**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **P.V., et al.,** | : | |
| **Plaintiffs,** | : | **CIVIL ACTION** |
| **v.** | : | |
| **The School District of Philadelphia, et al.,** | : | **NO. 2:11-cv-04027-LDD** |
| **Defendants.** | : | |

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**MEMORANDUM OF DEFENDANTS SCHOOL DISTRICT OF PHILADELPHIA, ARLENE ACKERMAN, LINDA WILLIAMS AND THE SCHOOL REFORM COMMISSION IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

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Defendants The School District of Philadelphia, Dr. Arlene Ackerman, Ms. Linda Williams, and the School Reform Commission (collectively, the "School District") submit this memorandum in opposition to plaintiffs' motion for class certification.

Plaintiffs' motion for class certification should be denied, because:

1. Plaintiffs lack standing and cannot represent their putative class because none of them has been transferred from one school building to another pursuant to the so-called (but non-existent) automatic autism transfer policy;

2. Plaintiffs do not satisfy the requirements for class certification set forth in Federal Rule of Civil Procedure 23(a) because they cannot demonstrate numerosity, typicality, commonality, or adequacy; and

3. Plaintiffs do not satisfy the requirements for class certification set forth in Federal Rule of Civil Procedure 23(b) because plaintiffs' claims are not cohesive and common questions do not predominate.

## I. FACTS

### A. The Plaintiffs

The plaintiffs in this action are four children, P.V., M.M., J.V. and R.S. *See* Compl. (attached as Ex. 1), at ¶¶ 15-18. The plaintiffs have Individualized Education Programs ("IEPs") requiring that they have access to an autism support classroom. *Id.* The School District has provided the autism support required by the plaintiffs' IEPs at the Richmond Elementary School ("Richmond"), a kindergarten through fifth grade ("K-5") school. *See* Pl. Objs./Resps. to Defs. 1st Set Interrogs. (attached as Ex. 2), at No. 7. **All four plaintiffs attend the *same school*, where they have always been in the *same classroom*, taught by the *same teachers***. *Id.*; Dep. of H. Sanasac (attached as Ex. 3), at 80:22 – 81:23; Dep. of S. Vargas (attached as Ex. 4), at

74:7-10; Dep. of Y. Cruz (attached as Ex. 5), at 5:24 – 6:2; Dep. of C. Murphy (attached as Ex. 6), at 10:1-15.

From kindergarten through second grade, the School District provided the autism support required by the plaintiffs' IEPs in a kindergarten through second grade ("K-2") autism support classroom at Richmond, where plaintiffs were taught by Ms. Leah Taylor. *See* Ex. 2, at 7. Ms. Taylor's K-2 autism support classroom was the only autism support classroom at Richmond. *See* Dep. of K. Hunt (attached as Ex. 7), at 96:3-21. Accordingly, when the plaintiffs completed the second grade in the Spring of 2011, the School District considered transferring each of the plaintiffs to a different school building, where the autism support required by plaintiffs' IEPs would be provided. However, after plaintiffs initiated due process hearings to remain at Richmond for third grade, the School District found suitable space in Richmond for a new third grade through fifth grade ("3-5") autism support classroom, which would allow the plaintiffs to remain at Richmond through fifth grade. *See* Tr., Due Process Hrg. of J.V. (attached as Ex. 8), at 6:25 – 7:15. Accordingly, for the 2011-2012 school year, all four plaintiffs continued to attend the Richmond school and received the autism support required by their IEPs in an autism support classroom taught by Ms. Rachel Szychulski. Plaintiffs' parents are all pleased with the education their children are receiving in the new 3-5 autism support classroom at Richmond. Ex. 3, at 80:22 – 81:23, 98:13 – 99:15; Ex. 4, at 84:13 – 88:2; Ex. 5, at 5:24 – 6:20, 7:8-14; Ex. 6, at 10:1-15, 71:19 – 80:4.

None of the plaintiffs has ever been transferred from one school to another school because of a supposed automatic autism transfer policy.

### B. The School District's Provision of Autism Support

#### 1. Location of the School District's Autism Support Classrooms

The School District operates over 250 school buildings and serves more than 154,000 students. *See* List of Schools (attached as Ex. 9), at DEF1002-DEF1005; Intermediate Unit Sp. Educ. Plan Doc. for the 2011-2012 School Year (attached as Ex. 10), at DEF633. For the 2011-2012 school year, 1,684 kindergarten through eighth grade ("K-8") students were identified as requiring access to an autism support classroom. *See* Chart of Dist. Students with Autism (attached as Ex. 11).

The School District currently has more than 130 autism support classrooms serving students in kindergarten through eighth grade. *See* Dep. of M. Monras-Sender (attached as Ex. 12), at 35:16 – 37:13. The school buildings within the School District have varied grade configurations (for example, K-2, K-5, 6-8 and K-8). *See* Ex. 9. The School District's autism support classrooms for kindergarten through eighth grade most often cover three grades, kindergarten through second grade ("K-2"), third grade through fifth grade ("3-5") and sixth grade through eighth grade ("6-8"). Ex. 1, at ¶ 36; Ex. 9. Due, in part, to the varied grade configurations of its schools and the uneven geographic distribution of children requiring autism support, the School District does not maintain autism support classrooms in all of its schools. *See* S.D. Designee Dep. (attached as Ex. 13), at 151:6 – 153:16; *see also* Ex. 7, at 100:6-22. For those same reasons, the grades covered by autism support classrooms vary from school to school, meaning "there might be a K-2 [autism support] class in one school, [and] a 3-5 in another school." Ex. 13, at 151:6 – 153:16; *see also* Tr., Due Process Hrg. for M.M. and P.V. (2/9/2011) (attached as Ex. 14), at 655:6 – 656:22 (Maria Monras-Sender testimony). Currently, out of the 77 schools that house K-8 autism support classrooms throughout the School District, 42 of those

schools do not offer autism support classrooms for every grade in the building. *Compare* AS Teacher List (attached as Ex. 15) *and* Ex. 9, at DEF1002-DEF1005.

Each year, based on information about how many students requiring autism support are entering the School District, leaving it, or moving from one grade level to the next, the School District's Special Education Directors undertake a complex process to identify suitable locations for autism support classrooms in the coming school year. Ex. 13, at 45:21 – 49:9. Suppose, for example, that a K-5 school had only a K-2 autism support classroom for the 2011-2012 school year. To determine that school's needs for the 2012-2013 school year, the Special Education Directors would examine the number of students requiring autism support that are expected to enroll at that school in the Fall and the number of students requiring such support who will have aged out of the K-2 classroom. *Id.* at 151:6 – 152:15. If, based on those considerations, the Special Education Directors then deem it appropriate to open a new autism support classroom in that school building (whether it be a new K-2 classroom or a new 3-5 classroom), they then "walk around to classrooms [in the school]" to determine the feasibility of doing so, taking into account such considerations as whether there is sufficient space in the building and whether "there is a bathroom near the classroom we're proposing." *Id*. at 152:16 – 153:16; *see also* 22 PA. CODE § 14.144(3)(v) (requiring that all special education classrooms be "composed of at least 28 square feet per student"); 22 PA. CODE § 14.146(a) (stating that "maximum age range in specialized settings shall be 3 years in elementary school (grades K-6) and 4 years in secondary school (grades 7-12)").

This is a fluid process. Each year, many families move into the School District or move from one location in the School District to another without providing the School District with advance notification. *See* Ex. 7, at 100:6-22. Indeed, on the first day of classes each year,

many students simply "walk in the door" of their neighborhood school, without regard to whether they are registered there. *Id*. at 99:23 – 100:5.

**2. Assigning Students to Autism Support Classrooms**

When a student requiring autism support completes the highest grade level for which autism support is located in his or her current school building, the School District must determine the location at which the educational programs and services required by his or her IEP will be continue to be provided. Sometimes, as in the case of the plaintiffs here, the services can continue to be provided in the same school building, but, if that is not feasible, they will be provided in a different building. When the new location is in different building, the assignment to the new location is called an "upper-level transfer." Ex. 13, at 37:22 – 38:9; Ex. 12, at 37:24 – 39:23, 42:19 – 43:3. Whether the new location is in the same building or a different building, there is no claim (or evidence) in this case that the programs or services provided at the new location are deficient (or different) in any relevant respect.

Decisions relating to upper-level transfers are made about each student on an individual basis, based primarily on his or her IEP. *See* L. Williams Decl. (attached as Ex. 16), at ¶ 8. When an IEP team determines that a student needs to be placed in an autism support classroom, the School District endeavors to find the school closest to that child's home that can provide him or her with the educational programming or services called for in his or her IEP. Ex. 12, at 55:6-17. Although the School District generally does not permit parents to dictate the specific building to which their child is assigned, "if [parents] make a request their request is taken into consideration." Ex. 12, at 55:18-22. In some cases, however, the School District *does* allow parents to participate in the choice of the school building that their child will attend. For example, prior to the 2011-2012 school year, Yolanda Cruz, mother of P.V., was given the choice whether her son would be transferred to McKinley Elementary or remain at Richmond.

Ex. 5, at 54:5-11. In August of 2011, Ms. Cruz decided to have P.V. remain at Richmond. *Id*. at 54:20 – 55:2.

Plaintiffs mischaracterize the upper-level transfer process as an "automatic autism transfer policy." *See* Ex. 1, at ¶ 38. To the contrary, upper-level transfers are only effectuated when a student's IEP cannot be implemented at his or her current school. Ex. 13, at 42:3-16. Loveli McKinnie, the only parent in the School District identified by plaintiffs as supposedly expressing concerns similar to those asserted in plaintiffs' complaint, testified that when her daughter (A.M.), a fifth grade student requiring autism support, was in kindergarten at Olney Elementary School ("Olney"), her K-2 autism support class was the only autism support class in the school. *See* Dep. of L. McKinnie (attached as Ex. 17), at 34:21-24. When A.M. reached the third grade, thus aging out of the K-2 autism support class, Ms. McKinnie testified that her daughter and her classmates were not transferred; rather "the K through 2 became a 1 through 3 class, and then [the next year] it became a 2 through 4 class." *Id*. at 35:6-14. Although the School District did not continue that trend by turning the 2-4 classroom into a 3-5 classroom the following year, A.M.'s IEP team specifically tailored an IEP to her needs, pursuant to which A.M. was integrated into a non-disabled classroom, allowing her to remain at Olney for fifth grade, instead of transferring to a school with a fifth grade autism support classroom. *Id.* at 71:22 – 72:10. Ms. McKinnie indicated that she was satisfied with the individual program that was designed for her daughter. *Id.* at 77:7-11.

**C. Plaintiffs File Class Action Complaint Demanding Systemic Change**

Plaintiffs sued on June 20, 2011. Even though none of the plaintiffs has ever been transferred under the alleged "automatic autism transfer policy," they claim that in assigning students requiring autism support to school buildings that do not have autism support classrooms for all grades in the school building, the School District violates the IDEA, Chapter 14 of the

Pennsylvania Code, the ADA, and Section 504 of the Rehabilitation Act. *See* Ex. 1, at ¶¶ 56, 59, 62, 65. Plaintiffs assert that this Court should overrule the School District's determination of the appropriate locations for autism support classrooms and order that an autism support classroom cannot be located in any school building that cannot accommodate autism support classrooms for all grades taught in that building. *Id*. at p. 21, ¶ 5. To put it another way, the plaintiffs contend that it was illegal to locate their admittedly excellent K-2 autism support classroom at Richmond because there did not, at the time, appear to be space in Richmond for a 3-5 autism support classroom. Plaintiffs purport to bring these claims on behalf of: "all children with autism in the School District of Philadelphia in grades kindergarten through eight ("K-8") who have been illegally transferred, are in the process of being transferred, or are at risk of being illegally transferred, as a result of the District's Automatic Autism Transfer Policy, the parents and guardians of those children, and future members of the class." Plaintiffs' Brief ("Pls' Brf.") at 12.

**D. Discovery Has Not Disclosed Any Evidence Supporting Class Certification**

There is no evidence in this case that any student requiring autism support has ever been transferred from one school building to another because of a supposed automatic autism transfer policy, or that any student requiring autism support has ever been transferred when that student's parents objected to the transfer. Indeed, all of the discovery has been to the contrary. Plaintiffs were not transferred. And of the approximately 1,700 students requiring autism support in grades K-8 who plaintiffs purport to represent, ***exactly ONE parent – Loveli McKinnie – was identified as expressing concerns similar to the plaintiffs, and her daughter was <u>not</u> transferred***. Indeed, the Chairperson of the Philadelphia Right to Education Task Force (the "Task Force"), Cecilia Thompson, and her immediate predecessor, Cathy Roccia-Meier, both testified that they could not recall the issue of K-8 students requiring autism support being

transferred from one school to another *ever* appearing on a Task Force meeting agenda. *See* Dep. of C. Thompson (attached as Ex. 18), at 56:9 – 57:2; Dep. of C. Roccia-Meier (attached as Ex. 19), at 76:7-12. Moreover, plaintiffs have also not identified any evidence suggesting that the academic or behavioral progress of *any* student, including the named plaintiffs, has suffered, or is in danger of suffering harm caused by the School District assigning students requiring autism support to school buildings that do not have autism support classrooms for all grades in the school building. In sum, there is no evidence of a systemic problem.

## II. LEGAL STANDARDS

### A. Legal Standard for Class Certification

"Class certification presupposes the existence of an actual class. That is, the proposed class must be sufficiently identifiable without being overly broad." *White v. Williams*, 208 F.R.D. 123, 129 (D. N.J. 2002). Plaintiffs seeking to certify a class under Rule 23 must satisfy all four elements of Rule 23(a) and "at least one of the three requirements listed in Rule 23(b)." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2011). Class certification "is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Fed. R. Civ. P. 23 are met." *In re: Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d Cir. 2009). Frequently that "rigorous analysis" will "entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Wal-Mart*, 131 S. Ct. at 2551-2; *In re: Hydrogen Peroxide*, 552 F.3d at 309, 317 (noting that the Rule 23 analysis requires a "thorough examination of the factual and legal allegations and may include a preliminary inquiry into the merits"). To determine whether the criteria of Rule 23 are satisfied, "a court may inquire whether the elements of asserted claims are

capable of proof through common evidence." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 305 (3d. Cir 2011).

Pursuant to Rule 23(a), one or more members of a class may sue as representative parties on behalf of all members only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Plaintiffs seek class certification pursuant to Rules 23(b)(2) and (b)(3). *See* Pls' Brf. at 12. Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) requires that the court find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

### B. A District Court Owes No Deference to Conclusions of Law Drawn by a State or Local Educational Agency and May Accept or Reject its Findings of Fact

Plaintiffs assert that "the Hearing Officer [at the administrative hearing for plaintiffs P.V. and M.M.] determined that the School District's upper-leveling process 'violated the Parents' right to participation by reassigning the Student to a different school building without sending IDEA-compliant prior written notice."" Pls' Brf. at 4. The Hearing Officer erred. The IDEA's procedural notice requirements are *not* triggered where, as here, a change in placement involves only a change in location, and not a change in educational program. *See, e.g.*, *T.Y. v. N.Y. City Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009). This Court owes no deference

to that error, since the Court need not afford any weight to the Hearing Officer's conclusions of law. *In re: Educational Assignment of Joseph R.*, No. 07-2753, 2009 U.S. App. LEXIS 6287 at *10-11 (3d Cir. March 24, 2009) (holding that "with respect to issues of law, such as the proper interpretation of the IDEA and its requirements … the district court owes ***no deference*** to conclusions of law drawn by a state or local educational agency") (internal citations omitted; emphasis added; non-precedential).

Although the factual 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), "district courts have discretion to determine how much deference to accord the administrative proceedings." *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 527 (3d Cir. 1995) (stating that although a district court must consider administrative findings of fact, it is "free to accept or reject them"). Here, any relevance of any findings in Dec. No. 1539-1011 AS (pertaining to plaintiff M.M.) and Dec. No. 1541-1011 AS (pertaining to plaintiff P.V.) (attached as Exs. 20 and 21, respectively), is extremely limited. The findings pertain to just two students, taught by the same teacher, in the same classroom of the same school, who, to this day, are in another classroom in the same school. Plaintiffs have not offered any evidence that the experiences of these students are emblematic of the experiences of other students with autism throughout the School District.[1]

[1] Additionally, contrary to plaintiffs' assertion that the Hearing Officer's findings concerning upper-leveling "included testimony from Cathy Roccia-Meier, member and former chair of the Philadelphia Right to Education Local Task Force," *see* Pls' Brf. at 5, the Hearing Officer's findings of fact make no reference to Ms. Roccia-Meier's testimony concerning upper-level transfers. *See* Ex. 20 at PLF1348 – PLF1354; Ex. 21 at PLF1365 – PLF1371.

## III. ARGUMENT

### A. Plaintiffs Lack Standing and Cannot Represent their Putative Class

The first requirement of any Rule 23 analysis must be whether the plaintiffs have standing to prosecute their claims in this Court. Standing, as a "threshold requirement," is an absolute prerequisite to class certification. *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974); *see also McNair v. Synapse Group, Inc.*, 672 F.3d 213, 223 n.10 (3d Cir. 2012) (observing that "standing is an inherent prerequisite to the class certification inquiry"). To have standing to sue, a plaintiff bears the burden of establishing "(1) [an] injury-in-fact ... that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) [a likelihood] ... that the injury will be redressed by a favorable decision." *Danvers Motor Co., Inc. v. Ford Motor Co*., 432 F.3d 286, 290-91 (3d Cir. 2005); *see also General Telephone Co. of the Southwest v. Falcon,* 457 U.S. 147, 156 (1982) (noting that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members").

The individual plaintiffs lack standing to bring claims against the School District because they have remained at the school of their choice, Richmond, and therefore, cannot even claim to have suffered an injury to their academic or behavioral progress from the purported policy they seek to challenge. Where, as here "none of the named plaintiffs purporting to represent [the] class [have] establishe[d] the requisite case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea*, 414 U.S. at 494. Given the named plaintiffs' inability to demonstrate standing, this Court cannot certify the putative class. *Id*.

Indeed, as discussed at greater length at pages 11-12 of defendants' memorandum in support of their motion for summary judgment, there is absolutely no evidence that any

putative class member's academic or behavioral progress suffered a concrete and particularized (as opposed to a conjectural or hypothetical) injury in-fact caused by an upper-level transfer. For that reason, not only do plaintiffs lack standing to represent their putative class, but also, the putative class lacks standing to bring suit. This Court should, therefore, deny plaintiffs' motion for class certification and dismiss this action in its entirety.

### B. Plaintiffs Do Not Satisfy the Requirements for Class Certification in Federal Rule of Civil Procedure 23(a)

#### 1. Plaintiffs Do Not Satisfy the Numerosity Requirement

Pursuant to Rule 23(a)(1), a class must be so numerous that joinder of all members would be "impracticable." Although there is no minimum number of plaintiffs required to maintain a suit as a class action, in general, sufficient numerosity exists "if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Plaintiffs here seem to argue that the class includes all of the School District's students requiring autism support in grades K-8. *See* Pls' Brf. at 13-14. That cannot be so. Plaintiffs have not identified any evidence to substantiate their claim that the putative class includes *anyone*, much less every student requiring autism support in grades K-8.

Even assuming, contrary to the facts, that the School District does have an automatic autism transfer policy, there is no evidence to suggest that such a policy is generally applicable to all students requiring autism support. Indeed, if the experiences of the five students identified in discovery (the four named plaintiffs and A.M.) are characteristic of the School District's students requiring autism support, one can infer that students are not transferred when parents object to the transfer. Plaintiffs cannot point to any evidence to suggest that the School District has *ever* failed to accommodate a parent's desire that his or her child not be transferred. If anything, the experiences of the five students indicate that the upper-level transfer process is applied in a highly differentiated manner, depending in each instance on whether the School

District has the classroom space and/or personnel in place to sufficiently effectuate a student's IEP in his or her current school building.

Moreover, because plaintiffs have not identified any evidence pertaining to students who have ever been transferred, there is no way to determine whether *any* students have ever been transferred or are in danger of being transferred in an allegedly *illegal* manner. Without identifying *any* K-8 student requiring autism support whose academic or behavioral progress has been affected, much less harmed, by this alleged policy, plaintiffs cannot possibly be permitted to represent *each and every* K-8 student requiring autism support in the School District. Because there is no evidence of the size of the putative class, plaintiffs cannot satisfy the numerosity requirement and their motion for class certification should be denied.

**2. Plaintiffs Do Not Satisfy the Commonality Requirement[2]**

Plaintiffs' motion for class certification should be denied for the additional reason that there are no questions of law or fact common to the putative class. Plaintiffs identify seven alleged "common issues of law or fact" in this case: (1) whether the School District upper-levels putative class members because of a disability; (2) whether the School District upper-levels putative class members without regard to each student's educational and behavioral goals; (3) whether the School District upper-levels putative class members without meaningful IEP team and parental involvement; (4) whether the School District upper-levels putative class members without appropriate notice to parents and other IEP team members, including their special education teachers; (5) whether the School District's challenged conduct deprives putative class

[2] The Third Circuit has held that "where an action is to proceed under Rule 23(b)(3), the commonality requirement is subsumed by the predominance requirement … because it is far more demanding than the Rule 23(a)(2) commonality requirement." *Danvers*, 543 F.3d at 148 (citation and quotation omitted). Defendants, therefore, incorporate all arguments from this section in their discussion of Rule 23(b)(3), *infra* at Section III.C.2.

members of a free appropriate public education;[3] (6) whether the School District has a policy and practice of upper-leveling putative class members;[4] and (7) whether the School District refuses to provide information about the location of its autism support classrooms.[5] *See* Pls' Brf. at 14-15. None of these alleged issues of law or fact, however, suffice to satisfy the commonality requirement.

The commonality prong of Rule 23(a) requires that the proposed class members share, not some highly abstract allegation of wrongdoing, but "a discrete legal question." *J.B. v. Valdez,* 186 F.3d 1280, 1289 (10th Cir. 1999) (observing that the "allegation of systematic failures" is not "a moniker for meeting the class action requirements"). The "discrete legal question" must be "applicable *in the same manner* to each member of the class" so that it may be meaningfully resolved in a *single* proceeding. *Falcon,* 457 U.S. at 155 (emphasis added). Plaintiffs must establish their class allegations by "*generalized proof . . . applicable to the class as a whole.*" *Lumpkin v. E.I. DuPont de Nemours & Co.,* 161 F.R.D. 480, 482 (M.D. Ga. 1995) (emphasis added). It follows that a common question, for purposes of Rule 23(a)(2), can only be one that is susceptible to such generalized proof. *See, e.g., Webb v. Merck & Co.,* 206 F.R.D. 399, 404-5 (E.D. Pa. 2002) (noting that "if broad discrimination is the only common denominator in the class, this does not satisfy the commonality requirement").

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[3] Plaintiffs have not identified any evidence to suggest that any students have been denied a free appropriate public education.

[4] There is no genuine issue of material fact with regard to "whether the District has a policy and practice of upper-leveling putative class members." There is no evidence whatsoever, of an upper-leveling "policy." However, the School District plainly admits to effectuating upper-level transfers where they are necessary to properly implement a student's IEP. *See* Ex. 13, at 37:22 – 38:9.

[5] Whether the School District refuses to publicly disseminate information about the location of its autism support classrooms has no relevance to any of the claims in plaintiffs' complaint.

By definition, there can be no generalized proof in this case. Whether the School District's purported (but non-existent) automatic autism transfer policy violates the IDEA depends on the actual application of that supposed policy to each specific student in light of the individual needs of that student and the programs and services the School District provides to that student. *See, e.g., Blunt v. Lower Merion Sch. Dist.*, 262 F.R.D. 481, 489-90 (E.D. Pa. 2009) (noting that individualized determinations were required to determine whether the school district had violated the IDEA). Accordingly, individualized proof will have to be obtained from each supposed class member to determine questions such as: (1) the reason that he or she was transferred; (2) whether his or her parents opposed or supported the transfer; (3) whether administrative procedures were invoked with respect to the transfer; (4) the extent to which the School District aided him or her in achieving his or her educational and behavioral goals; (5) whether the School District changed his or her educational placement (as opposed to the location at which the placement was effected) without meaningful involvement from the student's parents and/or IEP team; (6) whether the School District provided his or her family with appropriate notice of a change in the student's educational placement (again, as opposed to the location); and (7) whether he or she was deprived of a free appropriate public education. These questions and others must be answered for each individual student, and based on the divergent needs, abilities and circumstances of students and families requiring autism support, the answers to these questions will vary significantly, rendering class wide resolution "in one stroke" impossible. *Wal-Mart*, 131 S. Ct. at 2551.

Because plaintiffs' claims all require individualized proof, plaintiffs cannot satisfy the commonality requirement and their motion for class certification should be denied.

### 3. Plaintiffs Do Not Satisfy the Typicality Requirement

Plaintiffs cannot satisfy the requirement of Rule 23 that their claims be "typical … of the claims of the class." Fed. R. Civ. P. 23(a)(3). They fail the critical requirement that "the named plaintiffs have incentives that align with those of absent class members." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 631 (3d Cir. 1996), *aff'd sub nom., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).[6]

If the facts were as claimed by plaintiffs, there would not be typicality because none of them was ever transferred under the supposed automatic autism transfer policy and none of them can demonstrate any injury to their academic or behavioral progress. Where, as here, the named plaintiffs lack individual standing, the "named representative[s] do[] not have the requisite typicality to raise the same claim on behalf of the class." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000).

Moreover, as plaintiffs so carefully emphasize, determining school assignments for students requiring autism support is uniquely personal to each student, which precludes lumping all such students together to decide whether the best location for each is only in school buildings that offer autism support for all grades. There are many reasons why the best placement for a particular student might not be in a school building that offers autism support for all grades. Enrollment in a neighborhood school that offers autism support just for selected grades might be the best choice for a particular student because of its location, the presence of family and friends, a familiar faculty, a supportive student body, the absence of bullies, or its

[6] In addition to the arguments in this subsection, because "[t]he concepts of commonality and typicality are broadly defined and tend to merge," *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994), the arguments defeating commonality apply with equal force to this Court's analysis of typicality. *See Webb*, 206 F.R.D. at 404 ("discuss[ing] both commonality and typicality together").

provision of a setting that enables planning for and learning how to cope with change. *See, e,g.*, Ex. 6 at 82:21 – 85:18 (M.M.'s mother testified that she would have liked M.M. to attend the same school as his brother and that what is truly important to her is whether a school can attend to her son's needs, not the number of grades that the school covers); Dep. of M. Sanasac (attached as Ex. 22), at 8:22 – 10:16 (R.S.'s father stated his desire that his son not spend any time with non-disabled students because he would be a "target of ridicule"). In light of plaintiffs' complete failure to identify evidence suggesting that their views align with those of other putative class members, this Court has no basis to conclude that plaintiffs' interests align with those of the putative class members.

In fact, evidence uncovered in discovery suggests that plaintiffs' interests are not necessarily typical of the putative class. The issue of upper-level transfers has never been on the agenda of the Philadelphia Right to Education Task Force, the advocacy group for students requiring autism support. *See* Ex. 18, at 56:9 – 57:2; Ex. 19, at 76:7-12

Because plaintiffs cannot satisfy the typicality requirement, their motion for class certification should be denied.

**4. Plaintiffs Do Not Satisfy the Adequacy Requirement**

Plaintiffs' motion for class action certification should also be denied because they cannot adequately represent the putative class. The adequacy prong of Rule 23(a) is only minimally concerned with the qualifications of the named parties' counsel. Rather, as with the typicality prong, the relevant question is whether the representatives' claims are so aligned with the claims of the class as to ensure that in prosecuting their own claims, the representatives will not fail to protect the interests of the class as well. *Georgine*, 83 F.3d at 632; *see also Amchem*, 521 U.S. at 625 ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent"); *cf. Falcon*, 457 U.S. at 158

n.17 (explaining that the "requirements of Rule 23(a) … serve as guideposts for determining whether … the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence"). Plaintiffs' effort to impose their rigid views that students needing autism support can only attend schools that have autism support for all grades demonstrates that they cannot adequately represent a class whose putative members will include those with views that diverge significantly from those of the plaintiffs. As discussed above, many members of the putative class may have valid reasons to want to attend a school that will not be capable of supporting their special needs in future years. Plaintiffs cannot overcome the conflict presented by their rigid views that a child needing autistic support services cannot be allowed to attend such a school. *See Churchill v. Cigna Corp.*, No. 10-6911, 2011 U.S. Dist. LEXIS 90716, at *18 (E.D Pa. Aug. 12, 2011) (holding that named plaintiff could not adequately represent broader class where his incentive "present[ed] a clear conflict with the interest of the [broader class]").

Precisely because, as the plaintiffs acknowledge, each special education student's needs are unique and highly personal, the putative class necessarily is composed of members with widely divergent interests that could not possibly be encapsulated in a "representative" lawsuit. *See Webb*, 206 F.R.D. at 408 ("given the unavoidable factual disparities that will necessarily impact the success or failure of each plaintiff's claims," the named plaintiffs "will not be able to adequately represent" the "diverse factual situations that are relevant to each class member's right of recovery …"). Thus, in *McClendon v. Sch. Dist. of Phila.*, No. 04-1250, 2005 U.S. Dist. LEXIS 3497 (E.D. Pa. Mar. 7, 2005), this Court denied class certification under this prong to a group of plaintiffs who argued that the School District violated the IDEA by failing to provide for IEP services as specified by the students' settlement agreements. *Id.* at *10-13. According to the court, "whether or not an agreement is fulfilled demands individual proof, not

typical proof of one of the plaintiffs." *Id.* at *10-11. Similarly, to determine whether the transfer of a student requiring autism support to a school building with an age-appropriate autism support classroom violates the IDEA, Chapter 14, the ADA or Section 504, this Court must examine factors such as each student's unique needs, the facilities and support services provided in the student's new school, and the distance of the new school from the student's home. *See* Ex. 20, at p. 15; Ex. 21, at p. 16 (discussing several considerations necessary to determine if enjoining a transfer is warranted). As the *McClendon* Court recognized, "[t]he central tenant of the IDEA is that each child is entitled to an *individualized* education plan" based on students' "unique needs." *Id.* at *11-12. In such instances, named plaintiffs may adequately represent their own individual interests, but not the interests of all unnamed class members.

Because plaintiffs cannot satisfy the adequacy requirement, their motion for class certification should be denied.

### C. Plaintiffs Do Not Satisfy the Requirements for Class Certification Set Forth in Federal Rule of Civil Procedure 23(b)

#### 1. Because the Creation and Implementation of Each Student's IEP Is Done on an Individual Basis, Plaintiffs Do Not Satisfy the Requirement of Federal Rule of Civil Procedure 23(b)(2)

Certification under Federal Rule 23(b)(2), one of the two subsections invoked by plaintiffs, cannot be permitted under the facts of this case. In a Rule 23(b)(2) action, unnamed members of the class are bound by the result, without the right of notification and without the opportunity to opt out. *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142-43 (3d Cir. 1988). Binding unnamed class members is problematic when the claims of the members of the class are not sufficiently cohesive. *Id.* (noting that "a (b)(2) class may require more cohesiveness than a (b)(3) class"). "Thus, the court must ensure that significant individual issues do not pervade the entire action because it would be unjust to bind absent class members to a negative decision where the class representatives' claims present different individual issues than the claims of the

absent members present." *Id.* at 143 (quoting *Santiago v. City of Phila.*, 72 F.R.D. 619, 628 (E.D. Pa. 1976)). This court has "discretion to deny certification in Rule 23(b)(2) cases in the presence of disparate factual circumstances." *Id.* (quotation omitted).

Because of the binding effect of Rule 23(b)(2) certification, the absent members of the putative class at issue will effectively be forced to cede to the named plaintiffs and their counsel control over critical decisions regarding their children's education. This is incompatible with the very purpose of the IDEA, which is to create a framework that enables parents and educational professionals to work together in developing an effective, *individualized* educational program suited to the unique needs of the student.

Exacerbating this problem is the presence of individual issues with the potential to "overwhelm[] the litigation." *Blunt*, 262 F.R.D. at 489. In *Blunt*, for example, the court rejected certification under Rule 23(b)(2) of a putative class alleging that the school district violated the IDEA because "[a]nalysis of whether an African American student with a disability was deprived of an appropriate education will be highly individualized and dependent upon that particular students' [*sic*] needs, capabilities, and the IEP in place for that child." *Id.* Similarly disparate factual circumstances predominate here, as plaintiffs have alleged that "Defendants have and continue to use their unlawful upper-leveling policy and practice to deny putative class members free appropriate public education ("FAPE") by arbitrarily subjecting them to transfer because of their disability." Pls' Brf. at 20. "When parents challenge a school's provision of FAPE to a child, a reviewing court must (1) consider whether the school district complied with IDEA's procedural requirements and (2) determine whether the educational program was reasonably calculated to enable the child to receive educational benefits." *G.S. v. Cranbury Township Bd. Of Educ.*, No. 11-2439, 2011 U.S. App. LEXIS 22609 at *9 (3d Cir. Nov. 8, 2011). Because an assessment of whether the School District is enabling its students to achieve

the goals outlined in their IEPs, must, by definition, be done on an individualized basis, there are simply "too many individual issues to permit certification" under Rule 23(b)(2) here. *Barnes*, 161 F.3d at 143. Accordingly, plaintiffs cannot satisfy Rule 23(b)(2) and their motion for class certification should be denied.

**2. Because Their Claims are Not Cohesive and Common Questions Do Not Predominate, Plaintiffs Do Not Satisfy the Requirement of Federal Rule of Civil Procedure 23(b)(3)[7]**

**a. Common Questions of Law or Fact Do Not Predominate**

Because they fail to meet the commonality requirement of Rule 23(a)(2), plaintiffs clearly do not satisfy the requirements of Rule 23(b)(3). *See In re: LifeUSA Holding, Inc.*, 242 F.3d 136, 147 (3d Cir. 2000) ("If commonality … does not exist, then common questions cannot predominate over individual issues …"). Even if this Court were to hold that the putative class satisfies the commonality requirement of Rule 23(a)(2), plaintiffs still would fail to satisfy the more demanding requirements of Rule 23(b)(3). *See id.* at 144 ("[E]ven if Rule 23(a)'s commonality requirement is satisfied, predominance may not be, as it is more demanding").

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Under the predominance inquiry, courts may consider a list of factors, including "the class

[7] As discussed *supra*, Defendants incorporate into this subsection all arguments asserted in its discussion of Rule 23(a)(2). *See In re: LifeUSA Holding, Inc.*, 242 F.3d 136, 145-47 (3d Cir. 2000) (examining 23(a)(2) commonality as part of the court's analysis in determining whether the putative class satisfied (b)(3) predominance).

members' interest in individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3)(A).

Plaintiffs have identified only themselves and one other student who assert that the School District should not establish autism support classrooms in schools that do not have autism support classrooms for all grades taught at the school. That plaintiffs are virtually alone in objecting to the manner in which the School District locates autism support classrooms demonstrates that they should not be controlling the manner in which autism support classrooms are located. Moreover, the students have already gotten what they wanted. The four plaintiffs attend the same school, where they are taught in the same classroom, by the same teacher. They have remained at the same school. The experiences of those four students alone indicate that individual issues predominate within the putative class.

The experiences of all four students undercut plaintiffs' claim that "Defendants' upper-leveling policy and practice applies to all students with autism requiring autistic support, without regard to each student's individualized needs or circumstances." None of the four students was ever actually transferred. Moreover, Yolanda Cruz, mother of plaintiff P.V., testified that prior to the 2011-2012 school year, she was given the choice whether her son would be transferred to McKinley Elementary or remain at Richmond. Ex. 5, at 54:5-11. Similarly, Loveli McKinnie testified that her daughter's IEP team specifically tailored an IEP to her needs, by which her daughter was integrated into a non-disabled classroom, allowing her to remain at her current for fifth grade, instead of transferring to a school with a fifth grade autism support classroom. Ex. 17, at 71:22 – 72:10. In addition, the Chairperson of the Philadelphia Right to Education Task Force, Cecilia Thompson, and her immediate predecessor, Cathy Roccia-Meier, both testified that they could not recall the issue of K-8 students requiring autism support being transferred from one school to another *ever* appearing on a Task Force meeting agenda. *See* Ex.

18, at 56:9 – 57:2; Ex. 19, at 76:7-12. Thus, contrary to plaintiffs' arguments, the evidence clearly indicates that the process by which the School District determines the school buildings in which particular students are educated, is individualized and unique to each student, based upon his or her circumstances.

Plaintiffs also argue that "Defendants do not meaningfully involve a student's IEP team, including parents, when upper-leveling a student requiring autistic support." Pls' Brf. at 22. That argument incorrectly assumes that the School District is legally required to involve parents in the decision where to locate the autism support programs provided to their children.[8] Moreover, because there is no actual evidence in the record pertaining to any student who was ever transferred and no expert opinion concerning what constitutes "meaningful involvement," there is no way to determine this issue absent an individualized inquiry into the circumstances surrounding the transfers of *individual* students. Contrary to plaintiffs' unsupported characterization that the School District simply "shunt[s] a student to whatever building they can find with available space," Pls' Brf. at 22, the School District's administrators repeatedly testified that transfer decisions are made with each student's IEP in mind. *See, e.g.*, Ex. 7, at 137:5-20 (Kim Hunt testified that she decides the school to which a student should be assigned after considering the services outlined by the student's IEP team).[9]

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[8] Although the IDEA provides requirements that the School District must adhere to in the creation and implementation of students' IEPs, the IDEA leaves decisions concerning the physical location of such programs within the School District's discretion. *See* Section III.B of Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment

[9] Plaintiffs rely on the testimony of parents Matthew Sanasac, Carla Murphy, Yolanda Cruz, Sharon Vargas and Loveli McKinnie for the proposition that the District conducts transfers in an "arbitrary, tardy and haphazard" manner. Pls' Brf. at 22. But none of those individuals have children who were ever transferred.

Additionally, each individual school is responsible for notifying its students' parents of impending upper-level transfers. *See* Ex. 13, at 57:1-17; Ex. 12, at 66:3 – 67:5. Because this notice is not provided in a uniform manner, any inquiry into the sufficiency of the School District's notification procedures will require an examination of each individual school's notification procedures. This clearly weighs against class certification.

Finally, plaintiffs elected not to present expert opinion concerning the manner in which the School District's upper-level transfers affect the academic and behavioral progress of students requiring autism support. Their expert, Dr. Klin, testified at his deposition about how he would determine whether there was such an effect, but he emphasized that making such a determination was outside the scope of his engagement in this case. *See* Dep. of Dr. A. Klin (attached as Ex. 23), at 28:11 – 31:22, 49:18 – 50:12, 89:13 – 91:10, 93:6 – 95:2. Indeed, Dr. Klin conceded that he does not know whether any child in the School District has been adversely affected by a change in setting and that it is well-settled that children with autism "demonstrate varying abilities to cope with transition." *Id.* at 26:9-16. Any examination of the effect of upper-leveling on students requiring autism support therefore would need to be done on a student-by-student basis.

Because individual questions of law and fact predominate over common questions, class certification is not appropriate.

**b. A Class Action is Not Superior to Other Available Methods for Adjudicating This Controversy**

Rule 23(b)(3) also requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). To determine whether the class device is superior, the court must "balance, in terms of fairness and efficiency, the merits of a class action against those alternative available methods of adjudication." *Georgine*, 83 F.3d at 632 (quotation omitted). In this instance, putative class

members have administrative remedies that enable them to work with special education experts to tailor their child's individualized education plan based on the specific needs of the child. Moreover, as discussed above, the unique needs of students with autism and the specific requirements of the IDEA present "individualized issues that would require individual determinations of defenses [and] representations." *In re: LifeUSA Holdings*, 242 F.3d at 148 (vacating district court's order certifying class because class could not meet requirements of 23(b)(3)). Such individual issues outweigh any efficiency class adjudication would provide. Taken together, the class mechanism is inferior to other forms of adjudication for plaintiffs' claims.

## IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny plaintiffs' motion for class certification.

Respectfully submitted,

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Dated: August 3, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on August 3, 2012, a true and correct copy of the foregoing Memorandum of Defendants School District of Philadelphia, Arlene Ackerman, Linda Williams and The School Reform Commission in Opposition to Plaintiffs' Motion for Class Certification, was served electronically through the Court's ECF system upon:

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