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

DERRICK, et al., Plaintiffs, v. GLEN MILLS SCHOOLS, et al., Defendants.	CIVIL ACTION NO.: 2:19-CV-01541-HB

MEMORANDUM OF LAW IN SUPPORT OF THE COMMONWEALTH DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

This is one of three purported class actions alleging physical and psychological abuse of residents at the Glen Mills Schools, a facility for juveniles who have been adjudicated delinquent. Pennsylvania officials shut down Glen Mills earlier this year. While the other two cases assert only claims arising from the alleged abuse against Glen Mills and its staff members, this case ("*Derrick*") casts a wider net. It asserts a host of unrelated claims concerning the education provided to Glen Mills students, and tries to expand the reach of its claims to two sets of Commonwealth Defendants: (i) the Secretary of the Pennsylvania Department of Human Services ("DHS"), the former secretary of DHS, and the former Deputy Secretary for the DHS Office of Children, Youth, and Families ("OCYF"), purportedly in their individual capacities (collectively, the "DHS Defendants"); and (ii) the Pennsylvania Department of Education ("PDE") and the Secretary of Education, in his official capacity (collectively, the "PDE Defendants"). Neither the law nor the alleged facts, however, allow any of the eight claims pled against the Commonwealth Defendants to survive dismissal.

- ***Count Two*** is a Section 1983 claim against the DHS Defendants alleging violations of plaintiffs' Eighth and Fourteenth Amendment rights in connection with the alleged abuse. It is the only abuse-related claim pled against any Commonwealth Defendants, and the only claim asserted against the DHS Defendants. It is barred by the Eleventh Amendment, which immunizes the DHS Defendants notwithstanding plaintiffs' transparent effort to plead around immunity by cursorily naming the DHS Defendants in their "individual capacities." And in any event, the claim is insufficiently pled: the Eighth Amendment does not apply to plaintiffs, and regardless, plaintiffs have not plausibly alleged that the DHS Defendants violated their constitutional rights.

- ***Counts Three and Four*** are Section 1983 claims against, among others, the Secretary of Education, alleging violations of plaintiffs' rights to an education and to equal access to a public education. Eleventh Amendment immunity bars these claims as well. And regardless of immunity, each count fails to state a claim.

- ***Counts Six, Seven, and Eight*** are brought under the Individuals with Disabilities Education Act ("IDEA") against, among others, the Secretary of Education. They

should be dismissed for lack of jurisdiction because plaintiffs failed to exhaust administrative remedies, and in any event, each count fails to state a claim.

- ***Count Nine*** alleges a violation of Section 504 of the Rehabilitation Act by, among others, PDE. It too should be dismissed for failure to exhaust administrative remedies, and even if the Court had jurisdiction, the claim would fail because plaintiffs have not plausibly alleged a claim against PDE.

- ***Count Ten*** alleges a violation of the Americans with Disabilities Act ("ADA") by, among others, PDE. It is barred by PDE's Eleventh Amendment immunity. In any event, it should be dismissed for failure to exhaust administrative remedies, and even if the Court had jurisdiction, the claim would fail because plaintiffs have not plausibly alleged a claim against PDE.

In the alternative, if the Court allows one or more of the education claims to proceed against either of the PDE Defendants, it should sever such claims so that they proceed separately from the abuse claims. The claims present distinct issues, and allowing education claims to proceed along with abuse claims would prejudice the PDE Defendants, who are not parties to any of the abuse claims, and create inefficiencies in the resolution of both sets of claims.

II. BACKGROUND

A. Plaintiffs Allege a "Culture of Abuse" Created – and Suppressed – by Glen Mills Staff and Leadership

Glen Mills housed boys "who were adjudicated delinquent and committed to Glen Mills by state or local juvenile justice systems across the country." (Compl. ¶¶ 1, 3.) It was as a Private Residential Rehabilitative Institution and a Nonpublic Nonlicensed Day School (Compl. ¶¶ 25-26, 36, 241-48), and licensed by DHS as a residential facility (Compl. ¶ 24).

The complaint alleges that "hundreds" of Glen Mills residents were "subjected to extreme and sustained physical violence and psychological abuse and deprived of an education," "at the hands of Glen Mills leadership and staff." (Compl. ¶ 2; *see also, e.g.*, Compl. ¶¶ 54-59 (Glen Mills created a culture that incentivized fighting); ¶¶ 60-64 (Glen Mills "fostered and promoted" abuse of residents by staff).) "Glen Mills leadership . . . created this culture of abuse, then

ignored the medical and educational needs of youth. . . . [and] took all measures to suppress the stories of violence and neglect and protect the school's reputation . . . ." (Compl. ¶ 3.)

According to plaintiffs, Glen Mills leadership and staff "perpetuated a code of silence" (Compl. ¶ 74) and hid their conduct from regulators by targeting and punishing residents who tried to defend themselves or who "spoke out" (Compl. ¶¶ 70-74); "threatening to or actually terminating any staff who reported abuse" (Compl. ¶¶ 74, 222); "coerc[ing] youth into lying to any outside auditors or investigators" (Compl. ¶ 75); telling residents "to smile and wave at PA-DHS representatives, not to complain, and [to] praise the institution" (Compl. ¶ 75); making residents believe "they would be severely assaulted for making Glen Mills look bad to anyone outside the institution" (Compl. ¶ 76); and trying to prevent DHS officials from meeting with residents (Compl. ¶ 224 (a "DHS official and state police were 'physically obstructed'" by Glen Mills staff who sought to "interview a youth privately regarding allegations of child abuse") & ¶ 225 (staff prevented DHS officials and State Police from meeting with five residents until they were threatened with arrest).) (*See also* Compl. ¶¶ 70-82, 121, 199 (similar allegations).)

B. Based on Its Findings of Numerous Violations, DHS Ordered the Removal of All Residents from Glen Mills and Revoked Glen Mills' Licenses

On March 25, 2019 – seventeen days before plaintiffs filed this action – DHS issued an order determining that conditions at Glen Mills constituted "gross incompetence, negligence and misconduct in operating a facility, including mistreatment and abuse of clients, likely to constitute immediate and serious danger to the life or health of the children in care." ("DHS Order," Compl. Ex. A at A1.) DHS accordingly ordered the prompt relocation of all Glen Mills residents. (Id.) The DHS Order was based on violations DHS had issued to Glen Mills in 2017, 2018, and 2019; violations OCYF identified in staff interviews conducted in June 2018; and violations identified in an investigation commenced by OCYF in January 2019. (Id. at A2-A9;

see also Compl. Ex. C (reports documenting violations and corresponding plans of correction implemented by Glen Mills and approved by DHS).) DHS found that "a culture of intimidation and coercion is pervasive at Glen Mills and that youth were told to lie about the care they received and the physical mistreatment they endured." (Id. at A5.) On April 8, 2019, DHS revoked Glen Mills' licenses. (Compl. ¶ 1.)

C. Plaintiffs Separately Allege Failures in the General and Special Education Programs at Glen Mills

In addition to alleging abuse, plaintiffs allege that Glen Mills failed to provide appropriate general and special education programs for its students.

Plaintiffs contend that Glen Mills failed to provide the requisite curriculum and hours of instruction, did not offer sufficient live instruction, and relied on untrained staff, allegedly in violation of Pennsylvania education laws. (Compl. ¶¶ 241-82.)

Plaintiffs also contend that Glen Mills denied its students with disabilities "a free appropriate education in the least restrictive environment" in violation of their procedural due process and equal protection rights, the IDEA, the Rehabilitation Act, and the ADA. (Compl. ¶¶ 283-368; 386-506.) With respect to PDE, they allege generally that PDE "has the ultimate legal responsibility to ensure: (1) that schools provide the legal entitlements afforded to students under the IDEA; and (2) the educational programs for students with disabilities meet State standards and are administered by qualified staff members." (Compl. ¶ 295.) Plaintiffs acknowledge that PDE acted in accordance with its monitoring program, but also allege that PDE did not provide "any adequate monitoring and oversight." (Id.; *see also* Compl. ¶¶ 335 (same), 363 (PDE Bureau of Special Education performs "occasional" monitoring).)

D. Plaintiffs Assert Eight Claims against the Commonwealth Defendants

Plaintiffs are four former Glen Mills residents, through their parents or grandparents. Plaintiffs Derrick, Thomas, Sean, and Walter were placed at Glen Mills after adjudications of delinquency. (Compl. ¶¶ 88, 135, 155, 184.) Derrick and Walter are disabled for purposes of their special education claims. (Compl. ¶¶ 85-86, 124.) Each of the four plaintiffs alleges that he suffered or witnessed physical abuse at Glen Mills, and that he did not receive adequate general or special education, depending on the claim. (Compl. ¶¶ 84-200.) Plaintiffs purport to bring this as a class action on behalf of "hundreds" of former Glen Mills residents. (Compl. ¶ 2.)

Plaintiffs assert a total of eighteen claims, fourteen of which name Glen Mills, individuals affiliated with Glen Mills, or both as defendants. Certain of the plaintiffs assert one claim against the DHS Defendants (Theresa D. Miller, the Secretary of Human Services, Theodore Dallas, former Secretary, and Cathy Utz, former Deputy Secretary of OCYF, purportedly in their individual capacities); five against Pedro A. Rivera, the Pennsylvania Secretary of Education, in his official capacity; and two against PDE. The Commonwealth Defendants address below why the Court should dismiss each of the eight claims against them.

III. ARGUMENT

A. Plaintiffs' Claim That the DHS Defendants Violated Their Eighth Amendment Rights (Count Two) Should Be Dismissed

In Count Two of the complaint, plaintiffs assert that the DHS Defendants violated their Eighth and Fourteenth Amendment rights in connection with the alleged abuse at Glen Mills. The claim should be dismissed because: (i) the DHS Defendants are immune from such claims; and (ii) the allegations fail to state a claim under either amendment.

1. The DHS Defendants Are Immune from Plaintiffs' Claim

The Eleventh Amendment bars federal lawsuits against state governments and employees: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Betts v. New Castle Youth Dev. Ctr., 621 F.3d 249, 253-54 (3d Cir. 2010). This immunity protects state employees sued in their official capacities because such suits "generally represent only another way of pleading an action against the state." Id. (citing Hafer v. Melo, 502 U.S. 21, 25 (1991); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 (1984) (Eleventh Amendment bars suits when "the state is the real, substantial party in interest" (citation omitted)). Immunity is a "jurisdictional bar." Id. at 100.

In a transparent effort to evade application of this black-letter law, plaintiffs purport to proceed against the DHS Defendants in their "individual" capacities. But the actual allegations of the complaint tell a different story: plaintiffs' real complaint is with DHS, or at minimum the DHS Defendants' actions taken in their official capacities. Because no allegation in the complaint supports plaintiffs' "individual capacity" pleading artifice, the Court should ignore it.

"The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 270 (1997). Accordingly, the Court must look beyond plaintiffs' self-serving labels. "A mere invocation of 'individual capacity' in a complaint is not necessarily determinative of whether a plaintiff sued the defendant in his personal capacity if it is clear that the substance of the allegations is against the defendant for actions taken in his official capacity." Moyer v. Aramark, No. 18-cv-02267, 2019 U.S. Dist. LEXIS 37165, at *12-14 (E.D. Pa. Mar. 7, 2019) (applying Coeur D'Alene and finding that "individual capacity" defendants were in fact sued in their

official capacities, and dismissing claims against them). The Court should consider whether the allegedly unlawful conduct was "tied inextricably" to the defendants' official duties, whether the desired relief would have come from the state rather than the individuals, whether the defendants' actions were taken to further personal interests distinct from the state's, and whether the officials' actions were *ultra vires*. *See* Martin v. Wood, 772 F.3d 192, 196 (4th Cir. 2014) (rejecting the plaintiff's attempt to avoid immunity by suing her supervisors in their individual capacities because she made "no allegation" that the defendants had "acted in an *ultra vires* manner or attempted to serve personal interests distinct from the [state's] interests"). All of those inquiries reveal that the true nature of plaintiffs' claim is against DHS.

Indeed, the 506-paragraph complaint contains no allegations whatsoever about the individual conduct of any of the three DHS Defendants – DHS's current and former Secretary, and the former Deputy Secretary for OCFY – other than that the latter signed the DHS Order that all residents be removed from Glen Mills (Compl. ¶ 234). Nor is there any allegation about any DHS Defendant's conduct with respect to any of the named plaintiffs. Rather, plaintiffs make only generalized allegations that the "DHS Defendants" as a group "knew or should have known" about the alleged culture of abuse at Glen Mills, and should have taken action to protect its residents. (*See, e.g.*, Compl. ¶¶ 201-235 (section titled "***PA-DHS*** Failed To Ensure the Safety of Children at Glen Mills" (emphasis added), 379, 381-385.)

Moreover, plaintiffs frequently use the term "DHS Defendants" synonymously with DHS itself, belying any contention that the claims are against the DHS Defendants as individuals. (*See, e.g.*, Compl. ¶¶ 232 ("PA-DHS Defendants knew that its [*sic*] policies and customs exposed youth at Glen Mills to serious physical, psychological, and emotional harm."), 235 ("PA-DHS Defendants knew, or recklessly disregarded, that its [*sic*] policies and customs exposed youth at

Glen Mills to . . . harm.").) Thus, the DHS Defendants' allegedly unlawful conduct was tied inextricably to their official duties.

To the extent plaintiffs seek relief from the DHS Defendants – which is unclear, because the complaint does not seek any particular relief from the DHS Defendants – any such relief would have come from DHS in the first instance. And there is no suggestion that the DHS Defendants took any actions to further their personal interests or that were *ultra vires*. In the absence of any factual allegations supporting their "individual capacity" theory, it is hardly enough to allege, as plaintiffs conclusorily do (Compl. ¶ 385), that the conduct of the Defendants as a group "was a substantial departure from professional judgment." *See* Martin, 772 F.3d at 196; Moyer, 2019 U.S. Dist. LEXIS 37165, at *12. Accordingly, the claims against the DHS Defendants are official capacity claims from which the DHS Defendants are immune.

Even if the DHS Defendants were properly considered "individual capacity" defendants, however, they would be protected by qualified immunity. Qualified immunity protects state actors sued as individuals unless: (i) "the facts alleged by the plaintiff make out a violation of a constitutional right"; and (ii) "that right was clearly established at the time of the injury." Mann v. Palmerton Area Sch. Dist., 872 F.3d 165, 170 (3d Cir. 2017). To satisfy the first prong, plaintiffs must make specific allegations that Defendants themselves committed a constitutional violation. *See, e.g.*, Stengle v. Office of Dispute Resolution, 631 F. Supp. 2d 564, 578 (M.D. Pa. 2009). In other words, plaintiffs must show that each individual had "personal involvement in the alleged wrongs." Bradley v. West Chester Univ. of the Pa. State Sys. Higher Educ., 182 F. Supp. 3d 195, 198 (E.D. Pa. 2016) (citing Rode v. Dellarciprete, 845 F.2d 1197, 1207 (3d Cir. 1988)). "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and

acquiescence, however, must be made with appropriate particularity." Id. (citing Rode, 845 F.2d at 1207).

Here, plaintiffs make no allegation of specific wrongdoing by any particular DHS Defendant, much less any particularized allegations of their actual knowledge of or acquiescence in any improper conduct. Accordingly, qualified immunity would warrant dismissal of Count Two even if the DHS Defendants were properly sued in their individual capacities.

2. Count Two Fails To State a Claim in Any Event

Alternatively, Count Two should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)) (internal quotation marks omitted). The Court should "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the nonmovant." Davis v. Wells Fargo, 824 F.3d 333, 341 (3d Cir. 2016) (citation omitted). However, courts need not "accept mere[] conclusory factual allegations or legal assertions." In re Asbestos Prods. Liab. Litig. (No. VI), 822 F.3d 125, 133 (3d Cir. 2016) (citing Iqbal, 556 U.S. at 678-79). And the Court should disregard "naked assertions devoid of further factual enhancement." Santiago v. Warminster Twp., 629 F.3d 121, 131 (3d Cir. 2010) (internal citation omitted). Plaintiffs' claim against the DHS Defendants falls short of these standards.

First, Count Two rests in part on the incorrect premise that plaintiffs were protected by the Eighth Amendment. It is well-settled that the Eighth Amendment only protects individuals who are incarcerated after a formal conviction of guilt pursuant to a criminal process. *See* Natale v. Camden Cty. Corr. Facility, 318 F.3d 575, 581 (3d Cir. 2003) (Eighth Amendment "applies

only 'after [the State] has secured a formal adjudication of guilt in accordance with due process of law'") (quoting City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)). The Eighth Amendment "is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions." Whitley v. Albers, 475 U.S. 312, 327 (1986). Thus, the Eighth Amendment does not protect pre-trial detainees, Natale, 318 F.3d at 581; juvenile detainees at a juvenile detention center, A.M. v. Luzerne Cty. Juvenile Det. Ctr., 372 F.3d 572, 584 (3d Cir. 2004); students subject to a school's unreasonable or violent disciplinary policies, Ingraham v. Wright, 430 U.S. 651, 669-70 (1977); or plaintiffs here, who were adjudicated delinquent, not formally convicted of crimes (Compl. ¶¶ 88, 155, 184, 135; *see also* Compl. ¶ 39 (defining the purported class as youth who were "adjudicated delinquent")).[1] Accordingly, plaintiffs cannot state a claim based on alleged violations of Eighth Amendment rights.

Second, as discussed above in connection with the DHS Defendants' immunity, plaintiffs have made no allegations of wrongdoing by any of the particular DHS Defendants; instead, they make only generalized, conclusory allegations that the Court need not credit. Thus, they fail to state a claim under either the Eighth or Fourteenth Amendments.

For all these reasons, the Court should dismiss Count Two.

[1] The Third Circuit and other courts have recognized the distinctions between an adjudication of juvenile delinquency and a criminal conviction under both federal and Pennsylvania law. *See, e.g.*, Badewa v. Atty. Gen. of the United States, 252 F. App'x 473, 476 (3d Cir. 2007) ("Juvenile delinquency proceedings under [federal law] are civil, not criminal, adjudications."); United States v. Bucaro, 898 F.2d 368, 372 (3d Cir. 1990) ("Pennsylvania does treat an adjudication of juvenile delinquency differently than a criminal conviction.") (citing 42 Pa. C.S. § 6354(a)); Jackson v. Johnson, 118 F. Supp. 2d 278, 287 (N.D.N.Y. 2000) (Eighth Amendment does not apply to juvenile delinquents given differences between delinquency and criminal conviction); In re L.A., 853 A.2d 388, 393 (Pa. Super. Ct. 2004) ("[J]uvenile proceedings are not criminal proceedings. . . . [J]uveniles are not charged with crimes. . . . They do not have a trial; they have an adjudicatory hearing. If the charges are substantiated, they are not convicted; they are adjudicated delinquent.").

B. Plaintiffs' Claims that Secretary Rivera Violated Their Due Process and Equal Protection Rights (Counts Three and Four) Should Be Dismissed

In Counts Three and Four, plaintiffs assert pursuant to Section 1983 that Glen Mills, the Chester County Intermediate Unit ("CCIU"), and Secretary Rivera, in his official capacity, violated plaintiffs' rights to procedural due process by depriving them of their right to an education, and to equal protection by depriving them of equal access to an education. (Compl. ¶¶ 386-408.) Both counts seek "prospective injunctive and declaratory relief, including the provision of compensatory educational services." (Compl. ¶¶ 399, 408.) Secretary Rivera is immune from both claims, and the complaint fails to state a claim in any event.

1. Secretary Rivera Is Immune from Plaintiffs' Claims

A state employee sued in an "official capacity" is entitled to Eleventh Amendment immunity. *See* § III(A)(1), *supra*. The only exception to such immunity for a high-ranking state official like Secretary Rivera applies when the plaintiff seeks prospective injunctive relief, and when such relief is available. Under Ex Parte Young, 209 U.S. 123 (1908), and its progeny, "a private plaintiff may sue state officials for prospective injunctive relief to end ongoing violations of federal law." Williams v. Connolly, 734 F. App'x. 813, 817 (3d Cir. 2018); *see also* Coeur D'Alene Tribe, 521 U.S. at 281 ("An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the Young fiction."). When analyzing whether the Young exception applies, courts examine: (i) whether the requested relief is in fact prospective, and whether it is compensatory (and from state coffers), in which case the exception does not apply; and (ii) whether the plaintiff has alleged an ongoing violation of federal law. *See* id. Additionally, plaintiffs must demonstrate "that they have sustained or are in immediate danger of sustaining some direct injury as the result of the challenged official conduct." J.C. v. Ford, 674 F. App'x 230, 232 (3d Cir. 2016) (citing City of Los Angeles v.

Lyons, 461 U.S. 95, 102 (1983)). Finally, the official from whom they seek relief must have the authority to enforce the challenged action. *See* Young, 209 U.S. at 157.

The Young exception does not apply here. The plaintiffs are no longer at Glen Mills and Glen Mills is no longer operating. (Compl. ¶ 1.) Thus, there is no ongoing violation of federal law. Nor could one glean from the allegations about the four plaintiffs that there is any prospective relief that could be provided by Secretary Rivera, or by any state official or agency. Accordingly, Secretary Rivera is immune from the claims in Counts Three and Four.

2. Counts Three and Four Fail To State a Claim in Any Event

In any event, Counts Three and Four fail to state a claim against Secretary Rivera. Before he is named in those counts, Secretary Rivera is mentioned just once in the complaint, when he is identified as the head of PDE and CEO of the Pennsylvania Board of Education. (Compl. ¶ 37.) Moreover, plaintiffs fail to assert any substantive allegations related to their alleged deprivation of educational opportunities by Secretary Rivera. *See, e.g.*, Colombo v. Bd. of Educ., Nos. 11-cv-785, 12-cv-7132, 2017 U.S. Dist. LEXIS 178859, at *16-17 (D.N.J. Oct. 27, 2017) (procedural due process claim dismissed in absence of allegations "about what processes were available to [the plaintiffs], whether they took advantage of those processes, or why those processes were unavailable or patently inadequate").

In addition, Count Three is undermined by plaintiffs' concessions that they did receive some education, even if that education allegedly did not meet state standards. Procedural due process protections apply only when a student suffers "total exclusion from the educational process." Taylor v. Metuchen Pub. Sch. Dist., No. 18-cv-1842, 2019 U.S. Dist. LEXIS 54357, at *9-10 (D.N.J. Mar. 28, 2019) (citation omitted). Similarly, Count Four fails because plaintiffs do not allege any PDE policy upon which they base their claim, and PDE's policies satisfy rational basis review. *See, e.g.*, ASAH v. N.J. Dep't of Educ., 330 F. Supp. 3d 975, 1008-09

(D.N.J. 2018) ("Under the rational basis standard of review, state regulations that 'neither employ a suspect classification nor impinge a fundamental right are entitled to a presumption of validity against attack under the Equal Protection Clause." (citation omitted)).

C. Plaintiffs' ADA Claim against PDE (Count Ten) Should Be Dismissed

In Count Ten, two plaintiffs allege that PDE intentionally violated Title II of the ADA, and seek "declaratory relief, injunctive relief, and compensatory damages," as well as attorneys' fees and costs. (Compl. ¶¶ 464-65.) As an initial matter, the Court lacks jurisdiction over such claims because plaintiffs failed to exhaust administrative remedies. Because other claims at issue are subject to the same exhaustion analysis, those arguments are consolidated in Section III(E), below. Even if exhaustion were not required, the claim would fail because injunctive relief is not available with Glen Mills no longer operating (Compl. ¶ 1), and because PDE is immune from damages claims brought under Title II.

Although the ADA limits immunity for Title II claims, 42 U.S.C. § 12202, the Supreme Court has held that the statutory limitation only abrogates immunity from claims for "damages against the States for conduct that actually violates the Fourteenth Amendment." United States v. Georgia, 546 U.S. 151, 159 (2006); *see also* Baxter v. Pa. Dep't of Corr., 661 F. App'x 754, 756 (3d Cir. 2016) (citing Georgia, 546 U.S. at 159). Pursuant to Georgia, the Court must first determine whether "any aspect of the [] alleged conduct forms the basis of a Title II claim." Baxter, 661 F. App'x at 756 (quoting Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 553 (3d Cir. 2007) (alteration in original)). The Court "must next determine whether the alleged conduct also violates the Fourteenth Amendment, and if not, whether Congress's purported abrogation of the state sovereign immunity is nevertheless valid." Id. (citing Bowers, 475 F.3d at 553-54). The Court should not reach the constitutional issue "unless and until it is decided

that the plaintiff has made out a valid Title II claim." Id. (citing Georgia, 546 U.S. at 159; Bowers, 475 F.3d at 553).

Plaintiffs here have not sufficiently alleged a Title II violation by PDE, let alone a constitutional violation. Title II prohibits a public entity from discriminating against individuals with disabilities in the provision of the entity's "services, programs, or activities." 42 U.S.C. § 12132. To sustain a claim under Title II, a plaintiff must demonstrate: "(1) he is a qualified individual; (2) with a disability; (3) he was excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or was subjected to discrimination by any such entity; (4) by reason of his disability." Bowers, 475 F.3d at 553 n.32. The complaint does not satisfy these requirements.

Plaintiffs' only allegation in Count Ten against PDE is that PDE "knew that youth with disabilities at Glen Mills were entitled to equal access to the educational programs and services of Glen Mills," but "[t]hrough its lack of oversight and intervention intentionally and with deliberate indifference failed to ensure that youth were free from discrimination on the bases of their disabilities in the education program." (Compl. ¶ 462.) Elsewhere, plaintiffs similarly allege generally that "through lack of oversight and monitoring, PDE failed to fulfill its obligations as a state educational agency to ensure access to education for these students with disabilities who were deprived of education, subjected to restraint and punished for disability-related behaviors." (Compl. ¶ 360.) Plaintiffs do not allege any specific conduct of PDE that could plausibly establish that the department itself was responsible for excluding students from participation in education because of their disabilities. Accordingly, plaintiffs have not made out a viable Title II claim. Although the Court therefore need not reach the constitutional issue,

plaintiffs have failed to allege that the conduct of PDE that allegedly violated Title II also violated the Fourteenth Amendment.

Thus, PDE is immune from Count Ten to the extent it seeks damages, and the claim fails to the extent it seeks prospective injunctive relief because Glen Mills is no longer operating.

D. Plaintiffs' Claim under Section 504 of the Rehabilitation Act against PDE (Count Nine) Should Be Dismissed

In Count Nine, plaintiffs Derrick and Walter allege that PDE violated Section 504 of the Rehabilitation Act, and seek "declaratory, injunctive and compensatory relief" and attorneys' fees and costs. (Compl. ¶ 453.) As discussed below in Section III(E), the Court lacks jurisdiction over this claim because Derrick and Walter did not pursue administrative remedies. In any event, the claim fails because it does not sufficiently plead a claim against PDE.

Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program" receiving federal funding. 29 U.S.C. § 794(a). Given its similarity to Title II of the ADA (*see* § III(C), *supra*), the standards that govern ADA claims also apply to Section 504 clams. *See* Ridley Sch. Dist. v. M.R., 680 F.3d 260, 282-83 (3d Cir. 2012). Under either statute, a plaintiff must allege that he or she "(1) has a disability; (2) was otherwise qualified to participate in a school program; and (3) was denied the benefits of the program or was otherwise subject to discrimination because of her disability." Chambers v. Sch. Dist. of Phila. Bd. of Educ., 587 F.3d 176, 189 (3d Cir. 2009) (citation omitted).

Plaintiffs' only allegation that PDE violated Section 504 is that PDE "knew" that "students with disabilities at Glen Mills were entitled to equal access to the educational programs and services of Glen Mills" but that PDE "intentionally and with deliberate indifference failed to

ensure that the students received a free appropriate public education and were free from discrimination on the bases of their disabilities." (Compl. ¶ 451.) This conclusory allegation says nothing at all about Derrick or Walter, and is bereft of detail as to PDE's alleged violation of Section 504. Accordingly, Count Nine fails to state a claim and should be dismissed as to PDE. *See* Rovner v. Keystone Human Servs., No. 11-cv-2335, 2013 U.S. Dist. LEXIS 111336, at *24-26 (M.D. Pa. July 18, 2013) (dismissing Section 504 and ADA claims against Commonwealth defendants who allegedly "fail[ed] to prevent" discriminatory conduct by a state-funded residence; such "broad, conclusory contention[s]" were insufficient to state a claim).

E. All of the Special Education Claims against the PDE Defendants (Counts Six through Ten) Should Be Dismissed for Lack of Jurisdiction Because Plaintiffs Failed to Exhaust Administrative Remedies

All of plaintiffs' special education claims – *i.e.*, Counts Six through Eight (IDEA), Count Nine (Rehabilitation Act Section 504), and Count Ten (ADA) – assert grievances that plaintiffs could have pursued through the Commonwealth's IDEA-mandated administrative procedures. Plaintiffs' failure to exhaust those remedies bars the Court from exercising jurisdiction over all of the special education claims.

1. The IDEA Requires Students and Parents to Redress Violations through an Administrative Process

The IDEA is a designed to ensure that children with disabilities receive a "free, appropriate public education" ("FAPE") in the "least restrictive environment." *See* Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 993, 999 (2017) (educational services must be "reasonably calculated" to ensure that children with disabilities make "appropriate" educational progress). To this end, the statute requires local education agencies ("LEAs") to develop and implement an individualized education plan ("IEP") for each qualifying child. *See* Honig v.

Doe, 484 U.S. 305, 311 (1988); *see generally* 20 U.S.C. § 1414. State education agencies, like PDE, have general obligations to ensure LEAs' compliance with the law through monitoring, reporting, and enforcement. *See* 20 U.S.C. § 1416.

The IDEA further requires states to implement administrative processes for remedying violations. *See* Batchelor v. Rose Tree Media Sch. Dist., 759 F.3d 266, 272 (3d Cir. 2014); 20 U.S.C. § 1415. This affords parents "an avenue to file a complaint and to participate in an impartial due process hearing with respect to '***any matter relating to*** the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate public education to such child.'" Batchelor, 759 F.3d at 272 (quoting 20 U.S.C. § 1415(b)(6)(A) (emphasis added)). Disputes can be resolved through an informal meeting or mediation or, if unsuccessful, by an impartial officer at a due process hearing.[2] *See* Endrew F., 137 S. Ct. at 994.

Only a party who is "aggrieved" by an administrative determination can file a civil action in federal court. *See* 20 U.S.C. § 1415(i); Batchelor, 759 F.3d at 273 n.9. Exhausting the statute's administrative remedies is a jurisdictional requirement; absent exhaustion, the district court does not have subject matter jurisdiction. Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 778 (3d Cir. 1994). The exhaustion requirement serves significant policy interests, such as developing a factual record; encouraging collaboration between LEAs, parents, and their children; and allowing state and local agencies to apply their expertise. *See* Batchelor, 759 F.3d at 275 (citing S.H. v. State-Operated Sch. Dist. of City of Newark, 336 F.3d 260, 269-70 (3d Cir. 2003) and Komninos, 13 F.3d at 778); *see also* Smith v. Robinson, 468 U.S. 992, 1011-12

[2] Pennsylvania's process is codified at 22 Pa. Code § 14.162. For a compendium on Pennsylvania's dispute resolution procedures, see the PDE Office for Dispute Resolution's *Pennsylvania Special Education Dispute Resolution Manual*, available at https://odr-pa.org/wp-content/uploads/pdf/Dispute-Resolution-Manual.pdf.

(1984) (exhaustion requirement accords with "Congress' view that the needs of handicapped children are best accommodated by having the parents and the [LEA] work together to formulate an individualized plan for each handicapped child's education"). Exhaustion is "particularly helpful in developing a factual record" when, as here, plaintiffs failed "to provide even the most basic of documentation in support of their positions," such as their IEPs. Batchelor, 759 F.3d at 275; *see also* Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 284 n.23 (3d Cir. 1996) ("Specialized fact finding . . . is an important function of the IDEA's administrative hearing process.").

2. Plaintiffs Failed To Exhaust Their Administrative Remedies

(a) IDEA Claims

The complaint alleges various ways in which CCIU purportedly failed to meet IDEA requirements for Glen Mills students generally. (*See, e.g.*, Compl. ¶¶ 303-25.) Each of Counts Six through Eight, however, is brought by certain of the named plaintiffs, and in the body of the complaint, they assert individual harms that could have – and should have – been remedied through Pennsylvania's IDEA-mandated administrative process.

- ***Count Six*** is brought by plaintiffs Derrick and Walter. Derrick alleges that he did not receive a FAPE because he did not receive the services detailed in his IEP and his IEP was modified inappropriately, without consideration of his mother's concerns and without requisite meetings. (Compl. ¶¶ 90-107.) Walter similarly alleges that he did not receive a FAPE insofar as he did not receive the instruction and support contemplated by his IEP, and because his mother was not consulted about the IEP. (Compl. ¶¶ 127-30, 141-48.)

- ***Count Seven*** is brought by plaintiff Thomas, who alleges that he did not receive a FAPE insofar as he should have been but was not evaluated for an IEP and did not receive appropriately tailored instruction. (Compl. ¶ 156-66.)

- ***Count Eight*** is brought by the mothers of plaintiffs Derrick and Walter, alleging that they were denied meaningful participation in the special education process.

These are precisely the types of alleged harms that the administrative process is intended to remedy. Yet plaintiffs do not allege that Derrick, Walter, Thomas, or their parents attempted to pursue administrative remedies. Accordingly, Counts Six through Eight should be dismissed. *See, e.g.*, M.M. v. Tredyffrin/Easttown Sch. Dist., No. 06-cv-1966, 2006 U.S. Dist. LEXIS 62918, at *20-23 (E.D. Pa. Sept. 1, 2006) (applying exhaustion requirement to IDEA claims related to "the adequacy of [the plaintiff's] 504 Plan, the safety of his school environment and his classification under the IDEA," and noting that the "court would greatly benefit from the educational expertise that the state administrative process will bring").

Seeking to evade the jurisdictional bar imposed by their failure to exhaust administrative remedies, plaintiffs allege a "systemic" failure by PDE to ensure compliance with the IDEA. (Compl. ¶¶ 418-20; 428-30; 438-40.) Their averments supporting Counts Six through Eight do not even mention the individualized harms allegedly suffered by the plaintiffs asserting them; rather, they allege general failures by CCIU to comply with IDEA, and by PDE to monitor CCIU. (*See* Counts Six-Eight.) Plaintiffs contend that those alleged failures require "system-wide reforms that cannot be addressed or remedied through individual due process hearings." (Compl. ¶¶ 419, 429, 439.) That contention stretches the complaint's allegations too far.

Courts reject such attempts to spin a handful of alleged IDEA violations into a problem of "systemic" proportions. "[A] systemic claim is one which 'implicates the integrity of the IDEA's dispute resolution procedures themselves, or requires restructuring of the education system itself in order to comply with the dictates of the [IDEA].'" J.D.G. v. Colonial Sch. Dist., 748 F. Supp. 2d 362, 370 (D. Del. 2010) (citation omitted) (claim against Delaware Department of Education alleging that department appointed hearing officers that engaged in discriminatory conduct was not "systemic" because it was "directed towards the individual claim of [a

student]"). Thus, an allegedly flawed school-wide, or even district-wide, policy or procedure "is not rendered a systemic issue simply because [the student] raises it in a putative class action." J.T. v. Dumont Pub. Schs., 533 F. App'x 44, 54-55 (3d Cir. 2013) (allegedly improper classroom placement policy was not a "systemic" problem because addressing the issue required "a factually intensive inquiry into the circumstances of each individual child's case"); *see also* Ass'n for Cmty. Living in Colo. v. Romer, 992 F.2d 1040, 1043-44 (10th Cir. 1993) ("The determination of whether . . . policies have denied children with disabilities appropriately individualized IEPs entails a factually intensive inquiry into the circumstances of each individual child's case," which is "precisely the kind of issue the IDEA's administrative process was designed to address").

Plaintiffs do not plausibly allege any reason to conclude that an administrative proceeding brought by Derrick, Walter, Thomas, or their parents could not have provided the relief they sought. And even if one credits plaintiffs' conclusory allegations about more widespread problems – which the Court need not do – plaintiffs' complaints are about PDE's oversight of CCIU's provision of services to certain students at one school; they do not amount to a "systemic" problem that negates the requirement of administrative review.[3]

Plaintiffs will likely cite this Court's decision in Blunt v. Lower Merion School District, No. 07-cv-3100, 2008 U.S. Dist. LEXIS 11918, at *22-24 (E.D. Pa. Feb. 15, 2008) (Bartle, J.),

[3] By the same token, even if the IDEA claims were not subject to the exhaustion requirement, they would fail to state a claim. *See* J.D.G., 748 F. Supp. 2d at 370 (dismissing IDEA claims against department of education because allegations that, *inter alia*, department "allowed the District to fall below minimum required standards for special education" and was responsible for "systemic" violations did not satisfy Rule 12(b)(6) pleading standards); Price v. Commw. Charter Acad. Cyber Sch., No. 17-cv-1922, 2018 U.S. Dist. LEXIS 59394, at *18-19 (E.D. Pa. Apr. 6, 2018) (dismissing IDEA claim against PDE's Bureau of Special Education because the plaintiff did not sufficiently allege a systemic failure or that BSE's dispute resolution procedures themselves violated the IDEA).

holding that when a plaintiff alleges that the Commonwealth failed "appropriately to supervise [a school]'s provision of special education services generally," the exhaustion requirement is excused because neither IDEA nor state regulations provide an administrative process for such challenges.[4] However, the Third Circuit and other appellate courts have found that claims against the state are excused from the exhaustion requirement only when the grievance is with the administrative process itself or seeks a statewide restructuring of policy, and not when the complaints are grounded in individual students' educational experiences, as here. *See* J.T., 533 F. App'x at 54; *see also, e.g.*, Romer, 992 F.2d at 1043-44; Doe v. Ariz. Dep't of Educ., 111 F.3d 678, 681-82 (9th Cir. 1997) (exhaustion required for claims against a state if the relief does not "require[] restructuring the education system itself" but "involves only a substantive claim having to do with limited components of a program"); *cf.* Heldman v. Sobol, 962 F.2d 148, 159 (2d Cir. 1992) (exhaustion excused because of "systemic" claim against state's method of appointing hearing officers, which "neither the Commissioner [of Education] nor the assigned hearing officer had the authority to alter"). Accordingly, the IDEA claims plaintiffs assert here are subject to the exhaustion requirement.

(b) ADA and Rehabilitation Act Claims

The same analysis applies to plaintiffs' other education claims (Counts Nine and Ten) because they also arise from the alleged denial of a FAPE – an alleged harm plaintiffs could have remedied through the administrative process. "Exhaustion of the IDEA's administrative process is also required in non-IDEA actions where the plaintiff seeks relief that can be obtained under

[4] The Blunt plaintiffs further alleged that PDE "failed specifically in the areas of compliance monitoring, complaint resolution and 'child find.'" Id. at *23. In contrast, plaintiffs here conclusorily allege failure to ensure compliance with the law and do not pinpoint specific actions or policies for which PDE should be liable. A plaintiff cannot avoid the exhaustion requirement for a localized grievance simply by invoking PDE's duty to ensure compliance with the law.

the IDEA." Batchelor, 759 F.3d at 272. Congress explicitly mandated the exhaustion requirement in these circumstances. 20 U.S.C. § 1415(l) (requiring exhaustion of the IDEA administrative process "before the filing of a civil action under [federal laws protecting the rights of children with disabilities] seeking relief that is also available under this subchapter").

Accordingly, plaintiffs may not "circumvent[] IDEA's exhaustion requirement by taking claims that could have been brought under IDEA and repackaging them as claims under . . . section 504 of the Rehabilitation Act, or the ADA." Jeremy H., 95 F.3d at 281; *see also, e.g.*, Batchelor, 759 F.3d at 273-75 (applying exhaustion requirement to Section 504 and ADA claims after tracing a "logical path" from those claims to the defendant's "failure to provide, and [the parent]'s effort to obtain for [her child], a [FAPE]" (quotation omitted)). In other words, if the "gravamen" of the complaint is the denial of a FAPE, then a plaintiff first must seek relief through the state's administrative process. *See* Wellman v. Butler Area Sch. Dist., 877 F.3d 125, 131 (3d Cir. 2017) (applying Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743 (2017)).

To aid courts in determining whether the gravamen of a non-IDEA claim alleges the denial of a FAPE, the Supreme Court poses two hypothetical questions: "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school – say, a public theater or library? And second, could an adult at the school – say, an employee or visitor – have pressed essentially the same grievance?" Fry, 137 S. Ct. at 756; *see also* Wellman, 877 F.3d at 132. If the answer to these questions is "no," then the claim essentially alleges the denial of a FAPE and is subject to administrative exhaustion.

That is the case here. Plaintiffs acknowledge that in respect of each of these claims, they should have received a FAPE. (*See* Compl. ¶ 451 (Section 504 claim) ("PDE . . . failed to ensure that the students received a [FAPE]"), ¶ 462 (ADA claim) ("PDE . . . failed to ensure that youth

were free from discrimination on the bases of their disabilities in the education program."). Because the gravamen of each of these claims is a request for relief that is available under the IDEA, and because plaintiffs failed to pursue their claims administratively, Counts Nine and Ten should be dismissed. *See* Wellman, 877 F.3d at 133-34 (applying exhaustion requirement to Section 504 and ADA claims that arose from the plaintiff's education experience).

F. In the Event the Court Does Not Dismiss One or More of the Education Claims, It Should Sever Them from the Abuse Claims

For all the reasons discussed above, the Court should dismiss all of the claims against the Commonwealth Defendants. However, in the event that the Court allows one or more of the education claims to proceed against either of the PDE Defendants, the Court should sever the education claims from any abuse claims that proceed beyond motions to dismiss.

Courts have broad discretion under Rule 21 of the Federal Rules of Civil Procedure to sever claims or parties. A court can order severance "if it finds that the objectives of the rule in promoting trial convenience are not fostered, or that joinder would result in prejudice, expense, or delay." Patrick Collins, Inc. v. Doe, No. 12-cv-3148, 2013 U.S. Dist. LEXIS 39187, at *4-5 (E.D. Pa. Mar. 21, 2013) (citation omitted). Courts analyze four factors when considering severance: (i) whether the issues sought to be tried separately are significantly different from one another; (ii) whether the separable issues require the testimony of different witnesses and documentary proof; (iii) whether the party opposing the severance will be prejudiced if it is granted; and (iv) whether the party requesting the severance will be prejudiced if it is not granted. Archway Ins. Servs., LLC v. Harris, No. 10-cv-5867, 2011 U.S. Dist. LEXIS 64455, at *13-14 (E.D. Pa. Jun. 15, 2011). Here, the factors weigh in favor of severance.

The first factor – the difference between the issues to be litigated -- weighs heavily in favor of severance. The complaint itself neatly separates the education claims from the abuse

claims in its factual allegations. In addition, the legal theories are distinct, involving completely different issues, legal elements, and defenses. Trying all the claims together could result in jury confusion. *See* Klimaski v. Parexel Int'l, No. 05-cv-298, 2005 U.S. Dist. LEXIS 6403, at *14-15 (E.D. Pa. Apr. 5, 2005) (severing claims because a single action would "deflect the jury's attention from the merits" of each individual claim). Indeed, the education claims will involve highly individualized inquiries and will implicate technical and esoteric requirements that are wholly distinct from the legal and factual issues implicated by the abuse claims. *See* Ames v. USAA Life Ins. Co., No. 18cv-9865, 2018 U.S. Dist. LEXIS 186315, at *3 (D.N.J. Oct. 31, 2018) (severance favored when claims to be severed are "capable of resolution despite the outcome of the other claim"). And while there may be some overlap with witnesses (such as plaintiffs themselves) and discovery (such as the students' school records), the focus of discovery for the education claims will be quite different than that for the abuse claims, and will involve different witnesses and documentary evidence. Keeping the claims together could therefore delay resolution of each set of claims. *See* id. at *5-7 (severing breach of contract from bad faith claims against insurer because discovery for one was "irrelevant and disproportional" to the other and would "distract from" and "undoubtedly delay" the resolution of the other).

Severance of the education claims would also avoid prejudice to the PDE Defendants that would be caused by subjecting them to expensive and time-consuming discovery that is irrelevant to the claims against them. *See* DeMarco v. DIRECTV, LLC, No. 14-cv-4623, 2015 U.S. Dist. LEXIS 146009, at *24-25 (D.N.J. Oct. 28, 2015).

Meanwhile, there is little risk that severance would prejudice plaintiffs. Because the abuse and education claims are distinct, plaintiffs would not have to relitigate the same issues. *See* id. (plaintiffs would be prejudiced if severance would require them to "litigate essentially the

same case twice"). To the contrary, severance would allow for more orderly and focused discovery, pretrial motion practice, and trial, to the benefit of all parties.

IV. CONCLUSION

For all the foregoing reasons, the Court should dismiss all of the claims against the Commonwealth Defendants – or in the alternative, sever any education-related claims that the Court does not dismiss – and grant the Commonwealth Defendants such other and further relief as the Court deems just and proper.

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Respectfully submitted,

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