing

After filing its Motion for Reconsideration, the School District submitted a Notice of Supplemental Authority, bringing to this Court's attention the Third Circuit's opinion in J.T. v. Dumont Public Schools, 2013 U.S. App. LEXIS 8504 (3d Cir. April 26, 2013). In J.T., the Third Circuit reaffirmed the well-established proposition that "a procedural violation [under the IDEA] is actionable only if it results in substantive harm." Id. at *15 (citing Polk v. Central Susq. Interm. Unit 16, 853 F.2d 171 (3d Cir. 1988)). A procedural violation may result in substantive harm under the IDEA if it "results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits." D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 656 (3d Cir. 2010); see 20 U.S.C. § 1415(3)(E). Based on that well-settled precedent, the Third Circuit in J.T. concluded, unsurprisingly, that the autistic student's parent did not have standing to bring an IDEA claim because the "[p]laintiffs concede[d] they suffered no substantive harm." Id. at *11. Plaintiffs did not allege substantive violations of IDEA, "such as . . . hindering J.T.'s [the autistic student's mother] participation in the IEP process." Id. at *16. Indeed, the student's mother in J.T. had a full opportunity to participate in the decision about where her child with autism would attend school the following year. The conversations occurred both prior to and during the student's IEP meeting. See id. at *16-17.

This "supplemental authority" is far from an intervening change in law. Quite the contrary, it sets forth a proposition that is well-established, and which this Court adhered to when issuing our decision. In our Summary Judgment Opinion, this Court determined that upper-leveling constitutes a change in educational placement for autistic students, and accordingly,

under Sections 1414(e) and 1415(b) of the IDEA, parents of autistic children are entitled to a certain level of participation regarding the upper-leveling of those children. (See Doc. No. 74, at 10). We also found that the School District "seriously deprived" parents of the right to participate in the decision-making process regarding the upper-leveling—and hence, educational placement—of their child. (See Doc. No. 74). Thus, unlike J.T., this case did not involve mere allegations of procedural violations; it involved the serious deprivation of parental participation rights guaranteed under the IDEA.

B. Meaning of "Educational Placement"

As discussed in our Opinion, the central issue before this Court was whether the School District's practice of upper-leveling constitutes a change in educational placement, which triggers compliance with IDEA procedural requirements. We explained that according to the Third Circuit, determining whether a modification constitutes a change in educational placement is very fact-specific, and ultimately hinges on "whether the decision is likely to affect in some significant way the child's learning experience." (Doc. No. 74) (quoting DeLeon v. Susquehanna Cmty. Sch. Dist., 747 F.2d 149, 153 (3d Cir 1984)). Upon arriving at our conclusion that upper-leveling students with autism constitutes a change in educational placement, we explained:

> [A]n unplanned transition for children with autism is likely to affect their learning rate and learning sequences. (See Doc. No. 49, Ex. Q, at 31). This is because difficulty with transition is one of the *defining* characteristics of children with autism. (See Doc. No. 51, Ex. 1, at 4). Thus, despite the School District's contention to the contrary, upper-leveling students with autism does not merely change their physical surroundings; the transition is likely to have a significant impact on their learning experience. Accordingly, we must conclude that under the particular facts of our case, upper-leveling students with autism to a separate school building in the School District constitutes a change in their "educational placement" under the IDEA.

(Doc. No. 74, at 13).

The School District now contends that our citation to Dr. Ami Klin's expert testimony does not support the conclusion that upper-leveling constitutes a change in educational placement; i.e., it does not support our conclusion that upper-leveling is likely to have a significant impact on the learning experience of autistic students. The School District contends that Dr. Klin's testimony only indicates that unplanned transitions "could" have an impact on learning rate and learning sequences, and Dr. Klin never examined whether the upper-leveling process actually has a negative impact on autistic students' learning experiences.

To support its argument that Dr. Klin's testimony does not support our conclusion, Defendant relies on DeLeon v. Susquehanna Community School District, 747 F.2d 149, 154 (3d Cir 1984). DeLeon addressed the issue of whether extending the travel time on the way home from school for a mentally disabled child by ten minutes constituted a change in educational placement under the IDEA. The Third Circuit determined that the slight increase in travel time did not constitute a change in educational placement because, inter alia, the expert's affidavit "explained the problems which a long travel period posed for [the student's] education, but did not suggest that a small increase in travel time on the way home . . . would make a difference." DeLeon, 747 F.2d at 154. Defendants argue that "like Dr. Klin in this case, plaintiff's expert in DeLeon opined only that change in transportation *could* have a detrimental effect on the child" and "could not or did not indicate that the changes will have a substantial, detrimental impact on the child's education." (Doc. No. 76, at 6 (emphasis in original)).

The School District set forth the same argument at the summary judgment stage. (See (Doc. No. 54, Ex. 1, at ¶ 41). There, as here, the School District fails to appreciate that Dr. Klin

opined at length about the effect of unplanned transitions on students with autism. In particular, Dr. Klin explains that children with autism have an "insistence of sameness" which means they have "difficulty with transitions, changes in routine, and unexpected events." (Doc. No. 51-2, at 4). This difficulty with transition is a characteristic "virtually universal among all individuals with [autism]." (Doc. No. 51-2, at 4). Due to the difficulty with transition for autistic children, there is an "increasing recognition in policies and research that parents must be at the core of all decision-making about their children [with autism], . . . and that procedures for managing transitions are key standards of educational programming for children [with autism]." (Id., at 6). These standards for adequately managing transitions for students with autism "all emphasize anticipation and preparation." (Id.).[3]

Dr. Klin's testimony, combined with the undisputed evidence (discussed in our Opinion) that upper-leveling often involved last-minute and terse notification, provide more than sufficient support for this Court's conclusion that no genuine issue of material facts exists that upper-leveling students with autism is likely to affect their learning experience, and thus, constitutes a change in their educational placement.[4] With respect to DeLeon, which sets forth the principle

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[3] There is plenty of other evidence to support the fairly uncontroversial point that students with autism have difficulty with transition. See, e.g., Hunt Dep. (Doc. No. 48, Ex. 10, at 195) (acknowledging potential disruptive effects of upper-leveling on students with autism); Roccia-Meier Dep. (Doc. No. 48, Ex. 22, at 20) (stressing importance of familiar school environments for students with autism); Thompson Dep. (Doc. No. 48, Ex. 24, at 27-28) (same); M. Sanasac Dep (Doc. No 48, at Ex. 14, at 31) (describing child-Plaintiff's difficulty with transitions); Murphy Dep. (Doc. No. 48, Ex. 12, at 32) (same); Doc. No. 48, Ex. 11, at 9-10, 48 (same).

[4] It is also worth noting that the School District never provided any countervailing evidence to Dr. Klin's testimony. Instead, it simply disputed the testimony in its Statement of Facts, asserted that the evidence is immaterial, and set forth the same exact arguments it sets

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that educational placement analyses are highly fact-intensive, Defendant overlooks the stark factual distinctions. DeLeon involved only a ten minute change to a student's bus schedule, and more importantly, did not involve a student with autism. Unlike this case, the expert testimony in DeLeon provided no indication that because the student was mentally disabled, a ten minute change in his bus schedule would likely affect his learning experience.[5]

In addition to the arguments discussed supra, the School District once again sets forth its familiar contention that other "courts have consistently distinguished between 'educational placement' and the location where a student with disabilities receives his or her educational programming and services."[6] We addressed this issue directly in our Summary Judgment Opinion:

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[4](...continued)
forth here. (See Doc. No. 54, Ex. 1, at ¶ 41).

[5] Defendant also suggests that we misinterpreted DeLeon by relying on it for the principle that the term educational placement should be given an expansive reading because unlike DeLeon, our decision affects not only an individual child - but an entire class. However, DeLeon simply said that "given the remedial purposes of the [IDEA], the term 'change in educational placement' should be given an expansive reading, *at least* where changes affecting only an individual child's program are at issue." 747 F.2d at 154 (emphasis added). DeLeon never stated that the expansive reading should be precluded when more than an individual child is involved, and thus, Defendant's argument is misplaced. Moreover, it is axiomatic that a remedial statute should be interpreted broadly.

[6] Doc. No. 85, at 5, n.1, citing: T.Y. v. N.Y City Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009) ("'educational placement' refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the bricks and mortar' of the specific school"); Concerned Parents v. New York City Bd. of Ed., 629 F.2d, 751 754-56 (2d Cir. 1980) (a plaintiff must identify, at a minimum, a fundamental change in, or elimination of a basic element of a student's educational programming for the change in location to qualify as a "change in educational placement"); Lunceford v. Dist. of Columbia Bd. of Educ., 745 F.2d 1577, 1582 (D.C. Cir. 1984) (same); A.W. v. Fairfax Cty. Sch. Bd., 372 F.3d 674, 682 (4th Cir. 2004) (the term "placement" "refers only to the setting in which a student is educated, rather than the precise location"); Weil v. Bd. of Elementary & Secondary Educ., 931 F.2d 1069, 1072 (5th Cir. 1991) (transfer of a student from one school to another did not amount
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> From the number of out-of-circuit appellate decisions purported to support its contention, the School District lists only one that involves a student with autism: T.Y. v. N.Y. City Department of Education, 584 F.3d 412 (2d Cir. 2009). The Third Circuit has never adopted T.Y., and regardless, its holding is not contrary to our conclusion. The court in T.Y., "simply [held] that an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA." Id. at 420. Notably, the parents in T.Y. participated in selecting the school for their child prior to the final assignment and "worked cooperatively" with the school district in arriving at the decision. Therefore, the School District's reliance on T.Y., in this case is misplaced.

(Doc. No. 74, at 13-14).

For those reasons, as well as the reasons set forth in our opinion, we reaffirm that upper-leveling students with autism constitutes a change in "educational placement" under the IDEA.

C. Veto Power

As mentioned earlier, we made clear in our Summary Judgment Opinion that "by no means does our holding suggest that parents of children with autism are entitled to any type of 'veto power' over the final location decision." (Doc. No. 74, at 16). Defendant correctly points out that under the IDEA, to change the "educational placement" of a student requiring autism support, the student's school district is required to also change the student's IEP. Changes to a student's IEP require prior written notice, in the form of a Notice of Recommended Placement

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[6](...continued)
to a change in the student's educational placement); Tilton v. Jefferson Cnty Bd. of Ed., 705 F.2d 800, 804 (6th Cir. 1983) (transfer to a new school constitutes a change in placement only where evidence demonstrated that "the programs at alternative schools are not comparable" to the program offered at the student's current school); Hale v. Poplar Bluff R-I Sch. Dist., 280 F.3d 831, 834 (8th Cir. 2002) (transfer to a different school building for fiscal or other reasons unrelated to the disabled child has generally not been deemed a change in placement); Knight v. Dist. of Columbia, 877 F.2d 1025, 1028 (D.C. Cir. 1989) (when deciding whether a transfer to a new school building constitutes a change in educational placement, "the question before us is thus whether the [new school] is in relevant respects similar to the [old school]")."

("NOREP"), which the parents must sign and return to the School District before the proposed change can go into effect. If the parents refuse to sign the NOREP they are entitled to a due process hearing, and if not satisfied with the due process hearing, they can ask a state or federal court to review the decision.

The School District's concern arises from the so-called "stay-put" provision, which requires that "during the pendency of any proceedings conducted pursuant to the [IDEA] . . . the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j). Because this Court concluded that upper-leveling autistic students is a change in educational placement, Defendant is correct that under the stay-put provision, if a student's parent challenges the NOREP, that student could not be transferred until the proceedings are over. Therefore, the School District argues, "a parent can delay a proposed transfer indefinitely simply by refusing to sign the NOREP" and this "power to delay is effectively a veto." (Doc. No. 76, at 7). The School District is concerned that this "de facto" veto power will force schools to provide extra autism support classrooms while the student's proceedings are pending.

While we appreciate the concern of the School District, it does not warrant reconsideration of our opinion because no such veto power has in fact been created.[7] First, as Plaintiffs point out in their opposition-brief, if a parent refuses to sign a NOREP, there is typically significant discussion and mediation between the parents, the School District, and the IEP team prior to an actual due process hearing. Only when the parent affirmatively rejects the

[7] To the extent the School District seeks clarification regarding the extent to which parents are entitled to participate in School District's decisions concerning upper-level transfers, we will address that issue when we provide the appropriate and specific contours of injunctive relief in this matter.

NOREP and specifically invokes an administrative due process does the "stay put" provision apply. Second, and more importantly, if the School District could not provide autism support classrooms for a student in a particular building because of budgetary or administrative reasons beyond its control, case law suggests that the "stay-put" provision would not apply. See Knight v. District of Columbia, 877 F.2d 1025, 1028 (D.C. Cir. 1989) (section 1415 stay-put provision not applicable if student's "then current educational placement" becomes unavailable and public agency provides student with similar placement pending administrative review process); Tilton v. Jefferson Cnty Bd. of Ed., 705 F.2d 800, 804 (6th Cir. 1983) (section 1415 stay-put provision not applicable when school is closed for budgetary reasons). Such case law is consistent with this Court's opinion, which confirms that the School District retains the final word when determining the student's school location. Moreover, Defendant's apprehension about due process hearings presupposes bad faith on the part of parents and seems to be concerned with the system established by Congress through the IDEA, rather than this Court's Order enforcing compliance with the IDEA's provisions.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Reconsideration is DENIED.

BY THE COURT:
/s/ Legrome D. Davis
Legrome D. Davis, J.