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

DERRICK, by and with his parent and next friend TINA, et al., Plaintiffs, v. GLEN MILLS SCHOOLS, et al., Defendants.	Case No. 2:19-cv-01541-HB

PLAINTIFFS' OMNIBUS MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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TABLE OF CONTENTS

Page

INTRODUCTION 1

FACTUAL BACKGROUND 4

LEGAL ARGUMENT 9

I. STANDARD AND SCOPE OF REVIEW 9

II. PLAINTIFFS' CLAIMS COMPLY WITH RULES 8 AND 10 OF THE FEDERAL RULES OF CIVIL PROCEDURE 10

III. DEFENDANTS OFFER NO BASIS TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS 13

IV. PLAINTIFFS HAVE SUFFICIENTLY STATED CLAIMS UNDER THE FOURTEENTH AMENDMENT FOR EXCESSIVE FORCE, DENIAL OF PROTECTION FROM HARM, AND INADEQUATE MEDICAL CARE AGAINST GLEN MILLS, GLEN MILLS LEADERSHIP DEFENDANTS, ANDRE WALKER, AND ROBERT TAYLOR 15

V. THE COURT SHOULD DENY MOTIONS TO DISMISS PLAINTIFFS DUE PROCESS AND EQUAL PROTECTION CLAIMS 21

A. Plaintiffs Have Properly Alleged Their Procedural Due Process Claim 21

B. Plaintiffs Have Properly Alleged Their Equal Protection Claim 25

VI. PLAINTIFFS SUFFICIENTLY PLED FACTS TO SHOW THAT THE COMMONWEALTH DEFENDANTS ARE NOT IMMUNE FROM SUIT 28

A. Defendants Miller, Dallas, And Utz Are Properly Sued In Their Individual Capacities 28

B. Defendants Miller, Dallas, And Utz Violated Plaintiffs' Well-Established Rights Under The Fourteenth And Eighth Amendments 30

C. Claims Against PDE Secretary Rivera Are Not Barred By Sovereign Immunity 34

VII. THIS COURT SHOULD DENY CCIU'S MOTION TO DISMISS ALL CLAIMS AGAINST IT 38

A. CCIU Cannot Avoid Liability By Contending It is Not The LEA With Regard To Students With Disabilities 38

B. CCIU Is Responsible For Ensuring Rights Under Federal And State Laws To Students At Glen Mills 40

VIII. PLAINTIFFS' CLAIMS AGAINST DEFENDANTS GLEN MILLS, CCIU, AND PDE DO NOT REQUIRE EXHAUSTION OF IDEA'S ADMINISTRATIVE REMEDIES 43

A. Plaintiffs' Claims Against PDE Do Not Require Exhaustion As They Allege A Systemic Failure To Monitor Compliance With The Requirements Of The IDEA 44

B. Exhausting Plaintiffs' Claims Against CCIU Would Be Futile 46

C. Exhaustion Is Not Required For Plaintiffs' State Education Law, Equal Protection And Procedural Due Process Claims 50

IX. CLAIMS AGAINST DEFENDANTS BASED ON ADA AND SECTION 504 ARE NOT SUBJECT TO DISMISSAL 51

A. Plaintiffs Properly State Claims Against PDE Under Title II Of The ADA And Section 504 51

B. Plaintiffs' ADA And Section 504 Claims Of Denial Of Access To Educational Opportunities Are Separately Cognizable From A Denial Of FAPE And Not Subject To Exhaustion 52

C. Plaintiffs' ADA And Section 504 Claims Alleging Discriminatory Physical Abuse And Denial Of Access To Rehabilitation Programs Do Not Constitute A Denial Of FAPE 55

X. THE COURT SHOULD NOT SEVER CLAIMS AGAINST ANY DEFENDANTS BECAUSE PLAINTIFFS' CLAIMS ARE INTERWOVEN AND SEVERANCE WOULD SIGNIFICANTLY BURDEN VULNERABLE PLAINTIFFS AND UNDERCUT JUDICIAL EFFICIENCY 58

A. The Excessive Force And Assault And Battery Claims Against Andre Walker And Robert Taylor Are Part Of The Pattern And Policy Of Violence That Plaintiffs Experienced At Glen Mills Schools 59

B. The Court Should Not Sever Claims Against Rivera Or PDE Because They All Involve The Unlawful And Unconstitutional Culture Of Glen Mills 61

CONCLUSION 62

TABLE OF AUTHORITIES

CASES

A.M. ex rel. J.M.K. v. Luzerne Cty. Juvenile Det. Ctr.,
372 F.3d 572 (3d. Cir. 2004).....18, 31

A.T. v. Harder,
298 F. Supp. 3d 391 (N.D.N.Y. 2018).....14

Alexander S. By & Through Bowers v Boyd,
876 F. Supp. 773 (D.S.C. 1995), *as modified on denial of reh'g* (Feb. 17, 1995).....19

Andrew M. v. Del. Cty. Office of Mental Health & Mental Retardation,
490 F.3d 337 (3d Cir. 2007).....51

Antrican ex rel. Antrican v. Odom,
290 F.3d 178 (4th Cir. 2002).....35

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....10

Ass'n for Cmty. Living in Colo. v. Romer,
992 F.2d 1040 (10th Cir. 1993).....45

Bardelli v. Allied Servs. Inst. of Rehab. Med.,
No. 14-0691, 2015 WL 999115 (M.D. Pa. Mar. 6, 2015).....43, 52

Batchelor v. Rose Tree Media Sch. Dist.,
759 F.3d 266 (3d Cir. 2014).....48, 57

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....9-11

Bell v. Cheswick Generating Station,
No. 12-929, 2015 WL 401443 (W.D. Pa. Jan. 28, 2015).....15

Bell v. Wolfish,
441 U.S. 520 (1979).....17

Benedict v. Sw. Pa. Human Servs., Inc.,
98 F. Supp. 3d 809 (W.D. Pa. 2015).....30

Beth V. by Yvonne V. v. Carroll,
87 F.3d 80 (3d Cir. 1996).....43

Betts v. New Castle Youth Dev. Ctr.,
621 F.3d 249 (3d Cir. 2010).....19, 20

Blunt v. Lower Merion Sch. Dist.,
559 F. Supp. 2d 548 (E.D. Pa. 2008).....44, 48, 50

Bolick v. Ne. Indus. Servs. Corp.,
666 F. App'x 101 (3d Cir. 2016).....11

Bowers v. Nat'l Collegiate Athletic Ass'n,
475 F. 3d 524 (3rd Cir. 2007).....51

Bradley v. W. Chester Univ. of the Pa. State Sys. of Higher Educ.,
182 F. Supp. 3d 195 (E.D. Pa. 2016).....29

Brian B. ex rel. Lois B. v. Pa. Dep't of Educ.,
230 F.3d 582 (3d Cir. 2000).....27

Burr by Burr v. Sobol,
888 F.2d 258 (2d Cir. 1989).....35

Burrell v. Loungo,
750 F. App'x 149 (3d Cir. 2018).....17

C.F. by and through Flick v. Del. Cty. Intermediate Unit,
No. 17-1599, 2017 WL 4467498 (E.D. Pa. Oct. 6, 2017).....38

Cafasso v. Gen. Dynamics C4 Sys., Inc.,
637 F.3d 1047 (9th Cir. 2011).....12

Clark v Cohen,
794 F.2d 79 (3d Cir. 1986).....37

Coakley v. Welch,
877 F.2d 304 (4th Cir. 1989).....35

Cole v. Newton Special Mun. Separate Sch. Dist.,
676 F. Supp. 749 (S.D. Miss. 1987), *aff'd*, 853 F.2d 924 (5th Cir. 1988).....23

Commonwealth v. Hale,
85 A.3d 570 (Pa. Super. Ct. 2014), *aff'd*, 128 A.3d 781 (Pa. 2015).....18

Corrigan v. Methodist Hosp.,
160 F.R.D. 55 (E.D. Pa. 1995).....58

County of Sacramento v. Lewis,
523 U.S. 833 (1998).....31

Couture v. Bd. of Educ. of Albuquerque Pub. Sch.,
535 F.3d 1243 (10th Cir. 2008) 23

D.L. v. District of Columbia,
450 F. Supp. 2d 11 (D.C. Cir. 2006).....47, 49

Dare v. Township of Hamilton,
Case No. 13-1636, 2013 WL 6080440 (D.N.J. Nov. 18, 2013) 29

DeShaney v. Winnebago Cty. Dep't of Soc. Servs.,
489 U.S. 189 (1989).....30, 31

Ex parte Young,
209 U.S. 123 (1908).....2, 34

F.H. ex rel. Hall v. Memphis City Sch.,
764 F.3d 638 (6th Cir. 2014) 6

Farmer v. Brennan,
511 U.S. 825 (1994).....16

Fetto v. Sergi,
181 F. Supp. 2d 53 (D. Conn. 2001).....35

Fowler v. UPMC Shadyside,
578 F.3d 203 (3d Cir. 2009).....10, 25

Fry v. Napoleon Comty. Sch.,
137 S. Ct. 743 (2017)..... passim

Gary H. v. Hegstrom,
831 F.2d 1430 (9th Cir. 1987) 18

Gaskin v. Pennsylvania,
No. 94-4048, 1995 WL 154801 (E.D. Pa. Mar. 30, 1995) 45, 49

Geist v. Ammary,
40 F. Supp. 3d 467 (E.D. Pa. 2014) 30

Gibbons v. Kvaerner Phila. Shipyard, Inc.,
No. 05-685, 2006 WL 328362 (E.D. Pa. Feb. 10, 2006) 11

Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.,
284 F.R.D. 238 (E.D. Pa. 2012).....13

Goss v. Lopez,
419 U.S. 565 (1975).....2, 21, 22

Graham v. Florida,
560 U.S. 48 (2010).....16

Grieco v. N.J. Dep't of Educ.,
No. 06-4077, 2007 WL 1876498 (D.N.J. June 27, 2007).....51

H.C. by Hewett v. Jarrard,
786 F.2d 1080 (11th Cir. 1986).....18

Hafer v. Melo,
502 U.S. 21 (1991).....28, 29, 34

Handberry v. Thompson,
446 F.3d 335 (2d Cir. 2006).....47, 48, 52

Heinzl v. Cracker Barrel Old Country Store, Inc.,
No. 14-1455, 2015 WL 1925811 (W.D. Pa. Apr. 24, 2015).....13

Hill v. Borough of Kutztown,
455 F.3d 225 (3d Cir. 2006).....24

In re J.F.,
714 A.2d 467 (Pa. Super. Ct. 1998).....17, 18

In re Ry. Indus. Emp. No-Poach Antitrust Litig.,
No. 18-798, 2019 WL 2542241 (W.D. Pa. June 20, 2019).....15

In re Tasseing H.,
422 A.2d 530 (Pa. Super. Ct. 1980).....17

Ingraham v. Wright,
430 U.S. 651 (1977).....17, 18

Issa v. School Dist. of Lancaster,
No. 16-3881, 2016 WL 4493202 (E.D. Pa. Aug. 26, 2016).....21, 27

J.C. v. Ford,
674 F. App'x 230 (3d Cir. 2016).....36, 37

J.D.B. v. North Carolina,
564 U.S. 261 (2011).....20

J.D.G. v. Colonial Sch. Dist.,
748 F. Supp. 2d 362 (D. Del. 2010).....45

J.L. by and through Leduc v. Wyo. Valley W. Sch. Dist.,
722 F. App'x 190 (3d Cir. 2018).....57

J.M. by and through Mata v. Tenn. Dep't of Educ.,
358 F. Supp. 3d 736 (M.D. Tenn. 2018).....51, 52

J.S. ex rel. N.S. v. Attica Cent. Sch.,
386 F.3d 107 (2d Cir. 2004).....47-49, 54

J.S. III v. Houston Cty. Bd. of Educ.,
877 F.3d 979 (11th Cir. 2017).....54, 55

J.T. ex rel. A.T. v. Dumont Pub. Sch.,
533 F. App'x 44 (3d Cir. 2013).....45, 46

J.T. v. Dumont Pub. Sch.,
No. 09-4969, 2012 WL 1044556 (D.N.J. Mar. 28, 2012), *aff'd sub nom. J.T. ex rel. A.T. v. Dumont Pub. Sch.*, 533 F. App'x 44 (3d Cir. 2013).....46

J. v. Sch. Dist. of Phila.,
No. 06-3866, 2007 WL 1221216 (E.D. Pa. Apr. 25, 2007).....43

John T. ex rel. Paul T. v. Del. Cty. Intermediate Unit,
No. 98-5781, 2000 WL 558582 (E.D. Pa. May 8, 2000).....27

K.G. by & through Gosch v. Sergeant Bluff-Luton Cmty. Sch. Dist.,
244 F. Supp. 3d 904 (N.D. Iowa 2017).....56

K.M. v. Alabama Dep't of Youth Servs.,
360 F. Supp. 2d 1253 (M.D. Ala. 2005).....19

Kaucher v. County of Bucks,
455 F.3d 418 (3d Cir. 2006).....16

Kedra v. Schroeter,
876 F.3d 424 (3d Cir. 2017).....31-33

Kimmel v. Cavalry Portfolio Servs., LLC,
747 F. Supp. 2d 427 (E.D. Pa. 2010).....57

Kingsley v. Hendrickson,
135 S. Ct. 2466 (2015).....31, 32

Komninos v. Upper Saddle River Bd. of Educ.,
13 F.3d 775 (3d Cir. 1994).....43

Koslow v. Pennsylvania,
302 F.3d 161 (3d Cir. 2002).....34

L.R. v. Sch. Dist. of Phila.,
836 F.3d 235 (3d Cir. 2016).....31, 32, 34

L.T. v. N. Penn Sch. Dist.,
342 F. Supp. 3d 610 (E.D. Pa. 2018) 42

Landsman & Funk PC v. Skinder-Strauss Assocs.,
640 F.3d 72 (3rd Cir. 2011) 14

Lauren W. ex rel. Jean W. v. DeFlaminis,
480 F.3d 259 (3d Cir. 2007).....35, 44, 51

Lawton v. Success Acad. Charter Sch., Inc.,
323 F. Supp. 3d 353 (E.D.N.Y. 2018) 54, 55

Little v. Terhune,
200 F. Supp. 2d 445 (D.N.J. 2002) 27

Lopez v. City of Irvington,
No. 05-5323, 2008 WL 565776 (D.N.J. Feb. 28, 2008) 59

M.C. ex rel. R.C. v. Perkiomen Valley Sch. Dist.,
No. 14-5707, 2015 WL 2231915 (E.D. Pa. May 11, 2015).....57

M.M. v. Paterson Bd. of Educ.,
736 F. App'x 317 (3d Cir. 2018) 49

Mann v. Boatright,
477 F.3d 1140 (10th Cir. 2007) 12

Mann v. Brenner,
375 F. App'x 232 (3d Cir. 2010) 25

Marcus v. BMW of N. Am., LLC,
687 F.3d 583 (3d Cir. 2012).....15

Mathews v. Eldridge,
424 U.S. 319 (1976).....25

Miller v. Alabama,
567 U.S. 460 (2012).....16, 20

Miller v. Hygrade Food Prods. Corp.,
202 F.R.D. 142 (E.D. Pa. 2001).....58

Milliken v. Bradley,
433 U.S. 267 (1977).....37, 44

Milonas v. Williams,
691 F.2d 931 (10th Cir. 1982) 19

Moyer v. Aramark,
No. 18-2267, 2019 WL 1098951 (E.D. Pa. Mar. 7, 2019) 30

Muskrat v. Deer Creek Pub. Sch.,
715 F.3d 775 (10th Cir. 2013) 56

N.J. Prot. & Advocacy, Inc. v. N.J. Dep't of Educ.,
563 F. Supp. 2d 474 (D.N.J. 2008) 45, 48, 49

N.J. v. New York,
872 F. Supp. 2d 204 (E.D.N.Y. 2011) 36

N.M. v. Wyo. Valley W. Sch. Dist.,
No. 15-1585, 2016 WL 2757395 (M.D. Pa. May 11, 2016).....42

New York by Schneiderman v. Utica City Sch. Dist.,
No. 15-1364, 2016 WL 1555399 (N.D.N.Y. Apr. 18, 2016).....25

Nicini v. Morra,
212 F.3d 798 (3d Cir. 2000) (en banc).....31

Official Comm. of Unsecured Creditors v. Shapiro,
190 F.R.D. 352 (E.D. Pa. 2000).....58

Oravetz v. W. Allegheny Sch. Dist.,
74 Pa. D. & C.2d 733 (Pa. Ct. Com. Pl. 1975) 36

Orozco by Arroyo v. Sobol,
703 F. Supp. 1113 (S.D.N.Y. 1989).....25

P.G. by & through R.G. v. Rutherford Cty. Bd. of Educ.,
313 F. Supp. 3d 891 (M.D. Tenn. 2018).....56

P.V. ex rel. Valentin v. Sch.Dist. of Phila.,
No. 11-04027, 2011 WL 5127850 (E.D. Pa. Oct. 31, 2011) 46

Papasan v. Allain,
478 U.S. 265 (1986).....37

Patrick v. Success Acad. Charter Sch., Inc.,
354 F. Supp. 3d 185 (E.D.N.Y. 2018) 22-24

Pearson v. Callahan,
555 U.S. 223 (2009).....30

Performance HR, Ltd., Inc. v. Archway Ins. Servs. LLC,
No. 08-3432, 2008 WL 4739381 (E.D. Pa Oct. 23, 2008) 13

PG Publ'g Co. v. Aichele,
705 F.3d 91 (3d Cir. 2013).....25

Plyler v. Doe,
457 U.S. 202 (1982).....36

R.G. v. Koller,
415 F. Supp. 2d 1129 (D. Haw. 2006).....19

Rayan R. v. Nw. Educ. Intermediate Unit No. 19,
No. 11-1694, 2012 WL 398781 (M.D. Pa. Feb. 7, 2012).....12

Real Alternatives, Inc. v. Sec'y Dep't of Health and Human Servs.,
867 F.3d 338 (3d Cir. 2017).....26

Riggan v. Midland Indep. Sch. Dist.,
86 F. Supp. 2d 647 (W.D. Tex. 2000).....23

Roper v. Simmons,
543 U.S. 551 (2005).....16

Rovner v. Keystone Human Services,
No. 11-2335, 2013 U.S. Dist. LEXIS 111336 (M.D. Pa. July 18, 2013) 52

S.B. by and through Kristina B. v. Cal. Dep't of Educ.,
327 F. Supp. 3d 1218 (E.D. Cal. 2018).....35, 37, 50

S.D. by A.D. v. Haddon Heights Bd. of Educ.,
722 F. App'x 119 (3d Cir. 2018) 57

S.G. v. Success Acad. Charter Sch., Inc.,
No. 18-2484, 2019 WL 1284280 (S.D.N.Y. Mar. 20, 2019).....54, 55

S.H. ex rel. Durrell v. Lower Merion Sch. Dist.,
729 F.3d 248 (3d Cir. 2013).....51

Santana v. Collazo,
714 F.2d 1172 (1st Cir. 1983).....18

Scaggs v. N.Y. Dep't of Educ.,
No. 06-0799, 2007 WL 1456221 (E.D.N.Y. May 16, 2007).....49

Semenko v. Wendy's Int'l, Inc.,
No. 12-0836, 2013 WL 1568407 (W.D. Pa. Apr. 12, 2013).....14

St. Johnsbury Acad. v. D.H.,
240 F.3d 163 (2d Cir. 2001).....43

Summit Med. Assocs. v. Pryor,
180 F.3d 1326 (11th Cir. 1999) 35

Susavage v. Bucks County Schools Intermediate Unit No. 22,
No. 00-6217, 2002 WL 109615 (E.D. Pa. 2002) 39

Swank v. Wal-Mart Stores, Inc.,
Nos. 13-1185 & 14-267, 2015 WL 1508403 (W.D. Pa. Mar. 31, 2015) 15

Taylor v. Metuchen Pub. Sch. Dist.,
No. 18-1842, 2019 WL 1418124 (D.N.J. Mar. 28, 2019) 22

U.S. ex rel. Garst v. Lockheed-Martin Corp.,
328 F.3d 374 (7th Cir. 2003) 12

Ullmo ex rel. Ulmo v. Gilmour Acad.,
273 F.3d 671 (6th Cir. 2001) 43

United States v. Console,
13 F.3d 641 (3d Cir. 1993).....60, 62

Untracht v. Fikri,
368 F. Supp. 2d 409 (W.D. Pa. 2005).....11

Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,
535 U.S. 635 (2002).....34

Vicky M. v. Ne. Educ. Intermediate Unit 19,
486 F. Supp. 2d 437 (M.D. Pa. 2007).....49

Village of Willowbrook v. Olech,
528 U.S. 562 (2000) (per curiam).....25

Wellman v. Butler Area Sch. Dist.,
877 F.3d 125 (3d Cir. 2017).....54, 55

Whitley v. Albers,
475 U.S. 312 (1986).....19

Wilburn v. Nelson,
329 F.R.D. 190 (N.D. Ind. 2018).....14

Williams v. Fulton Cty. Sch. Dist.,
181 F. Supp. 3d 1089 (N.D. Ga. 2016).....23

Youngberg v. Romeo,
457 U.S. 307 (1982).....17, 31

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. amend. VIII ..... passim

U.S. Const. amend. XI 28, 34, 35, 51

U.S. Const. amend. XIV ..... passim

Americans with Disabilities Act (ADA) ..... passim

Individuals with Disabilities Education Act (IDEA) ..... passim

Section 504 of the Rehabilitation Act ..... passim

20 U.S.C.A. § 1401 ..... 38, 39, 43

42 U.S.C. § 2000d-7 ..... 34, 51

42 U.S.C. § 12202 51

Pennsylvania Juvenile Act 17, 18, 26

24 P.S. § 9-901-A 38, 39

24 P.S. § 9-914.1-A 22, 39, 40, 42

24 P.S. § 13-1301 21

24 P.S. § 13-1302 21

24 P.S. § 13-1305 21

24 P.S. § 13-1306 ..... 21, 41, 42

24 P.S. § 13-1372 ..... 38, 39

42 Pa.C.S.A. § 6301 ..... 16, 18

42 Pa.C.S.A. § 6352 18

42 Pa.C.S.A. § 6354 18

OTHER AUTHORITIES

34 C.F.R. § 300.12 38

34 C.F.R. § 300.28 38

34 C.F.R. § 300.177 34

22 Pa. Code § 11.11 21

22 Pa. Code § 12.8 21

22 Pa. Code § 14.103 .....38, 39, 43

Fed. R. Civ. P. 8 10-13

Fed. R. Civ. P. 10 .....10, 11, 13

Fed. R. Civ. P. 12 9-10

Fed. R. Civ. P. 15 15

Fed. R. Civ. P. 21 58

Fed. R. Civ. P. 23 .....14, 15

Fed. R. Civ. P. 42 58

INTRODUCTION

Plaintiffs and hundreds of other young men at Glen Mills Schools were violently abused and mistreated by the very people who were charged with protecting and educating them. Plaintiffs suffered persistent physical, emotional, and mental abuse at the hands of Glen Mills staff and administrators. Glen Mills also abjectly failed to provide an adequate education for the youth in its care, and committed multiple violations against students with disabilities. Because those tasked with oversight failed to perform their jobs, these atrocities went unchecked for many years. This lawsuit, beginning with the Complaint filed by Plaintiffs, is an appropriate vehicle for redressing these serious and systemic wrongs. In moving to dismiss the Complaint, Defendants have failed to provide any sufficient legal basis for why this case should not move forward. Accordingly, Plaintiffs respectfully ask that the Court deny Defendants' Motions to Dismiss in their entirety.

Defendants' arguments are legally baseless and repeatedly misrepresent the facts as pled in the Complaint. In seeking dismissal under Federal Rules of Civil Procedure 8 and 10, Defendants misstate the law and incorrectly attempt to downplay the complexity of this suit, which alleges eighteen counts against thirteen named Defendants on behalf of four named Plaintiffs who themselves represent multiple classes and subclasses. The Complaint's length and structure are justified. Even if the Court disagrees, the proper remedy is not dismissal, but instead for Plaintiffs to amend the Complaint. Likewise, Defendants offer no basis for why this Court should take the extreme measure of striking Plaintiff's class allegations before class certification or discovery. The request is both premature and legally flawed. These issues are properly dealt with at the class certification stage, not now. And, in all events, the pleadings show that the class and subclasses are ascertainable and that common issues predominate over individual ones.

In seeking to dismiss Plaintiffs' claims, Defendants fail to properly state the applicable legal standards. The argument advanced by some (but not all) Defendants that an Eighth

Amendment standard should apply both ignores the fact that Plaintiffs were adjudicated through the juvenile justice system and the many binding and persuasive authorities that analyze similar facts concerning adolescents under the framework of the Fourteenth Amendment. In any event, Plaintiffs have pled facts sufficient to support claims under either the Eighth or Fourteenth Amendment. The Procedural Due Process claim should plainly proceed because Plaintiffs properly alleged that their property interest in a free public education was systematically interfered with if not completely abridged by Glen Mills and its regulators. And Plaintiffs alleged that *no process at all* was provided to them to challenge their exclusion from a state-defined education and that their complaints were typically met with more abuse. Plaintiffs thus suffered far worse than the ten-day suspension the Supreme Court recognized as an unconstitutional deprivation in *Goss v. Lopez*. Likewise, Plaintiffs' Equal Protection claim is valid because Plaintiffs properly pled that their educational options of either self-directed GED study or a self-directed computer-based credit recovery program were vastly inferior to the offerings at other institutions. Although this reality violated state requirements, officials did nothing to rectify it.

Defendants' immunity defenses are also unavailing. Secretary Rivera cannot claim sovereign immunity because Plaintiffs sued him in his official capacity seeking prospective injunctive relief—exactly the kind of relief that the Supreme Court has long permitted under *Ex parte Young*. Similarly, Defendants Miller, Dallas, and Utz cannot claim sovereign immunity because they were appropriately sued in their individual capacities. Nor can they hide behind qualified immunity, where they concede that Plaintiffs' rights are clearly established, and where they violated those rights by doing nothing to protect Plaintiffs despite actual knowledge of Glen Mills' violent and abusive culture. Nor can the Chester County Intermediate Unit ("CCIU") escape liability by denying its role as the public agency responsible for ensuring that *all* students,

including those with disabilities, receive an appropriate education under state law.

Defendants are also wrong to argue that Plaintiffs' IDEA claims require exhaustion of administrative remedies because they plainly fall within the well-recognized futility exception. In Glen Mills' case, its status as a private school places it outside the Individuals with Disabilities Education Act's ("IDEA") administrative hearing process and thus, for it, exhaustion is a meaningless legal concept. With respect to the Pennsylvania Department of Education ("PDE") and CCIU, Plaintiffs allege that they systematically abdicated their legal responsibilities by failing to monitor and oversee Glen Mills Schools and ensure the existence of a special education process to serve any student with a disability. These are systemic challenges that the administrative process is not designed to redress; exhaustion would be pointless. Nor is exhaustion required for Plaintiffs' state education law, Equal Protection, or Procedural Due Process claims, because, applying *Fry v. Napoleon Community Schools*, they do not center on the denial of a free appropriate public education. Similarly, Plaintiffs' claims under Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act deal primarily with mistreatment, based on disability, denial of equal access to educational opportunities, exclusion, discriminatory physical abuse, and denial of access to rehabilitation programs—none of which relate to the denial of a free appropriate public education and none of which, under *Fry*, requires exhaustion.

Finally, the Court should deny the suggestion of several Defendants' to sever Plaintiffs' claims. All of those claims involve actions that took place at Glen Mills throughout its residential units and that were manifestations of a culture of violence, abuse, and neglect. Glen Mills' sadistic culture was made possible through the actions and conduct of administrators and staff, including these individual defendants, and it escaped the indifferent eye of the state regulatory agencies tasked with preventing exactly this kind of suffering and deprivation of rights. Plaintiffs' claims

are accordingly interwoven together and will be proven by common sources of evidence. Deciding them together would be the most efficient and appropriate path forward.

For all of the above reasons, which are examined in greater detail below, Defendants' Motions to Dismiss should be denied and the case should move on to the discovery phase.

FACTUAL BACKGROUND

State juvenile court judges ordered teenaged Plaintiffs Derrick, Walter, Thomas, Sean, and all members of the proposed class to be placed at Glen Mills, a juvenile justice facility for the care, supervision, and rehabilitation of youth adjudicated delinquent. (Compl. ¶¶ 17, 19, 21-22, 39.) Instead of receiving rehabilitation and treatment, Plaintiffs endured physical abuse, intimidation, medical neglect, and were deprived of a legally compliant education. (*See, e.g.*, Compl. ¶¶ 2-7, 17-22, 45-47, 54, 56-83, 90-122, 127-153, 156-178, 180, 182, 185-200, 208, 211-12, 215-17, 220-21, 224-35, 237-40, 252-62, 266-69, 271-82, 298-26, 329-35, 347-60, 365-68.)

Physical Abuse at Glen Mills

Glen Mills, its leadership, and its staff, including Defendants Randy Ireson, Andre Walker, Robert Taylor, and various John Does, contributed to the abuse and violence Plaintiffs experienced throughout their time at Glen Mills. (*See, e.g.*, Compl. ¶¶ 28-30, 108, 131, 171-72, 193.) For example, Derrick was head-butted by Defendant Walker for not "shutting up," assaulted by four staff members in the cafeteria for not tying his shoes, and punched in the middle of the night by other youth while staff did nothing to protect him. (Compl. ¶¶ 109-13.) Physical abuse also took place in the classroom, such as when a staff member slammed Derrick on a desk and dragged him across the floor. (Compl. ¶ 114.) Thomas was required to complete his credit recovery education course within his units at Van Buren and Tyler Hall, where he witnessed and experienced physical abuse, including receiving a black eye from a staff member after Thomas bumped into him. (Compl. ¶¶ 156, 169-77.) Walter also faced extreme abuse when Defendant Sean Doe assaulted

him with a metal pin, and Defendant Taylor violently assaulted him after he attempted to run away from the abuse at Glen Mills. (Compl. ¶¶ 131, 133-34.) Glen Mills staff even failed to protect Plaintiff Sean from another student, who broke Sean's jaw. (Compl. ¶¶ 193, 197.) After Sean's mouth was eventually wired shut to help his jaw heal, Glen Mills staff forced him to subsist on a diet limited to milk and the occasional Gatorade. (Compl. ¶ 19.) Glen Mills further harmed Plaintiffs by failing to provide adequate medical treatment for their injuries resulting from the abuse. (Compl. ¶¶ 3, 65-66, 194-97, 230.)

These specific instances of abuse took place within the broader violent culture of Glen Mills, which included almost daily violence by Glen Mills staff on youth; Glen Mills staff encouraging youth to fight other youth; Defendants Ireson and the Glen Mills Leadership Team's (together, "Glen Mills Leadership Defendants") failure to properly train, discipline, and supervise staff; and Glen Mills Leadership Defendants' and staff members' failure to properly supervise youth to ensure they were protected from violence. (Compl. ¶¶ 54, 57-60, 62-63, 67-69, 74-77.) Glen Mills staff also discouraged youth from speaking out about the violence and other problems at Glen Mills by publicly assaulting youth as an intimidation tactic, taking away weekend or holiday passes, moving students to different units, and implementing various other punishments. (Compl. ¶¶ 71, 78-80.) Glen Mills Leadership threatened to or actually fired staff who reported abuse. (Compl. ¶¶ 72-74.) Glen Mills staff would also cover up abuse by confining injuries to students' torsos or falsely telling families that students' injuries were sports-related. (Compl. ¶ 61.)

Systemic Deprivations of General Education and Special Education

The rampant abuse at Glen Mills also undermined Plaintiffs' ability to learn. (Compl. ¶ 237.) Plaintiffs attended school on the same units where they lived with staff members. Thus, their education suffered as a result of all the abuse they witnessed. (Compl. ¶¶ 54, 156, 169-78,

257.) Students with disabilities were especially burdened by the abuse because Glen Mills subjected them to physical force, restraint, isolation, and other disciplinary sanctions without first determining whether their behaviors were disability-related. (Compl. ¶¶ 60, 351-57.) In addition, Glen Mills lacked a system for providing individualized special education services and disability accommodations. (Compl. ¶ 330.) As a result, students with disabilities failed to make academic progress and remained at Glen Mills longer than necessary. (Compl. ¶¶ 332-33.) Plaintiffs Tina and Janeva are the next friends of Derrick and Walter, respectively, and also bring their own claims under the IDEA for their wholesale exclusion as parents of children with disabilities from the educational planning process. (Compl. ¶¶ 18, 20, 318.)

Many students experienced absolute deprivations of education due to extensive delays, interruptions, lack of access to computers, and Glen Mills-required sports obligations whereby they had no access to any educational program for weeks or months at a time. (Compl. ¶¶ 90, 92, 129, 136, 145, 167, 185-88, 256, 269.) Other school-age youth were deprived of a secondary education because they were diverted to a GED program. (Compl. ¶¶ 261-62.) Staff unilaterally assigned students entering Glen Mills to either an independent GED study (often in violation of age restrictions under state law) or a self-directed computer-based credit recovery program. (Compl. ¶¶ 5, 254, 260-61.) This on-line credit recovery program failed to align with required state curricula and minimum hours of instruction (Compl. ¶¶ 107, 143, 153, 165-66, 188, 253) and provided no qualified teachers or classroom instruction. (Compl. ¶¶ 91, 106, 128, 158, 162, 178, 239, 256, 266-67.) Students had no recourse to process by which they could challenge or complain about these education and schooling violations (Compl. ¶ 258), and, in fact, students were abused and retaliated against for complaining about their lack of education or inability to access or

complete their computer-based credit recovery program because they were not given computers. (Compl. ¶¶ 118, 128-29, 185.)

Glen Mills' computer-based educational program did not allow for individually tailored instruction or modifications to the education program that would reflect a students' Individualized Education Program ("IEP") or Section 504 Plans. (Compl. ¶¶ 90-91, 128-30, 330.) Students who believed that, due to their disabilities, their learning needs would not be met by the computer-based program were forced to participate in the non-credit bearing GED program. (Compl. ¶¶ 141, 331.)

Failures of Government Agencies and Officials

Secretaries Miller and Dallas, and Deputy Secretary Utz were responsible for the relevant policies at PA-DHS and the Office of Children, Youth, and Families ("OCYF"), the agency and office in charge of licensing and overseeing child residential facilities in Pennsylvania. (Compl. ¶¶ 32-34, 204-06.) They knew about the routine violence against youth at Glen Mills yet failed to take any meaningful action to stop it. (Compl. ¶ 208.) PA-DHS officials, who all reported to Miller, Dallas, or Utz, received numerous written complaints about child abuse at Glen Mills, including abuse that resulted in a broken jaw, along with reports of staff slapping, slamming heads into countertops and fire extinguishers, body slamming, throwing youth through closet doors, failing to employ de-escalation techniques, improperly restraining students, and failing to report abuses. (Compl. ¶¶ 211-12, 221, 228; *see also generally id.* at Exs. A & C.) PA-DHS officials, together with state police officers, were refused access to interview a child regarding abuse, resulting in a serious confrontation between state police and Glen Mills officials. (Compl. ¶¶ 224-25.) Anonymous letters to OCYF triggered targeted site visits of youth, during which OCYF staff concluded that Glen Mills staff were not protecting youth; that they restrained youth by the neck, forced haircuts as punishment, and choked youth; that Defendant Ireson failed to ensure the safety

of youth within the facility; and that staff at times delayed medical treatment. (Compl. ¶¶ 226-27; *see also generally id.* at Exs. A & C.) Other agencies and the media also alerted PA-DHS Defendants to the ongoing abuse at Glen Mills: the Department of Justice was investigating Glen Mills for civil rights violations (Compl. ¶ 209); several jurisdictions stopped sending youth to Glen Mills for fear of abuse (Compl. ¶¶ 218-19, 221, 233); national organizations called on PA-DHS to improve conditions at Glen Mills (Compl. ¶ 223); and news stories highlighted concerns about mistreatment of youth at Glen Mills (Compl. ¶¶ 220, 223, 233).

Despite the knowledge of these significant abuses, and Glen Mills' noncompliance with numerous 3800 regulations, Miller's, Dallas's, and Utz's offices continued to license Glen Mills. Indeed, none of these officials issued an emergency removal order until March 2019, and did not revoke Glen Mills' license until April 2019. (Compl. ¶ 208.)

PDE and CCIU also failed to ensure youth at Glen Mills received a legally compliant general education or special education program. (Compl. ¶ 6.) PDE, as the state education agency ("SEA"), did not exercise oversight or conduct compliance monitoring as required and failed to ensure that children with disabilities placed at Glen Mills, a private school, received a free appropriate public education and education consistent with federal and state standards. (Compl. ¶¶ 277-80, 326, 363-67.) PDE provided no monitoring of Glen Mills' provision of education, including ensuring that Glen Mills was teaching the required curriculum or providing the minimum number of instruction hours required by law. (Compl. ¶¶ 241, 366.) PDE never evaluated or considered the quality of education provided to thousands of children at Glen Mills (Compl. ¶ 280), and only monitored the special education program once every six years, thereby failing to ensure compliance with rights and protections mandated by the IDEA and to ensure that children with disabilities at Glen Mills received a free appropriate public education. (Compl. ¶ 326.)

CCIU also systematically failed to ensure a system for the provision of the special education services by Glen Mills Schools, as required pursuant to law and to its contract. (Compl. ¶ 300.) CCIU did not participate in IEP meetings or ensure there was a system to provide any of the cornerstone components of the IDEA, including parent participation, the development of individualized IEPs, the implementation of IEPs, the availability of related services, or the continuum of placements. (Compl. ¶¶ 300-03.) As a result, students with disabilities and other students at Glen Mills languished in a one-size-fits-all credit recovery program or GED program. (Compl. ¶¶ 306-08, 310-13, 317, 319.)

PDE's and CCIU's lack of oversight and monitoring also subjected Plaintiffs to disability-related physical force, restraint, isolation, and disciplinary sanctions, and denied them educational opportunities on the basis of their disabilities. (Compl. ¶¶ 105, 109, 112-14, 129-30, 359-60, 460.) As a result, Plaintiffs were abused, removed from the classroom, segregated, denied instruction, and denied equal access to programs on the basis of their disabilities. (Compl. ¶¶ 114, 129-30, 131-34, 136, 352-60.)

In addition to the life-altering trauma, Plaintiffs' experience at Glen Mills (Compl. ¶¶ 7, 152) caused significant disruption to their education, causing Plaintiffs to lose months or years of academic instruction and progress, undermining their ability to graduate on time—or at all—and limiting their educational and employment opportunities and earnings. (Compl. ¶ 282.) Plaintiffs bring this case to seek redress for the multiple violations of their rights described above. (Compl. ¶ 8.)

LEGAL ARGUMENT

I. STANDARD AND SCOPE OF REVIEW

Courts may grant motions to dismiss under Fed. R. Civ. P. 12(b)(6) only where a plaintiff has not pled sufficient facts to state a claim for relief that is "plausible" on its face. *Bell Atl. Corp.*

v. Twombly, 550 U.S. 544, 570 (2007). This "facial plausibility" standard does not require a plaintiff to demonstrate in any way a "probability" of success, but rather requires the pleading of factual content that allows the court to draw a "reasonable inference" that a defendant may be liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Factual allegations in a complaint must be "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action" and must set out "sufficient factual matter" to show that the claim is facially plausible. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Twombly*, 550 U.S. at 555, 564) (overturning lower court decision where the complaint, while not rich in detail, included sufficient facts to support plausible claims of employment discrimination).

In evaluating Rule 12(b)(6) motions, courts must accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. *Fowler*, 578 F.3d at 210.

II. PLAINTIFFS' CLAIMS COMPLY WITH RULES 8 AND 10 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Court should deny Defendants' baseless motion to dismiss Plaintiffs' Complaint under Rules 8 and 10.

The Federal Rules of Civil Procedure provide, in relevant part, that a pleading "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under this standard, a complaint must be written so as to provide "'fair notice of what the . . . claim is and the grounds upon which it rests,'" which "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Twombly*, 550 U.S. at 555 n.3 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Federal courts in Pennsylvania have long recognized that "Rule 8(a)(2) 'must be applied with some logic and common sense. The length of a pleading will depend upon a number of factors, not the least of which is the *complexity of the case*.'" *Untracht v. Fikri*, 368 F. Supp. 2d 409, 412 (W.D. Pa. 2005) (emphasis added) (internal quotation marks and citation omitted).

Meanwhile, Rule 10 provides, in relevant part, that "[a] party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances." Fed. R. Civ. P. 10(b). This Rule, too, is applied with logic and common sense: "What constitutes a single set of circumstances will depend upon the nature of the action and be determined in light of the basic objective of the rule, which is to ensure that the contents of each paragraph are composed so as to produce a lucid pleading." *Gibbons v. Kvaerner Phila. Shipyard, Inc.*, No. 05-685, 2006 WL 328362, at *8 (E.D. Pa. Feb. 10, 2006) (internal quotation marks and citation omitted).

Courts rarely grant relief on these grounds, other than where complaints are so rambling or incoherent that they fail to provide notice to defendants on plaintiffs' claim—which can hardly be said in these circumstances.

As CCIU Defendants concede, "a class action lawsuit intended to address years of alleged abuse in a public institution plainly requires some latitude for elaboration." (CCIU Mem. Supp. Mot. Strike 5, ECF No. 12-1.) The Complaint sets forth eighteen counts of systematic abuse carried out by thirteen named Defendants against four named Plaintiffs, who themselves represent multiple classes of other young men who suffered abuse at the hands of Defendants. The Complaint contains strong language because strong language is warranted. While courts disfavor "irrelevant" facts that do not "satisfy the elements of any of the causes of action [plaintiffs] attempt[] to raise," *Bolick v. Ne. Indus. Servs. Corp.*, 666 F. App'x 101, 104 (3d Cir. 2016), Plaintiffs' Complaint

details numerous instances of abuse and neglect that are all relevant to Plaintiffs' eighteen causes of action.

None of the precedents that Defendants cite support their argument. In *Mann v. Boatright*, the Tenth Circuit upheld dismissal of an individual plaintiff's 99-page complaint for violating Rule 8, when that complaint contained only one cause of action that "[went] on for 463 paragraphs spanning 83 pages [that] neither identifie[d] a concrete legal theory nor target[ed] a particular defendant." 477 F.3d 1140, 1148 (10th Cir. 2007). By contrast, here the four named Plaintiffs plead eighteen causes of action on behalf of multiple classes, using targeted allegations against thirteen defendants. Nor does *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, where the plaintiff was seeking leave to file an amended *733 page* complaint, have any bearing on the completely coherent and appropriately tailored complaint here. 637 F.3d 1047, 1059 (9th Cir. 2011).

Indeed, if anything, Defendants' precedents only undermine their argument. For instance, in *U.S. ex rel. Garst v. Lockheed-Martin Corp.*, the Seventh Circuit upheld dismissal of the plaintiff's *third* amended complaint that remained "so long, so disorganized, so laden with cross-references and baffling acronyms, that they could not alert either the district judge or the defendants to the principal contested matters." 328 F.3d 374, 378 (7th Cir. 2003). Certainly the same cannot be said here, where the allegations and related Defendants are made clear throughout the Complaint. And in *Garst* the Seventh Circuit expressly emphasized that "[a] district court is not authorized to dismiss a complaint merely because it contains repetitious and irrelevant matter, a disposable husk around a core of proper pleading." *Id.* (internal quotation marks and citation omitted). Courts within this Circuit agree. *See, e.g., Rayan R. v. Nw. Educ. Intermediate Unit No. 19*, No. 11-1694, 2012 WL 398781, at *4 (M.D. Pa. Feb. 7, 2012) ("Dismissal . . . is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise

unintelligible that its true substance, if any, is well disguised." (internal quotation marks and citation omitted)).

Motions to strike are a "drastic remedy" and one "generally viewed with disfavor by the courts." *Performance HR, Ltd., Inc. v. Archway Ins. Servs. LLC*, No. 08-3432, 2008 WL 4739381, at * 29 (E.D. Pa Oct. 23, 2008) (internal quotation marks and citation omitted). Because Plaintiffs' legal theories and factual allegations are clearly articulated and appropriately tailored to the significance and complexity of this case, the Court should deny Defendants' baseless request to strike the Complaint under Rule 8 or Rule 10.[1]

III. DEFENDANTS OFFER NO BASIS TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS

Defendants have no basis for striking Plaintiffs' class allegations prior to discovery or class certification briefing. Plaintiffs have met their obligations to plead a proper class and subclasses, and "district courts within the Third Circuit typically conclude that motions to strike class action allegations filed before plaintiffs move for class certification are premature." *Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 284 F.R.D. 238, 244 (E.D. Pa. 2012). In *Goode*, the court explained that classes are stricken before certification proceedings only in "the rare few [cases] where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met" and where "[n]o amount of additional class discovery will alter th[e] conclusion that the class is not maintainable." *Id.* at 244, 246 (internal quotation marks and citations omitted); *see also Heinzl v. Cracker Barrel Old Country Store, Inc.*, No. 14-1455, 2015 WL 1925811, at *2 (W.D. Pa. Apr. 24, 2015). While the Third Circuit has allowed that these "rare few [cases]" may exist, it

[1] To the extent the Court believes any of Plaintiffs' allegations violate Rule 8 or Rule 10, the appropriate remedy would be to allow leave to amend, not to strike the Complaint itself.

has held that, "[i]n most cases, some level of discovery is essential to such an evaluation." *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 93, 93 n.30 (3rd Cir. 2011).

Plaintiffs adequately pled their class and subclasses, and Defendants offer no basis to strike these proposed classes at this early juncture, prior to discovery or class certification briefing. As set forth in the Complaint, Plaintiffs' proposed classes are ascertainable and can be identified using objective criteria, including, but not limited to, juvenile records, medical records, disciplinary records, residency records, and education records. The means of identifying class members is a matter for future class certification briefing but will not require extensive and individualized fact-finding or "mini-trials" as to prohibit certification. Indeed, class members are readily identifiable based on Glen Mills' own records. *See A.T. v. Harder*, 298 F. Supp. 3d 391, 411 (N.D.N.Y. 2018) (deeming inmate plaintiffs' class with claims under the IDEA ascertainable because the class was "readily identifiable pursuant to objective criteria, such as records maintained by defendants"). Defendants' contention that Plaintiffs may not allege a class using educational and medical parameters is simply not true. *See, e.g.*, *Wilburn v. Nelson*, 329 F.R.D. 190, 195 (N.D. Ind. 2018) (certifying inmate classes under Rule 23(b)(1), (b)(2) and (b)(3), including an IDEA subclass, where plaintiffs were "attacking the [prison's] rote policy . . . not challenging the application of it in any given circumstance."); *A.T. v. Harder*, 298 F. Supp. 3d at 411 (certifying subclass of inmate plaintiffs seeking IDEA relief). And Defendants' reliance on *Semenko v. Wendy's Int'l, Inc.*, No. 12-0836, 2013 WL 1568407 (W.D. Pa. Apr. 12, 2013) for the proposition that a court cannot determine class members' disabilities on a class-wide basis is also misplaced. In that case, the court refused to certify a class of Wendy's employees for protection under the ADA because the class members were not easily ascertainable and would require too many factual inquiries. *Id.* at

*9. Here, substantial records exist to define the classes based on medical and educational records of Glen Mills' residents.

Moreover, as reflected in the Complaint, Plaintiffs' proposed class and subclasses are based upon common questions of law and fact that predominate over individual issues, making class resolution a superior method of addressing Plaintiffs' claims. A class is properly certified under Rule 23(b)(3) when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Here, the Complaint details numerous instances where Defendants' policies, actions, and failures to act caused cognizable harm to Plaintiffs as a whole. *See Swank v. Wal-Mart Stores, Inc.*, Nos. 13-1185 & 14-267, 2015 WL 1508403, at *4 (W.D. Pa. Mar. 31, 2015). And, recognizing that there are some distinctions among potential class members, Plaintiffs have appropriately proposed a class and four subclasses. In short, Defendants' effort to attack Plaintiffs' class allegations at this stage are both premature and without merit, and should accordingly be rejected.[2]

IV. PLAINTIFFS HAVE SUFFICIENTLY STATED CLAIMS UNDER THE FOURTEENTH AMENDMENT FOR EXCESSIVE FORCE, DENIAL OF PROTECTION FROM HARM, AND INADEQUATE MEDICAL CARE AGAINST GLEN MILLS, GLEN MILLS LEADERSHIP DEFENDANTS, ANDRE WALKER, AND ROBERT TAYLOR

Defendants disagree on the proper standard for analyzing Plaintiffs' Section 1983 claims of excessive force, lack of protection from harm, and inadequate medical treatment. In arguing to dismiss Plaintiffs' Fourteenth Amendment claims, Glen Mills Defendants, Taylor, and Walker

[2] Even if Defendants' concerns were valid, the appropriate remedy is to grant Plaintiffs leave to amend their Complaint, not to dismiss outright. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend the pleadings] when justice so requires."); *see also Bell v. Cheswick Generating Station*, No. 12-929, 2015 WL 401443, at *7 (W.D. Pa. Jan. 28, 2015) (granting plaintiffs leave to amend class allegations); *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 18-798, 2019 WL 2542241, at *39 (W.D. Pa. June 20, 2019) (same); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) (same).

wrongly conflate youth adjudicated through the juvenile justice system with adults convicted through the criminal justice system. (*See* GMS Mem. Supp. Mot. Dismiss 24-26, ECF No. 46-1; Taylor Mem. Supp. Mot. Dismiss 3-4, ECF No. 48-1; Walker Mem. Supp. Mot. Dismiss 14-15, ECF No. 43.) As Commonwealth Defendants explain, Plaintiffs' claims are properly analyzed under the Fourteenth Amendment, rather than the Eighth, because Plaintiffs are youth adjudicated through the juvenile justice system—not convicted of crimes as adult prisoners.[3] (Com. Mem. Supp. Mot. Dismiss 16-17, ECF No. 47-1.) Plaintiffs, moreover, have sufficiently pled facts to support claims under either a Fourteenth Amendment or a traditional Eighth Amendment analysis.[4] Indeed, Glen Mills Defendants, Walker, and Taylor do not move to dismiss Plaintiffs' Eighth Amendment claims. The appalling conditions and conduct at Glen Mills cannot pass constitutional muster under any standard.

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[3] The claims against DHS Defendants are also properly analyzed under the Fourteenth Amendment because DHS Defendants have a "special relationship" with Plaintiffs, as discussed in Section VI.B.

[4] The Eighth Amendment standard applicable in cases involving convicted adults requires subjective "deliberate indifference" to (*i.e.*, reckless disregard of) a substantial risk to inmates' health or safety. *Farmer v. Brennan*, 511 U.S. 825, 837-44 (1994); *Kaucher v. County of Bucks*, 455 F.3d 418, 426-27 (3d Cir. 2006). While Plaintiffs have met this standard, Plaintiffs contend that this is not the proper standard for Eighth Amendment claims in a juvenile context. As described more fully below, the Supreme Court has made plain that juveniles enjoy *greater* constitutional protections than adults under several constitutional provisions, including the Eighth Amendment. *See Miller v. Alabama*, 567 U.S. 460, 489 (2012) (striking down mandatory imposition of life sentences without parole for juveniles); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (striking down life sentences without parole for juveniles convicted of nonhomicide offenses); *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (striking down the juvenile death penalty as unconstitutional). In addition to Plaintiffs' youth, which is itself sufficient to warrant a heightened standard, the fact that Plaintiffs were removed from their homes through the juvenile justice system further underscores the need for a more protective standard; as described below, the juvenile justice system is intended to rehabilitate youth, and promises "[t]o provide for the care, protection, safety and wholesome mental and physical development" of the children in its care. 42 Pa.C.S.A. § 6301(b)(1.1). In view of the Supreme Court's jurisprudence and the goals of the juvenile justice system, officers serving youth incarcerated through the juvenile system should be held liable when they "should have known" of a substantial risk of harm to children in their custody yet failed to act to protect those children.

While the United States Supreme Court has not directly addressed the appropriate constitutional standard to apply in youth correctional settings, the Court has long made clear that the Eighth Amendment's prohibition on cruel and unusual punishment applies only to criminally convicted prisoners. *See, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 666-68, 669 n.37, 671 n.40 (1977). By contrast, a less deferential Fourteenth Amendment standard applies in situations in which punishment is not the primary goal. *See, e.g.*, *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982). For example, individuals confined for treatment purposes, such as those involuntarily confined to mental health facilities, "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Id.* at 322. Similarly, for adults in pre-trial detention not yet convicted of a crime, conditions are unconstitutional under the Fourteenth Amendment if they "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 535, 545 (1979); *see also Burrell v. Loungo*, 750 F. App'x 149, 157 (3d Cir. 2018) (finding the Fourteenth Amendment Due Process Clause, not the Eighth Amendment, applied to conditions of confinement claims brought by a civil contemnor: "In the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable." (quoting *Ingraham*, 430 U.S. at 667-68)).

Pennsylvania's juvenile justice system has always endeavored to provide "treatment, reformation and rehabilitation," and not to punish. *In re Tasseing H.*, 422 A.2d 530, 535 (Pa. Super. Ct. 1980); *In re J.F.*, 714 A.2d 467, 471 (Pa. Super. Ct. 1998) (noting that, even after amendments to Pennsylvania's Juvenile Act, "concern for the juvenile remains a cornerstone of our system of juvenile justice"). While principles and policies underlying the juvenile justice system have evolved since its creation, "particular importance is still placed upon rehabilitating and protecting

society's youth." *In re J.F.*, 714 A.2d at 471; 42 Pa.C.S.A. § 6301(b)(1)-(3). Youth adjudicated delinquent are explicitly not convicted of crimes. 42 Pa.C.S.A. § 6354(a); *see also Commonwealth v. Hale*, 85 A.3d 570, 584 (Pa. Super. Ct. 2014) (holding that the juvenile justice system is protective rather than penal), *aff'd*, 128 A.3d 781 (Pa. 2015). Rather, when a youth has been adjudicated delinquent, the juvenile court may make an order of disposition, choosing only among options that are consistent with the goals of the Juvenile Act—that is, dispositions that are "rehabilitative and are not punitive in nature." *In re J.F.*, 714 A.2d at 473; 42 Pa.C.S.A. § 6352. Even when juvenile adjudications result in harsh consequences, these "measures are not designed to punish." *In re J.F.*, 714 A.2d at 472. Because Plaintiffs are not convicted prisoners, and are not confined via a punitive penal system, they are most similar to pretrial detainees and involuntarily committed patients—not to adult prisoners—and the Fourteenth Amendment should govern their claims.[5]

Binding and persuasive precedents apply the Fourteenth Amendment in juvenile conditions cases. *See, e.g., A.M. ex rel. J.M.K. v. Luzerne Cty. Juvenile Det. Ctr.*, 372 F.3d 572, 575-76, 584 (3d. Cir. 2004) (applying Due Process Clause and noting plaintiff was a juvenile detainee "*and not a convicted prisoner*" (emphasis added)); *Gary H. v. Hegstrom*, 831 F.2d 1430, 1431-32 (9th Cir. 1987) (applying the Fourteenth Amendment to juvenile conditions of confinement class action because Oregon juvenile justice system is "noncriminal and nonpenal")*; Santana v. Collazo,* 714 F.2d 1172, 1179 (1st Cir. 1983) (likening juveniles to involuntary confined mentally ill individuals because they are not convicted as criminals and thus cannot be punished); *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1085 (11th Cir. 1986) (likening detained children to school children and

[5] Moreover, Plaintiffs have alleged numerous instances of abuse that took place in the classroom. (*See, e.g.*, Compl. ¶¶ 114, 156, 169-77.) The Fourteenth, not the Eighth Amendment, governs claims of corporal punishment in school. *Ingraham*, 430 U.S. at 664, 674.

therefore analyzing their conditions claims under the Fourteenth Amendment); *Milonas v. Williams*, 691 F.2d 931, 942 & n.10 (10th Cir. 1982) (applying Fourteenth Amendment because juveniles are involuntarily confined but not convicted of crimes); *K.M. v. Alabama Dep't of Youth Servs.*, 360 F. Supp. 2d 1253, 1258-59 (M.D. Ala. 2005) (holding Fourteenth Amendment is appropriate standard of review for juvenile conditions of confinement cases); *Alexander S. By & Through Bowers v Boyd*, 876 F. Supp. 773, 796 (D.S.C. 1995), *as modified on denial of reh'g* (Feb. 17, 1995) (applying Fourteenth Amendment because most incarcerated youth at facility had not been convicted of a crime but were merely adjudicated delinquent); *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1152 (D. Haw. 2006) (applying Fourteenth Amendment to conditions claims because the juvenile justice system is rehabilitative and youth were not convicted of crimes).

Glen Mills Defendants, Taylor, and Walker fail entirely to acknowledge the distinctions between the juvenile and criminal justice systems, and erroneously rely on inapplicable cases governing *adult* prisoners. (*See* Walker Mem. 14-15; Taylor Mem. 3-4; GMS Mem. 24-26.)[6] The singular case Defendants cite that involves a youth in a juvenile facility is *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249 (3d Cir. 2010). Yet, *Betts* does not control here. *Betts* involved a single tragic accident that occurred when a plaintiff was injured during a football game: more akin to a tort claim than a constitutional violation. 621 F.3d at 252-53. While the plaintiff in *Betts* happened to be confined in a juvenile correctional facility at the time of his injury, his claim bears no resemblance to more typical constitutional challenges that allege ongoing abusive practices or conditions in juvenile facilities. Consequently, the *Betts* court had no occasion to consider whether

[6] Notably, Glen Mills Defendants' assertion that *Whitley v. Albers* sets forth a standard for deciding excessive force claims by people convicted of crimes or adjudicated delinquent, (GMS Mem. 26), is patently false—*Whitley* applies to prisoners convicted of crimes through the criminal justice system and does not discuss the juvenile standard in any way. 475 U.S. 312, 317 (1986).

youth in the juvenile justice system are entitled to distinctive treatment under the Constitution. In contrast, Plaintiffs here allege rampant, facility-wide abuse, medical neglect, and intimidation—violations which negate the core promise of the juvenile justice system and call for distinct constitutional analysis.

This conclusion is also supported by the Supreme Court's repeated recognition that children are different from adults, and that those "distinctive attributes of youth" impact the applicable constitutional standard. *See Miller v. Alabama*, 567 U.S. 460, 472-74 (2012). *Betts* predates *J.D.B. v. North Carolina*, in which the Supreme Court underscored that children's unique qualities warrant distinct constitutional analysis. 564 U.S. 261, 271-75 (2011) (adopting a "reasonable child" standard for *Miranda* warnings). One year later, in *Miller v. Alabama*, the Court extended this notion to find youth categorically "less deserving of the most severe punishments." 567 U.S. at 471 (holding mandatory juvenile life without parole sentences unconstitutional). Grounding its decisions in common sense—*i.e.*, "what 'any parent knows'"—and on scientific research, the Court explained that children differ from adults in their developmental maturity, susceptibility to outside influences, and capacity for change. *Id.* at 471-73. Consequently, the State cannot simply treat youth accused of committing crimes "as though they were not children." *Id.* at 473-74. Rules of criminal procedure that fail to take into account how children are different "would be flawed," the Court declared. *See id.* at 473-74 (quoting *Graham*, 560 U.S. at 76).

Here—where children were involuntarily removed from their parents and held in state custody purportedly for their rehabilitation yet suffered abuse and other abhorrent conditions—the bedrock principle that children deserve distinct constitutional protections takes on special importance. This Court should find that the Fourteenth Amendment governs Plaintiffs' claims.

V. THE COURT SHOULD DENY MOTIONS TO DISMISS PLAINTIFFS DUE PROCESS AND EQUAL PROTECTION CLAIMS

A. Plaintiffs Have Properly Alleged Their Procedural Due Process Claim

Plaintiffs have asserted a valid Procedural Due Process claim alleging that Defendants Rivera, CCIU, and Glen Mills deprived Plaintiffs of their state-law created property interest in a legally compliant free public education without affording them any procedural due process of law. *See Goss v. Lopez*, 419 U.S. 565, 574 (1975).

Defendants do not challenge that children in Pennsylvania aged six through twenty-one have a property interest in a free public education. *See, e.g.*, *Issa v. School Dist. of Lancaster*, No. 16-3881, 2016 WL 4493202, at *1 (E.D. Pa. Aug. 26, 2016) (noting that Pennsylvania state law guarantees school-aged individuals a free and full education until they graduate or turn twenty-one); 24 P.S. § 13-1301; 22 Pa. Code § 12.8(a). The same legal entitlement applies to a nonresident school-age child who is living with a district resident, 24 P.S. § 13-1302; in a foster home, 24 P.S. § 13-1305; or living in a children's institution, 24 P.S. § 13-1306; 22 Pa. Code § 11.11(c).

As the Supreme Court recognized in *Goss*, even temporary suspensions from school constitute deprivations of a student's protected property interest in an education and warrant the provision of procedural due process. *Goss*, 419 U.S. at 576 (holding ten-day suspension could not be imposed without due process.). The Court explained: "The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences." *Id.* at 579. The importance of a public education does not cease when a student is adjudicated delinquent and placed in a residential facility. *See* 24 P.S. § 13-1306 (establishing right of all students in "children's institutions" to attend public school in the district where the facility is located). Accordingly, Pennsylvania law requires not only the provision of an education, but, *inter alia*, that certain minimum standards be maintained for the education of students in residential

placements like Glen Mill—precisely because these children remain equally entitled to a free public education. 24 P.S. § 9-914.1-A(a), (c).

Named Plaintiffs and the Education Subclass challenge the systemic deprivation of Glen Mills students' right to a legally compliant free public education.[7] (Compl. ¶¶ 252-82.) Plaintiffs allege in part that there were many periods of absolute deprivation when students experienced extensive delays, interruptions, and zero access to any educational services for weeks or months at a time. (Compl. ¶¶ 90, 92, 129, 136, 145, 167, 185-87, 256, 269.) In addition, the Complaint alleges that school-age children were unilaterally diverted into an independent GED program and deprived of any secondary education, often contrary to age restrictions under state law. (Compl. ¶¶ 141-2, 146, 153.) These "total exclusions" are far beyond the 10-day benchmark recognized in *Goss* as establishing a due process violation. *Goss*, 419 U.S. at 576.

Moreover, Plaintiffs allege that the *de minimis* and materially inferior education offered at Glen Mills—a unilateral assignment into either an independent GED study or a self-directed computer-based credit recovery course (Compl. ¶¶ 238-39)—failed to comply with state education requirements and constituted a functional exclusion from the educational process. While the Third Circuit has not addressed this issue, many courts have recognized a Procedural Due Process claim where, as in this case, students were deprived of classroom instruction and the opportunity to learn while placed in a program "materially inferior" to that offered in the regular public school; students were functionally excluded from the education process; and due process is implicated. *Patrick v. Success Acad. Charter Sch., Inc.*, 354 F. Supp. 3d 185, 216 (E.D.N.Y. 2018).

[7] While some courts have held, as Rivera cites (Com. Mem. 12), that short-term "in-school" suspensions or "timeouts" are such *de minimis* exclusions from education that they do not support Procedural Due Process claims, *see Taylor v. Metuchen Pub. Sch. Dist.*, No. 18-1842, 2019 WL 1418124 (D.N.J. Mar. 28, 2019), those cases are inapposite here.

Courts have also found that under certain circumstances in-school exclusions and removals to alternative education programs may constitute "as much deprivation of education as at-home suspension" or expulsion, "depending on the extent to which the student was deprived of instruction or the opportunity to learn." *Williams v. Fulton Cty. Sch. Dist.*, 181 F. Supp. 3d 1089, 1131 (N.D. Ga. 2016) (internal quotation marks and citation omitted) (recognizing pattern of repeated in-school isolation as functionally excluding student from education process without due process); *see also Couture v. Bd. of Educ. of Albuquerque Pub. Sch.*, 535 F.3d 1243, 1257 (10th Cir. 2008) (holding excessive timeouts may be the "functional equivalent of [an] out-of-school suspension"). "The primary thrust of the education process is classroom instruction" and where a child is deprived of classroom instruction, procedural due process protections may be required. *Cole v. Newton Special Mun. Separate Sch. Dist*., 676 F. Supp. 749, 751-52 (S.D. Miss. 1987) (denying judgment as a matter of law where student's isolation on campus may have involved sufficient educational deprivation to warrant due process), *aff'd*, 853 F.2d 924 (5th Cir. 1988).

In these situations, courts assess whether the education provided is so "deficient or inadequate" that it limits educational opportunities and effectively acts as an exclusion from the educational process, implicating due process rights and protections. *Riggan v. Midland Indep. Sch. Dist*., 86 F. Supp. 2d 647, 655 (W.D. Tex. 2000). For example, in *Patrick v. Success Academy*, the court held that plaintiff stated a viable due process claim where he alleged that the education he received in his alternative education placement was so "materially inferior" to what he would have received in his regular public school that it significantly affected his educational opportunities and deprived him of his property interest in an education. 354 F. Supp. 3d at 216.

Similarly, in this case, the Complaint describes a "materially inferior" education comprised of a self-directed computer-based credit recovery program that failed to align with state curriculum

requirements or minimum hours of instruction (Compl. ¶¶ 107, 143, 153, 163, 165-66, 188); the absence of any classroom instruction or access to qualified teachers (Compl. ¶¶ 91, 106, 128, 158, 162, 178, 186); and the inability of students to earn credits toward graduation. (Compl. ¶¶ 262, 273-274, 282.) Students who complained about the lack of education were abused and retaliated against, depriving them of any opportunities to learn. (Compl. ¶¶ 91-92, 118, 128-29, 157-58, 185.) In sum, Plaintiffs alleged either a total or functional exclusion from the educational process.

This is not a case where students contend that a school failed to provide "the best possible education attainable" or "instruction administered under ideal conditions." *See Patrick*, 354 F. Supp. 3d at 216 (quoting *Wayne v. Shadowen*, 15 F. App'x 271, 285 (6th Cir. 2001)). Rather, Plaintiffs were subjected to a program that was not only "significantly different" and "materially inferior" to regular public school, but deprived Plaintiffs of an education as defined by state law, thereby implicating their right to procedural due process for deprivation of a recognized property interest. *See id.* at 216 (reviewing cases recognizing due process claims for inferior education provided in alternative settings).

Plaintiffs have also sufficiently alleged that there was no process at all provided in connection with these deprivations of their education rights. (Compl. ¶¶ 239, 258, 260.) Plaintiffs contend that they were due at least some process—at a minimum, notice and an opportunity to be heard—before Defendants deprived them of their right to a free public education. (Compl. ¶¶ 396-97.) These allegations are clearly sufficient to state a due process claim under the standard articulated in *Hill v. Borough of Kutztown*, 455 F.3d 225, 238 (3d Cir. 2006). Accordingly, Defendants' motions to dismiss these claims should be denied.[8]

[8] Ultimately, the question of what process is due necessitates a balancing of the interests using the *Mathews v. Eldridge*, 424 U.S. 319 (1976) framework. However, this is a factual matter to be

B. Plaintiffs Have Properly Alleged Their Equal Protection Claim

The Fourteenth Amendment mandates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause protects every individual from "intentional and arbitrary discrimination" by state actors. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). To state an Equal Protection claim where no protected class is at stake, a plaintiff must allege that he has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564; *see also PG Publ'g Co. v. Aichele*, 705 F.3d 91, 114 (3d Cir. 2013). Plaintiffs need only identify the similarly situated group and are not required to "identify in the complaint specific instances where others have been treated differently." *Mann v. Brenner*, 375 F. App'x 232, 238 (3d Cir. 2010) (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 245 (3d Cir. 2008)).

Plaintiffs have satisfied these pleading requirements. The Complaint alleges with specificity that Plaintiffs were deprived of educational services and opportunities provided to other nonresident students publicly placed in other children's institutions. *See Fowler*, 578 F.3d at 210. While their same-age peers, including nonresident children in other residential placements for court-placed youth, attend public schools that must meet rigorous state education standards in accordance with a specific state curriculum, receive actual instruction from qualified teachers, and earn credits toward a high school diploma (Compl. ¶ 238), youth placed at Glen Mills are subject

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determined by the Court based on the record evidence. It cannot be a basis to deny Plaintiffs the opportunity to present their claim. *See Orozco by Arroyo v. Sobol*, 703 F. Supp. 1113, 1120-21 (S.D.N.Y. 1989) (denying motion to dismiss prior to determining what process was due to homeless student summarily denied enrollment in public schools); *New York by Schneiderman v. Utica City Sch. Dist.*, No. 15-1364, 2016 WL 1555399, at *9 (N.D.N.Y. Apr. 18, 2016) (same, in case where school district deliberately denied enrollment to immigrant students).

to the Glen Mills' custom, policy, or practice of requiring all youth to either (a) forgo a high school education entirely and engage in independent review of a GED book, or (b) rely on a limited self-directed computer-based credit recovery program that provides no in-person instruction or support from qualified teachers, and does not meet state curriculum standards. (Compl. ¶ 239.) Glen Mills is a nonpublic, nonlicensed school with private residential rehabilitative institution ("PRRI") designation. (Compl. ¶¶ 25-26.) It is a children's institution and is similarly situated to other residential placements for youth adjudicated dependent and/or delinquent as authorized by state law. (Compl. ¶ 402.) All of these institutions serve the same types of youth—those adjudicated dependent and/or delinquent under the Juvenile Act—and provide the same primary function of residential placement. *Cf. Real Alternatives, Inc. v. Sec'y Dep't of Health and Human Servs.*, 867 F.3d 338, 349 (3d Cir. 2017) (dismissing Equal Protection claim because party was a "completely different type of entity, particularly because of its structure, aim, purpose, and function in its members' lives," and not similarly situated to comparator).

Rivera[9] argues that Count IV should be dismissed because the Complaint provides no substantive allegations related to his role in the deprivation of educational opportunities and fails to identify a PDE policy that does not satisfy rational basis review. (Com. Mem. 12.) To the contrary, the Complaint is replete with allegations describing the requirements and obligations of the state education agency, PDE—in addition to CCIU, as the local educational agency, and Glen Mills—to provide for and ensure a legally compliant free public education to all nonresident students placed at children's institutions, and PDE's failure to provide any oversight or monitoring to support the provision of such an education. (Compl. ¶¶ 6, 36, 37, 251, 276-78.) The Complaint

[9] CCIU and Glen Mills do not move to dismiss Counts III and IV on any grounds beyond those dispensed with in Parts VII-IX (relating to exhaustion and CCIU's role as the LEA).

details the many ways in which PDE, CCIU, and Glen Mills failed to satisfy these obligations with regard to Plaintiffs and other students publicly placed at Glen Mills. (Compl. ¶¶ 243, 251, 276-282, 391-94, 396.) Plaintiffs have more than satisfied the pleading requirement to survive a motion to dismiss.

It is premature to adjudicate whether there is a rational basis for treating students placed at Glen Mills differently—by denying their right to a free public education compliant with state law—compared to other nonresident students publicly placed at other children's institutions.[10] However, Defendants have not offered any rational basis to support this disparate treatment. *See e.g.*, *Issa*, 2016 WL 4493202, at *8 (finding school district has no interest in continuing practices that violate federal and state law). Defendants have not offered any purported basis for their acts and omissions, and there appears to be no legitimate government interest that could be claimed here. "Providing statutorily granted special services to a child does not harm [the IU or state]; doing so is its function under state and federal law." *John T. ex rel. Paul T. v. Del. Cty. Intermediate Unit*, No. 98-5781, 2000 WL 558582, at *8 (E.D. Pa. May 8, 2000). Defendants cannot argue that, under the law, Plaintiffs are less entitled than others to an education, or require some greater level of security that interferes with the provision of education services onsite. *Cf. Brian B. ex rel. Lois B. v. Pa. Dep't of Educ.*, 230 F.3d 582, 587-88 (3d Cir. 2000) (finding rational basis for providing limited education services to school-aged youth convicted as adults and confined in adult county facilities); *Little v. Terhune*, 200 F. Supp. 2d 445, 457 (D.N.J. 2002) (finding rational basis for

[10] To the extent that Defendants argue, or the Court finds, that the PRRI structure allows Glen Mills to deny these students a public education compliant with state law, permits CCIU to ignore the responsibilities identified in its contract to oversee and ensure general education services to Glen Mills students, and omits these students from PDE's obligation to ensure all students have access to a public education compliant with state standards and requirements, Plaintiffs have argued that the PRRI statute is unconstitutional. (*See* Compl. ¶ 404.)

denying education services to adult inmate held in administrative segregation). Plaintiffs' Equal Protection claim does not concern a "non-arbitrary judgment about educational priorities," but rather an unequal application of the law to youth at Glen Mills compared to other nonresident students publicly placed at similar institutions. *Cf. Little*, 200 F. Supp. 2d at 457. Because Plaintiffs have fully pled a viable cause of action supported by the requisite factual allegations, the Court should deny Defendants' motion to dismiss Plaintiffs' Equal Protection claims.

VI. PLAINTIFFS SUFFICIENTLY PLED FACTS TO SHOW THAT THE COMMONWEALTH DEFENDANTS ARE NOT IMMUNE FROM SUIT

A. Defendants Miller, Dallas, And Utz Are Properly Sued In Their Individual Capacities

Miller, Dallas, and Utz personally violated Plaintiffs' Eighth and Fourteenth Amendment rights by failing to protect Plaintiffs from the excessive and unreasonable use of force against them and to ensure adequate medical care at Glen Mills. Based on these violations, Plaintiffs seek monetary damages directly from Miller, Dallas, and Utz—not from PA-DHS or the Commonwealth. Throughout their Complaint, Plaintiffs explicitly state that Miller, Dallas, and Utz are each being sued in their individual capacities. It is well established that defendants sued in their individual capacities cannot claim sovereign immunity. *Hafer v. Melo*, 502 U.S. 21, 28 (1991).

Plaintiffs' suits against these Defendants are supported by decades of sovereign immunity doctrine. The Supreme Court has held that the Eleventh Amendment does not bar suits imposing individual and personal liability on state officials under Section 1983 for actions taken in their official capacity. *Id.* In *Hafer*, the Supreme Court clarified that "the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Id.* at 26. Thus, state officials may be sued in their personal (or individual) capacity for actions that they took in their official capacity.

Id. at 28 ("[O]ur cases do not extend absolute immunity to all officers who engage in necessary official acts."). In fact, the Court specifically notes that state officials can be sued in their personal capacity for two categories of actions: those "outside the official's authority or not essential to the operation of state government" and those "within the official's authority and necessary to the performance of governmental functions." *Id.* at 28. Further, the Court clarifies that while sovereign immunity principles prevent plaintiffs from seeking damages from the public treasury, damage awards against individual defendants are permissible in federal courts even if those defendants hold public office. *Id.* at 30-31.

Plaintiffs make clear in the Complaint that their intention is to sue Miller, Dallas, and Utz individually, rather than the PA-DHS itself. They only seek monetary damages from the three officials—not money from the DHS coffer. Indeed, Plaintiffs have sued Theodore Dallas as a Defendant for his actions while he was the Secretary of DHS even though he is no longer in that role (Compl. ¶ 33), and are suing Cathy Utz although she resigned from her role at OCYF at PA-DHS following the filing of Plaintiffs' complaint.[11] Even in cases where parties were less explicit in their pleadings about how they sued state officials, courts have shown flexibility in allowing plaintiffs' personal-capacity claims to proceed. *See, e.g.*, *Bradley v. W. Chester Univ. of the Pa. State Sys. of Higher Educ.*, 182 F. Supp. 3d. 195, 198 (E.D. Pa. 2016) (accepting the plaintiff's limiting construction that the claim was only against a defendant in his personal capacity even though the complaint alleged a Section 1983 violation against defendant in his official capacity); *Dare v. Township of Hamilton*, Case No. 13-1636, 2013 WL 6080440, at *6 (D.N.J. Nov. 18,

[11] (*See* Com. Mem. 1 (referring to Cathy Utz as the former Deputy Secretary for the DHS OCYF).)

2013) (considering both personal- and official-capacity claims against defendant when the complaint did not clarify which types of claims plaintiff had brought).[12]

B. Defendants Miller, Dallas, And Utz Violated Plaintiffs' Well-Established Rights Under The Fourteenth And Eighth Amendments

Nor are Miller, Dallas, and Utz protected from suit by qualified immunity. Defendants bear the burden of showing they are entitled to qualified immunity. *Geist v. Ammary*, 40 F. Supp. 3d 467, 483 (E.D. Pa. 2014). To meet that burden, Defendants must show: (i) the facts alleged by Plaintiffs did not make out a violation of a constitutional right, and (ii) the right at issue was not clearly established at the time of the injury. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Defendants have failed to satisfy either of these prongs.

Miller, Dallas, and Utz make no argument under the second prong of the qualified immunity test—conceding that indeed Plaintiffs' rights here are clearly established. Indeed, it is well settled that PA-DHS Defendants have an affirmative duty under the Fourteenth Amendment to protect Plaintiffs from harm. The Supreme Court has clearly articulated that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). Restricting a plaintiff's liberty, and thereby limiting his ability to act on his own behalf, creates a "special relationship" whereby "the government acquires an affirmative obligation to protect the individual from harm—including harm caused by third parties." *Benedict v. Sw. Pa. Human Servs., Inc.*, 98 F. Supp. 3d 809, 821 (W.D. Pa. 2015) (citing *Morrow v. Balaski*, 719 F.3d 160, 167 (3d Cir.

[12] If the Court were to disagree, Plaintiffs request leave to amend their Complaint to adequately plead against these Defendants. *See Moyer v. Aramark*, No. 18-2267, 2019 WL 1098951, at *5-6 (E.D. Pa. Mar. 7, 2019).

2013)). Based on this affirmative duty to protect, which is enforceable through the Due Process Clause of the Fourteenth Amendment, state officials must protect incarcerated persons from cruel and unusual punishment and provide them with medical care. *DeShaney*, 489 U.S. at 198-200 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Robinson v. California*, 370 U.S. 660 (1962)). Courts have also found that "special relationships" exist giving rise to a state's affirmative duties of care and protection in regard to involuntarily committed mental patients and young people in the foster care system. *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc); *see also Youngberg*, 457 U.S. at 318-19. As Plaintiffs here were confined through state action in a juvenile justice facility (Compl. ¶¶ 1, 17, 19, 21-22, 39), they have a clearly established right under the Fourteenth Amendment to care and protection from state officials.

Ignoring numerous examples in the Complaint, these Defendants claim Plaintiffs did not sufficiently allege that they violated Plaintiffs' constitutional rights. (Com. Mem. 8-9.) Under the "special relationship" analysis, defendants violate a plaintiff's rights when their behavior "shocks the conscience." *Nicini*, 212 F.3d at 810; *see also County of Sacramento v. Lewis*, 523 U.S. 833, 846-53 (1998) (discussing the shock-the-conscience test). In situations where, as here, officials have the time to deliberate and make "unhurried judgments," plaintiffs need only show deliberate indifference to demonstrate behavior that shocked the conscience. *See L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 246 (3d Cir. 2016); *A.M.*, 372 F.3d at 579 (applying deliberate indifference standard because "the custodial setting of a juvenile detention center presents a situation where forethought about [a resident's] welfare is not only feasible but obligatory" (internal quotations and citations omitted)).

An objective deliberate indifference standard applies to Plaintiffs' Substantive Due Process claims. *See Kedra v. Schroeter*, 876 F.3d 424, 438-40 (3d Cir. 2017) (citing *Kingsley v.*

Hendrickson, 135 S. Ct. 2466, 2470, 2472-73, 2475-76 (2015), and *L.R.*, 836 F.3d at 245-46). In *L.R.*, the plaintiff's allegation that, as "a matter of common sense," the defendant teacher "knew, or should have known, about the risk" of releasing a child to a stranger was enough to establish deliberate indifference because the risk of harm was "so obvious" that it should have been known. 836 F.3d at 245-46. *See also Kingsley*, 135 S. Ct. at 2472-73 (holding that plaintiff "must show only that the force purposely or knowingly used against him was objectively unreasonable" in order to demonstrate that it was excessive in violation of the Due Process Clause). The Complaint clearly alleges that Miller, Dallas, and Utz should have reasonably known about the harm to Plaintiffs at Glen Mills but did nothing to stop it.[13] In fact, the Complaint sets forth numerous allegations that these Defendants had *actual* knowledge about the routine violence at Glen Mills and did not take adequate action to curtail it, thus failing to uphold their duties of care and protection to every young person confined at Glen Mills, including named Plaintiffs and all putative class members.[14] (*See, e.g.*, Compl. ¶¶ 208, 232.)

In addition to Plaintiffs' direct allegations of knowledge, Plaintiffs also pled circumstantial evidence of knowledge. *See Kedra*, 876 F.3d at 441 (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). Plaintiffs allege numerous child abuse violations that PA-DHS officials, who all reported to Miller, Dallas, or Utz, received complaints about confrontations between PA-DHS and Glen

[13] Moreover, this rule was clearly established in the Third Circuit by 2016, after the Supreme Court's decision in *Kingsley*, 135 S. Ct. at 2472-73, and the Third Circuit's decision in *L.R.*, 836 F.3d at 246. *See Kedra*, 876 F.3d at 432-40.

[14] While PA-DHS Defendants agree with Plaintiffs that Fourteenth Amendment Substantive Due Process Rights govern here, because PA-DHS Defendants have moved to dismiss Plaintiffs' claims under both the Fourteenth and Eighth Amendments, Plaintiffs submit that their allegations survive under either standard. As discussed here, Plaintiffs have sufficiently pled that PA-DHS Defendants knew or recklessly disregarded a substantial risk of serious harm to Plaintiffs by allowing Glen Mills to continue housing children despite the well-documented abuse, violating their special relationship and affirmative duty to ensure the safety and wellbeing of those children under both the Fourteenth and Eighth Amendments.

Mills staff, and complaints that Defendant Ireson was not ensuring the youth were safe or receiving adequate medical treatment. (Compl. ¶¶ 212-11, 221-22, 226-28; *see also generally id. at* Exs. A & C.) The quantity and severity of the complaints that were received by PA-DHS and, specifically, OCYF, amply establish how Miller or Dallas, who led DHS, and Utz, who oversaw OCYF, would have known about the allegations of abuse, and that all children confined at Glen Mills, including named Plaintiffs and members of the putative class, faced a substantial risk of harm from the abusive culture and policies of Glen Mills. Indeed, as Commonwealth Defendants acknowledge, Utz sent Glen Mills a removal order and license revocation letter that highlights many of these abusive incidents and reports. (Com. Mem. 9-10; Compl. ¶ 234 & Ex. A.) The federal investigation of Glen Mills (Compl. ¶ 209); the fact that multiple jurisdictions were pulling students from the facility due to abuse allegations (Compl. ¶¶ 218-19, 221, 233); and the highlighting of ongoing mistreatment at Glen Mills by national organizations and news outlets (Compl. ¶¶ 220, 223, 233) all further establish that the risk to children remaining at Glen Mills was obvious to anyone paying attention. *See Kedra*, 876 F.3d at 441 (finding evidence that a risk was "obvious or a matter of common sense" to be one example of circumstantial evidence that is probative of deliberate indifference). (*See also* Compl. ¶ 235.)

Despite these known abuses, PA-DHS Defendants permitted Glen Mills to continue operating. (Compl. ¶ 230.) Construing these facts and all reasonable inferences that flow from them in the light most favorable to Plaintiffs, the allegations are sufficient to demonstrate that Miller, Dallas, and Utz knew, and certainly should have known, that Plaintiffs were being harmed at Glen Mills but did not take appropriate actions to protect Plaintiffs from such harm. Accordingly, Plaintiffs state a claim under the Fourteenth Amendment, and PA-DHS Defendants have failed to meet their burden to establish qualified immunity. As the Third Circuit has noted,

"[e]xposing a young child to an obvious danger is the quintessential example of when qualified immunity should not shield a public official from suit." *L.R.*, 836 F.3d at 260.

C. Claims Against PDE Secretary Rivera Are Not Barred By Sovereign Immunity

Secretary Rivera is not protected by Eleventh Amendment immunity against Plaintiffs' Equal Protection Clause and Procedural Due Process claims.[15] (*See* Com. Mem. 11-12.) Under *Ex parte Young*, private parties can sue state officials in their official capacity to enforce federal law, so long as they seek only prospective injunctive and declaratory relief. 209 U.S. 123 (1908). To assess whether immunity is available, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (internal quotation marks and citation omitted); *see also Koslow v. Pennsylvania*, 302 F.3d 161, 178-79 (3d Cir. 2002).

Here, Plaintiffs have appropriately sued Secretary Rivera in his official capacity as head of the PDE[16] and seek prospective injunctive relief in the form of declaratory judgment and compensatory education services for Named Plaintiffs and members of the Education Subclass. (Compl. ¶¶ 36, 37, 399, 413.) The Third Circuit, like other courts, has recognized that

[15] Secretary Rivera and PDE have not asserted Eleventh Amendment immunity defenses to Plaintiffs' claims under the IDEA and Section 504 of the Rehabilitation Act, as both statutes waive this defense. *See* 34 C.F.R. § 300.177; *see also* 42 U.S.C. § 2000d-7.

[16] While Rivera suggests that these claims may be barred due to the frequency with which his name is invoked, (Com. Mem. 12), he cites no authority to support this novel proposition. As Rivera is sued in his official capacity, (Compl. ¶ 37), the Complaint's reference to actions and omissions by PDE are clearly allegations lodged against Rivera. *See Hafer*, 502 U.S. at 25 (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (holding that allegations against government entity regarding policies and practices are pled against named official in official-capacity suits)). Here, Plaintiffs' Complaint includes multiple references to acts, policies, and omissions by the state education agency sufficient to state a claim. (Compl. ¶¶ 276-80.)

compensatory education services qualify as equitable, prospective injunctive relief. *See Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 272 n.16 (3d Cir. 2007) (categorizing compensatory education as "prospective injunctive relief rather than reimbursement for the education [the student] already has received"); *Fetto v. Sergi*, 181 F. Supp. 2d 53, 79 (D. Conn. 2001) (holding that the nature of compensatory education as an "equitable and prospective" remedy prohibited an *Ex parte Young* immunity challenge to constitutional claims brought by former student); *Burr by Burr v. Sobol*, 888 F.2d 258, 259 (2d Cir. 1989) (compensatory education is "prospective in nature, and any effect on the state treasury would be ancillary to such relief and therefore permissible despite the Eleventh Amendment").

Courts which focus on the ongoing need for injunctive relief to remedy violations and ongoing harm have permitted claims to proceed even where the allegedly unconstitutional state action is no longer "imminent" or "in progress against the particular plaintiffs initiating suit." *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1338 (11th Cir. 1999); *see also, e.g.*, *Antrican ex rel. Antrican v. Odom*, 290 F.3d 178, 186-87 (4th Cir. 2002) (holding that, while plaintiff Medicaid recipients currently received dental services, they validly challenged ongoing violation under immunity exceptions); *S.B. by and through Kristina B. v. Cal. Dep't of Educ.*, 327 F. Supp. 3d 1218, 1237-38 (E.D. Cal. 2018) (holding student no longer in juvenile justice system was entitled to assert claim based on allegations of ongoing violations of law). While Plaintiffs must show that the action by a state official causes harm, it does not require "daily attention" or "imminent" action by the state actor. *See, e.g.*, *Coakley v. Welch*, 877 F.2d 304, 307 n.2 (4th Cir. 1989) (noting that "alleged [official] conduct [], while no longer giving [the plaintiff] daily attention, continues to harm him by preventing him from obtaining the benefits of [state agency] employment"); *Summit Med. Assocs.*, 180 F.3d at 1338 ("This requirement does not mean that the enforcement of the

allegedly unconstitutional state statute actually must be in progress against the particular plaintiffs initiating suit. Rather, we agree with the district court that the ongoing and continuous requirement merely distinguishes between cases where the relief sought is prospective in nature . . . and cases where relief is retrospective.").

In this case, Plaintiffs allege constitutional violations stemming from the absence of state oversight over PRRIs which resulted in a denial of education to Plaintiffs and Education Subclass members. This deprivation resulted in ongoing harm that requires prospective injunctive relief to remedy the continuing denial of opportunities. (*See* Compl. ¶¶ 282, 396, 406.), *see also Plyler v. Doe*, 457 U.S. 202, 223 (1982) ("By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."); *N.J. v. New York*, 872 F. Supp. 2d 204, 214 (E.D.N.Y. 2011) ("[I]nterruption of a child's schooling causing a hiatus not only in the student's education but also in other social and psychological developmental processes that take place during the child's schooling, raises a strong possibility of irreparable injury." (internal quotation marks and citation omitted)); *Oravetz v. W. Allegheny Sch. Dist*., 74 Pa. D. & C.2d 733, 737-38 (Pa. Ct. Com. Pl. 1975) ("[D]eprivation of educational rights can produce irreparable harm and establishes a need for prompt and immediate relief.").[17]

[17] Secretary Rivera's reliance on *J.C. v. Ford*, 674 F. App'x 230, 232-33 (3d Cir. 2016) is misplaced. (Com. Mem. 11.) In that case, a *pro se* plaintiff claimed that he was subjected to a suspicionless urinalysis but did not allege ongoing harm or the need for prospective relief. The court rejected his constitutional Section 1983 claims on the ground that the only future injury claimed was that he may be subject to a suspicionless urinalysis in the future in the absence of any official policy or practice. *Id.* By contrast, Plaintiffs allege a clear and ongoing injury to Named Plaintiffs and class members in the form of lost educational and employment opportunities, the need for remedial help to build basic skills, and inability to graduate from high school, etc. (*See, e.g.*, Compl. ¶¶ 282, 396, 406.) Plaintiffs allege the injury was caused by the failure to provide notice and due process to challenge a deprivation of education and the denial of equal access to

Other courts have recognized the importance of granting such remedial injunctive relief as exceptions to an immunity challenge in the education context and beyond. For example, in *Milliken v. Bradley*, 433 U.S. 267, 277 (1977) the Supreme Court upheld a lower court's order directing the creation of a system-wide remedial education plan that included reading, communication skills, counseling, and career guidance to remedy educational deprivations that offended the Constitution caused by prior segregation. In *Clark v Cohen*, 794 F.2d 79, 83-84 (3d Cir. 1986), the Third Circuit, relying on *Milliken*, dismissed a state immunity challenge, finding that state payments for an individual's supervised living arrangement qualified as prospective injunctive remedial measures, as they were necessary to undo the harmful effects of constitutional violations.

Here, the Complaint sufficiently alleges that Rivera's actions and inactions, including the ongoing failure to monitor PRRIs, require prospective injunctive relief and violate the equal protection and procedural due process rights of Plaintiffs and Education Subclass members; the relief sought is precisely the type of prospective relief needed to prevent a continuing violation of federal law and permitted under *Young*. *See, e.g.*, *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986) (finding the essence of the complaint to be the present and presumably ongoing disparity in educational opportunity); *S.B. by and through Kristina B.*, 327 F. Supp. 3d at 1237-38 (viable claim stated where student challenged deprivation of appropriate education based on residency rules).

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the education afforded to nonresident students at other children's institutions. (*See* Sections V.A, V.B.) Contrary to a "hypothetical" injury or threat of injury rejected by the court in *J.C.*, Plaintiffs have sufficiently pled direct and ongoing injury caused by Secretary Rivera's failure to ensure students' right to a legally compliant education at PRRI facilities.

VII. THIS COURT SHOULD DENY CCIU'S MOTION TO DISMISS ALL CLAIMS AGAINST IT

In seeking to dismiss all claims asserted against it, CCIU posits that it bears no legal responsibility for the education of students with disabilities and other students at Glen Mills. CCIU's argument is incorrect and disingenuous. CCIU's status as the local educational agency ("LEA") for students with disabilities at Glen Mills is clear and undeniable under federal and state law, and the governing contract between CCIU and Glen Mills under the PRRI statute delineates CCIU's specific duties and obligations that it chose to ignore.

A. CCIU Cannot Avoid Liability By Contending It is Not The LEA With Regard To Students With Disabilities

Under the IDEA, an LEA is a "public board of education or other *public authority* legally constituted within a State for either administrative control or direction of, *or to perform a service function for*" the public schools in a political subdivision or combination of political subdivisions. 20 U.S.C.A. § 1401(19) (emphasis added). This definition includes Educational Service Agencies, or Regional Public Multiservice Agencies, which are "[a]uthorized by State law to develop, manage, and provide services or programs to LEAs"—put another way, LEAs are often governed or serviced by other, larger LEAs. 34 C.F.R. §§ 300.28(b), 300.12.

In Pennsylvania, intermediate units ("IUs") such as CCIU are LEAs that serve as educational service agencies for local school districts. 22 Pa. Code § 14.103; *see also* 24 P.S. § 9-901-A; *C.F. by and through Flick v. Del. Cty. Intermediate Unit*, No. 17-1599, 2017 WL 4467498, at *4 (E.D. Pa. Oct. 6, 2017) (holding IU liable as an LEA under the IDEA). Intermediate Units have a duty "to provide, maintain, administer, supervise and operate such additional classes or schools as are necessary or to otherwise provide for the proper education and training for all exceptional children who are not enrolled in classes or schools maintained and operated by school districts or who are not otherwise provided for." 24 P.S. § 13-1372(4).

As the PRRI statute allows, IUs are permitted to contract out the services they are required to provide to students, including educational services and transportation, though a contractual agreement does *not* absolve IUs of the ultimate duty to provide an appropriate education. *See* 24 P.S. § 9-914.1-A. For example, in *Susavage v. Bucks County Schools Intermediate Unit No. 22*, the court held that an IU was responsible under the ADA, Section 504, and the IDEA for failures to properly restrain a private school student with disabilities on the school bus, which resulted in her death, even though the IU had contracted these services to Levy, a transportation agency. No. 00-6217, 2002 WL 109615, at *11 (E.D. Pa. 2002) (citing *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1037 n.5 (3d Cir. 1993)). The IU's "undertaking to provide transportation services [to a student] arose not from a 'policy choice' but from a federal statutory requirement, which in the context of a contractual relationship, made [the IU's] responsibility non-delegable." *Id.* The district court further explained that, "[e]ven where, at the discretion of the public agency, a private school conducts meetings and revises an IEP, 'responsibility for compliance with [IDEA] remains with the public [agency].'" *Id.* (quoting *McKenzie v. Smith*, 771 F.2d 1527, 1531 (D.C. Cir. 1985) (quoting 34 C.F.R. § 300.347 (1985))).

Here, it is clear that CCIU serves as the LEA for Glen Mills because it performs "a service function" as well as supervisory functions under the IDEA, 20 U.S.C.A. § 1401(19), and satisfies the definition of an educational service agency under state law. *See* 22 Pa. Code § 14.103; 24 P.S. § 9-901-A. In this capacity, CCIU had a clear duty and ultimate responsibility to provide for the proper education and training of children with disabilities and cannot contract away these obligations. *See* 24 P.S. § 9-914.1-A; 24 P.S. § 13-1372(4). Both the PRRI statute and CCIU's contract with Glen Mills specifically acknowledge CCIU's continuing obligations to students with disabilities. This contract delineates many of these responsibilities and states in part that CCIU is

responsible for the following: monitoring Glen Mills to ensure compliance with federal and state laws; ensuring Glen Mills has staff necessary to implement special education services; reviewing records to assess Glen Mills' compliance with special education laws; reviewing the process for developing IEPs; appointing staff to attend IEPs to comply with State Standards for developing IEPs; and appointing surrogate parents. (CCIU Mem. Ex. A ¶¶ 10, 14-17, 44.) In sum, CCIU is the public agency and LEA for the students with disabilities at Glen Mills and is responsible for ensuring their special education rights, even if certain responsibilities are contracted to Glen Mills as the PRRI.

B. CCIU Is Responsible For Ensuring Rights Under Federal And State Laws To Students At Glen Mills

In addition to ensuring that students with disabilities receive a free appropriate public education, CCIU also has a responsibility to all students at Glen Mills, in its capacity as the "contracting LEA" under the PRRI statute. This responsibility focuses on monitoring the educational program provided at Glen Mills to ensure compliance with federal and state laws. (CCIU Mem. Ex. A ¶¶ 44-45.)

Under the PRRI statute, intermediate units like CCIU are responsible for ensuring that the PRRI uses funds for the "maintenance of the minimum education program provided for in the contract." *See* 24 P.S. § 9-914.1-A(d). Notably, state guidance issued by the PDE regarding PRRIs specifically references "contracting LEAs" as intermediate units or school districts with specific responsibilities. In part, the contract between a PRRI and intermediate unit or school district must include: (1) assurances that the PRRI "will adhere to Chapter 4 curriculum regulations as closely as possible given the educational needs of the students," and (2) a delineation of LEAs' monitoring responsibilities and activities related to these program requirements. *See Private Residential Rehabilitative Institutions* (Sept. 1, 1999), https://www.education.pa.gov (under "Policy and

Funding," follow "Basic Education Circulars" hyperlink; then follow "Private Residential Rehabilitative Institutions" hyperlink).

In this case, CCIU's contract with Glen Mills describes CCIU's specific responsibilities for monitoring and reviewing the educational program at Glen Mills, in addition to ensuring the provision of a FAPE to all students with disabilities in accordance with CCIU's responsibilities as the LEA. For example, Paragraph 44 of the Agreement states that CCIU will monitor the educational program at Glen Mills to ensure compliance with all applicable laws, that CCIU will notify PDE of non-compliance, and Glen Mills will permit CCIU's review of its documents and programs. (CCIU Mem. Ex. A ¶ 44.) Paragraph 45 of the Agreement further provides that Glen Mills' provision of its "'Minimum Education Program' . . . shall conform to federal and state laws, to include adherence to the state standards . . . ." (*Id.* ¶ 45.)[18] Legislative reports regarding PRRI arrangements further explain that "[t]he local IU in which the facility [*i.e.*, PRRI] is located has the responsibility of ensuring the adequacy of all educational services" and "[t]he contracting IU or school district is responsible for oversight of the PRRI." *Reimbursement for Educational Services for Adjudicated Youth in Private Residential Facilities*, Legislative Budget and Finance Committee of the Pennsylvania General Assembly, 8, 25-26 (Feb. 2006), http://lbfc.legis.state.pa.us/Resources/Documents/Reports/111.pdf.

CCIU also erroneously argues that it is relieved of any obligations to ensure the quality of educational services at Glen Mills because only 24 P.S. § 13-1306 ("Section 1306") imposes such obligations on LEAs and it is wholly inapplicable to this situation. This is incorrect. The PRRI

[18] CCIU's contract with Glen Mills also reflects that the purpose of the Agreement is to "facilitate provision and coordination of appropriate educational services to children who are residents of Glen Mills" (CCIU Mem. Ex. A at 1); calls for "regular discussions" between PRRI staff and CCIU representatives to review the provision of educational services (*id.* ¶ 28); and requires Glen Mills to notify CCIU regarding the certification of its staff (*id.* ¶ 6).

statute and Section 1306 must be read as co-extensive. Section 1306 applies to all "non-resident inmates of children's institutions," which are defined broadly as any institutions "for the care or training of . . . children" and therefore would include Glen Mills. The statute assigns the duty to ensure public education services that comply with all standards and laws to a school district or IU where a facility is located, known as the host school district.[19] The language of Section 1306 is purposely "overly inclusive" to ensure that students receive educational services whenever they are away from their home districts. *N.M. v. Wyo. Valley W. Sch. Dist.*, No. 15-1585, 2016 WL 2757395, at *4 (M.D. Pa. May 11, 2016). The monitoring obligations under Section 1306 apply even when students are placed at schools outside of the host school district. *L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610, 617 (E.D. Pa. 2018) (finding that the host school district is responsible for education of student in residential facility placed at an approved private school outside of the district).

Importantly, Section 1306 recognizes its applicability to all children's institutions, as well as its interplay with the PRRI statute, as it expressly states: "Nothing in this section is intended to supersede section 914.1-A of this act or any other provision of law applicable to a particular type of placement." 24 P.S. § 13-1306(e) (footnote omitted). Accordingly, these statutes must be read in tandem. CCIU cannot hide behind Section 1306 or the PRRI statute to avoid liability that is widely recognized by courts, the Pennsylvania Department of Education, and is set forth in its own contract with Glen Mills. CCIU's motion to dismiss Plaintiffs' claims should be denied and Plaintiffs must be afforded the opportunity to present evidence regarding CCIU's failure to fulfill its legal duties.

[19] *See Nonresident Students in Institutions* (July 1, 1999), https://www.education.pa.gov (under "Policy and Funding," follow "Basic Education Circulars" hyperlink; then follow "Nonresident Students in Institutions" hyperlink).

VIII. PLAINTIFFS' CLAIMS AGAINST DEFENDANTS GLEN MILLS, CCIU, AND PDE DO NOT REQUIRE EXHAUSTION OF IDEA'S ADMINISTRATIVE REMEDIES

Plaintiffs are not required to exhaust administrative remedies prior to proceeding on their claims brought under the IDEA because this case so clearly falls within a well-recognized exception to the exhaustion rule. *See, e.g.*, *Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778-79 (3d Cir. 1994) (recognizing exhaustion exception where it would be "futile or inadequate" or "where the administrative agency cannot grant relief" (internal quotation marks and citation omitted)); *see also Beth V. by Yvonne V. v. Carroll*, 87 F.3d 80, 89 (3d Cir. 1996) (holding that allegations of systemic legal deficiencies seeking system-wide relief fall within the futility exception). As an initial matter, Glen Mills' attempt to secure dismissal of all education claims against it on this ground must be rejected, inasmuch as exhaustion of the administrative process against it is not required, nor is it available.[20] The instant case presents extraordinary systemic deficiencies, for which exhaustion under the IDEA is not required. Plaintiffs allege CCIU failed to ensure *any* system for the provision of special education and related services to eligible youth placed at Glen Mills and that PDE failed to oversee and monitor the provision of these services.

[20] Glen Mills, a private school, is not a party against which a parent and child can bring a complaint to invoke the IDEA's administrative hearing process. *See* 20 U.S.C. § 1401(19), (32) (defining LEA and SEA); *see also* 22 Pa. Code § 14.103 (defining LEA); *see also St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 172 (2d Cir. 2001) (holding that a private school is not an LEA); *see also Ullmo ex rel. Ulmo v. Gilmour Acad.*, 273 F.3d 671, 679 (6th Cir. 2001). As a result, Glen Mills cannot be held liable under the IDEA, and exhaustion of the IDEA's administrative process is not required. *See St. Johnsbury Acad.*, 240 F.3d at 172; *see also J. v. Sch. Dist. of Phila.*, No. 06-3866, 2007 WL 1221216, at *4 (E.D. Pa. Apr. 25, 2007) (holding that a private entity implementing an IEP is not liable under the IDEA); *Bardelli v. Allied Servs. Inst. of Rehab. Med.*, No. 14-0691, 2015 WL 999115, at *6 (M.D. Pa. Mar. 6, 2015) (excusing exhaustion against private school for claims brought under Section 504 and the ADA). Plaintiffs have not brought claims against Glen Mills under the IDEA and Glen Mills cannot seek dismissal of all education claims against it on this ground.

(Compl. ¶ 417.) Plaintiffs seek declaratory and prospective injunctive relief that will require a restructuring of the educational system for these youth.[21] (Compl. ¶¶ 422, 432, 442.) These claims cannot be remedied by the administrative process and, as discussed herein, requiring Plaintiffs to exhaust administrative remedies undercuts the purpose of the exhaustion doctrine.

A. Plaintiffs' Claims Against PDE Do Not Require Exhaustion As They Allege A Systemic Failure To Monitor Compliance With The Requirements Of The IDEA

Plaintiffs allege that PDE, as the state educational agency, systematically failed to conduct compliance monitoring as required and failed to ensure that children with disabilities placed at Glen Mills, a non-public school, received a free appropriate public education consistent with federal and state standards. (Compl. ¶¶ 277-80, 326, 363-68.) Exhaustion would be futile for these systemic challenges against PDE for the same reasons articulated by this Court in *Blunt v. Lower Merion School District*, 559 F. Supp. 2d 548, 560 (E.D. Pa. 2008). There, plaintiffs challenged PDE's failure "to supervise the School District's provision of special education services generally and specifically in the areas of *compliance monitoring*, complaint resolution, and 'child find.'" *Id.* (emphasis added). This Court denied a motion to dismiss claims against PDE, holding that "[n]either the IDEA nor the Pennsylvania regulations provides an administrative forum wherein plaintiffs can challenge the actions of the Commonwealth defendants." *Id.* at 560. The Court further explained that "allegations of systemic failure could not be remedied through any administrative process since there is none." *Id.* The administrative process is futile at addressing claims against the state educational agency that involve policies and practices of general

[21] As prospective injunctive relief, Plaintiffs seek a system-wide compensatory education services plan that will restore the educational rights of youth at Glen Mills. *See, e.g., Milliken*, 433 U.S. at 277; *see also Lauren W.*, 480 F.3d at 272 n.16 (holding that compensatory education is prospective injunctive relief).

applicability. *See, e.g., N.J. Prot. & Advocacy, Inc. v. N.J. Dep't of Educ.*, 563 F. Supp. 2d 474, 486-87 (D.N.J. 2008) (finding that a hearing officer does not have the authority to order the state to change its policies and practices); *Gaskin v. Pennsylvania.*, No. 94-4048, 1995 WL 154801, at *5 (E.D. Pa. Mar. 30, 1995) (holding that a hearing officer cannot grant relief ordering PDE to monitor whether school districts comply with the IDEA).

PDE's attempt to recast Plaintiffs' claims as "grounded in individual students' educational experiences" must fail. (Com. Mem. 21.) None of the cases the Commonwealth cites regarding the nature of systemic claims support a finding that Plaintiffs' claims are individual in nature. (*Id.* at 19-21.) *See, e.g., J.D.G. v. Colonial Sch. Dist.*, 748 F. Supp. 2d 362, 370 (D. Del. 2010) (*pro se* complaint challenged the state's appointment of hearing officers as it related to only *one* student and failed to plead systemic facts); *J.T. ex rel. A.T. v. Dumont Pub. Sch.*, 533 F. App'x 44, 55 (3d Cir. 2013) (finding plaintiffs' claims were not systemic because (1) they only addressed one component of the school district's educational program affecting a small subset of the school's population, and (2) determining the violation would require a factually intensive inquiry); *Ass'n for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993) (holding that claim challenging "single component of CDE's educational program on individual children's IEPs" was not a systemic violation that excused exhaustion).

Here, Plaintiffs challenge the wholesale absence of any system of monitoring or oversight by PDE whereby *all* children with disabilities at Glen Mills were deprived of all aspects of the education to which they were legally entitled—including individualized programming, parent participation in the process, an education provided by special education teachers, availability of related services, etc. (Compl. ¶¶ 277-80, 326, 335, 360, 363.) Remedying these failures requires systemic rather than individualized response. (Compl. ¶¶ 277-80, 326.) Determining these

violations will *not* require a factually intensive analysis into individual students because PDE's failures were uniformly denied against them all. (Compl. ¶¶ 277-80, 326.) These are precisely the type of systemic legal deficiencies that the administrative process cannot address and for which exhaustion is not required. As a result, the Court should deny the Commonwealth's motion to dismiss Counts VI, VII, VIII, IX, and X for failure to exhaust.

B. Exhausting Plaintiffs' Claims Against CCIU Would Be Futile

Plaintiffs' claims against CCIU involve policies and practices that impacted the totality of education provided at Glen Mills are likewise systemic and do not require exhaustion. *See J.T. v. Dumont Pub. Sch.,* No. 09-4969, 2012 WL 1044556, at *11–12 (D.N.J. Mar. 28, 2012) (discussing the futility exception for systemic claims against an LEA), *aff'd sub nom. J.T. ex rel. A.T. v. Dumont Pub. Sch.*, 533 F. App'x 44 (3d Cir. 2013); *see also P.V. ex rel. Valentin v. Sch. Dist. of Phila.*, No. 11-04027, 2011 WL 5127850, at *8-9 (E.D. Pa. Oct. 31, 2011) (excusing exhaustion for class-wide relief). Plaintiffs' claims fall squarely within the systemic claim analysis conducted by the district court in *J.T. v. Dumont Public Schools*. Quoting from the Ninth Circuit, the district court delineated that a complaint is systemic if it "'requires restructuring the education system itself in order to comply with the dictates of the Act'" and is not systemic if it "'involves only a substantive claim having to do with limited components of a program.'" 2012 WL 1044556, at *11-12 (quoting *Doe v. Ariz. Dep't of Educ.*, 111 F.3d 678, 682 (9th Cir. 1997)). In *J.T.*, plaintiffs' claims against the LEA were not systemic because they did not allege that the school district "fails to develop IEPs for kindergarten students," "fails to involve parents in the IEP development process," "fail[s] to individually evaluate students," or "fail[s] to provide sufficient . . . special education support services to the kindergarteners in the inclusion class." *Id.* at *12.

Here, unlike in *J.T.*, Plaintiffs' claims relate to every aspect of the education program provided to children with disabilities at Glen Mills. For example, Plaintiffs complain that CCIU

failed to ensure that any of the components required by the IDEA were provided to children with disabilities at Glen Mills, including developing IEPs, involving parents in the IEP process, evaluating students, and providing any individualized special education services. (Compl. ¶¶ 301-03.) These systemic claims cannot be remedied through the administrative process.

Courts outside of the Third Circuit have also found exhaustion unnecessary when plaintiffs raise systemic claims against the LEA and seek system-wide relief. *See, e.g., J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 114-15 (2d Cir. 2004) (exhaustion not required when nature and volume of plaintiffs' claims prevented meaningful remedy through administrative process); *D.L. v. District of Columbia*, 450 F. Supp. 2d 11, 18 (D.C. Cir. 2006) (plaintiffs' claims alleging district failed to comply with Child Find requirements did not require exhaustion where, "given the nature of the claims presented, agency expertise would provide no benefit to the judicial resolution of [the] case"). In a factually similar case, the Second Circuit found that school-eligible inmates with disabilities at Rikers Island's prison who challenged the New York City school district's failure to provide general education and special education services were not required to exhaust administrative remedies before proceeding on claims under the IDEA. *See Handberry v. Thompson*, 446 F.3d 335, 344 (2d Cir. 2006). Exhaustion was not required because "individual administrative remedies would be insufficient to address the defendants' failure to provide the service required by the IDEA to all relevant inmates. . . . The purposes of exhaustion . . . are unavailing where the alleged issue is the absence of any services whatsoever." *Id.* In this case, Plaintiffs have also alleged that students were educated in a one-size-fits-all program and did not receive individualized programming. (Compl. ¶¶ 306-11.) *See J.S.*, 386 F. 3d at 115 (excusing exhaustion for systemic claims alleging LEA's failure to ensure parent participation in the special education process, train school staff, perform timely evaluations, and provide and implement

transition plans, support services, and assistive technology services). Here, similar to the challenges in *Handberry* and *J.S.*, Plaintiffs have alleged that CCIU wholly neglected its obligations to ensure that students with disabilities at Glen Mills received a free appropriate public education. (Compl. ¶¶ 252, 300-02, 323.) As recognized in *Handberry* and *J.S.*, Plaintiffs' allegations regarding the absence of any system to address the needs of students with disabilities is precisely the type of claim for which exhaustion would be futile.

CCIU's reliance on *Blunt v. Lower Merion School District* is misplaced. (CCIU Mem. 10.) In *Blunt,* this Court emphasized the complaint's "overwhelming focus" on the "individualized circumstances" of the named plaintiffs and the school district's failure to support those specific students. 559 F. Supp. 2d at 559. Here, by contrast, the Complaint is focused on systemic school-wide deficiencies and the absence of a system to serve all students with disabilities at Glen Mills. (Compl. ¶¶ 301, 302, 304, 310-13, 317, 319.) The Complaint emphasizes CCIU's common denial of its obligations as an LEA, including failing to ensure parent participation in a legally cognizable special education process, the lack of special education teachers, and deprivation of a free appropriate public education in the least restrictive environment for all students with disabilities. Plaintiffs' allegations are systemic and are not focused on individual factual circumstances. Accordingly, this is precisely the type of case for which exhaustion of administrative remedies should be excused.

Finally, as with the claims against PDE, requiring exhaustion for claims against CCIU undermines the policy goals of exhaustion. *See Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 275 (3d Cir. 2014). In cases challenging the failure of an entire system to serve students with disabilities, the use of an administrative process which, at best, will lead to inconsistent results, an overwhelmed administrative system, and no systemic relief. *See N.J. Prot. & Advocacy, Inc.*, 563

F. Supp. 2d at 487*; see also M.M. v. Paterson Bd. of Educ.*, 736 F. App'x 317, 320 (3d Cir. 2018) (highlighting that systemic claims involving thousands of children would overwhelm the state administrative agency and foreclose timely relief); *J.S.*, 386 F.3d at 114-15 (excusing exhaustion, in part, because the nature and volume of plaintiffs' claims prevented a meaningful remedy through the administrative process). Furthermore, the factual record is best developed through standard discovery procedures, as hearing officers lack authority to hear evidence regarding these systemic claims. *See Vicky M. v. Ne. Educ. Intermediate Unit 19*, 486 F. Supp. 2d 437, 455 (M.D. Pa. 2007); *Gaskin*, 1995 WL 154801, at *5. Given that Plaintiffs' claims involve the broad failure to provide any of the components required by the IDEA, they do not require agency expertise for their resolution. *See, e.g., Scaggs v. N.Y. Dep't of Educ.*, No. 06-0799, 2007 WL 1456221, at *6-7 (E.D.N.Y. May 16, 2007) (noting courts are best equipped to address systemic violations of educational programs and facilities); *D.L.*, 450 F. Supp. 2d at 18 (D.C. Cir. 2006) (plaintiffs not required to exhaust claims where district failed to comply with Child Find requirements because, "given the nature of the claims presented, agency expertise would provide no benefit to the judicial resolution of [the] case").

Here, requiring individual administrative hearings for a system-wide failure common to all putative class members—the failure of Glen Mills to offer and provide a legally compliant education to all students with disabilities—would drain scarce resources and fail to remedy structural deficiencies that can only be addressed systemically. Plaintiffs' putative classes involve hundreds of young men who were placed at Glen Mills; requiring exhaustion for each class member would be entirely ineffective based on the volume and nature of the claims.

C. Exhaustion Is Not Required For Plaintiffs' State Education Law, Equal Protection And Procedural Due Process Claims

Defendants CCIU and Glen Mills incorrectly argue that failure to exhaust with regard to IDEA claims bars Plaintiffs' state law, Equal Protection and Procedural Due Process claims. (CCIU Mem. 8; GMS Mem. 21.) While the IDEA's administrative exhaustion requirement may apply to claims asserted pursuant to other federal laws protecting the rights of children with disabilities, it does not apply when the gravamen of the claim is not a denial of a free appropriate public education ("FAPE"). *See Fry v. Napoleon Comty. Sch.*, 137 S. Ct. 743, 755 (2017). Clearly, Plaintiffs' state law, Equal Protection and Procedural Due Process claims do not focus on a denial of FAPE and therefore exhaustion is not required. *See, e.g.*, *Blunt*, 559 F. Supp. 2d at 569 (holding that the IDEA exhaustion requirement did not bar plaintiffs' claims under Title VI because, unlike the IDEA, Title VI does not focus on the rights of children with disabilities); *see also S.B. by & through Kristina B.*, 327 F. Supp. 3d at 1251 (holding that a constitutional claim regarding the denial of educational services without due process did not require exhaustion). Counts III, IV, and V are brought by the Education Subclass, which includes students who are not covered by the IDEA and for whom the administrative process offers no remedies. (Compl. ¶¶ 20, 39-40.) In addition, these claims assert denials of general education in violation of state law, equal protection and procedural due process, which do not mention, involve, or relate to a denial of FAPE. (Compl. ¶¶ 249-268, 386-413.) These claims are distinct from a denial of FAPE and seek relief that is not available under the IDEA; therefore, exhaustion is not required. *See Fry*, 137 S. Ct. at 755.

IX. CLAIMS AGAINST DEFENDANTS BASED ON ADA AND SECTION 504 ARE NOT SUBJECT TO DISMISSAL

A. Plaintiffs Properly State Claims Against PDE Under Title II Of The ADA And Section 504

Plaintiffs have properly pled facts supporting claims against PDE for intentional discrimination under Title II of the ADA and Section 504 of the Rehabilitation Act. PDE does not challenge Plaintiffs' identification of its Disability Subclass as residents who have disabilities or who were "otherwise qualified" to participate in Glen Mills' school program—the first two pleading requirements—but instead focuses on a purported failure to include specific facts about PDE's responsibility for the disability discrimination.[22] (Com. Mem. 13-16.) *See also S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 260 (3d Cir. 2013) (delineating the identical requirements under Title II and Section 504 for violations within a school setting (citing *Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 189 (3d Cir. 2009))). Importantly, a state educational agency's failure to oversee or ensure the guarantee of education for students with disabilities constitutes discrimination under Title II and Section 504. *See Andrew M. v. Del. Cty. Office of Mental Health & Mental Retardation*, 490 F.3d 337, 350 (3d Cir. 2007) (noting "the denial of an education that is guaranteed to all children . . . forms the basis of the claim"); *see also J.M. by and through Mata v. Tenn. Dep't of Educ.*, 358 F. Supp. 3d 736, 750-52

[22] PDE further challenges Plaintiffs' request for injunctive relief and compensatory damages to remedy PDE's discrimination under Title II of the ADA. (Com. Mem. 13.) Both Title II and Section 504 waive sovereign immunity defenses. 42 U.S.C. § 12202; 42 U.S.C. § 2000d-7. Further, the Third Circuit has determined that Congress validly abrogated sovereign immunity for Title II claims involving public education. *See Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F. 3d 524, 550-56 (3rd Cir. 2007); *see also Grieco v. N.J. Dep't of Educ.*, No. 06-4077, 2007 WL 1876498, at *5 n.2 (D.N.J. June 27, 2007) (acknowledging *Bowers* as a "binding, precedential Third Circuit decision . . . wherein the Court concluded that Congress validly abrogated Eleventh Amendment immunity under Title II in the context of education"). In addition, Plaintiffs seek compensatory education, which is prospective, injunctive relief available regardless of whether Glen Mills is still operating. *See Lauren W.*, 480 F.3d at 272 n.16.

(M.D. Tenn. 2018) (holding that the state's failure to provide the minimum necessary oversight or guidance forms the basis for Title II and Section 504 claims). Plaintiffs have pled the necessary facts regarding PDE's discrimination under Title II and Section 504.

Here, unlike the plaintiffs in the case PDE relies upon, *Rovner v. Keystone Human Services*, No. 11-2335, 2013 U.S. Dist. LEXIS 111336 (M.D. Pa. July 18, 2013), Counts IX and X, with all preceding paragraphs incorporated, specifically allege that PDE failed to monitor and oversee the education at Glen Mills and ensure students with disabilities were not: deprived of an education; subject to physical force, restraint, isolation, or punitive behavior management for disability-related behaviors; or otherwise subject to disability-based discrimination. (Compl. ¶¶ 278, 280, 326, 335, 360-61, 363, 365.) These facts are sufficient to state a claim that PDE denied students with disabilities the benefit of, and access to, its educational program in violation of Title II of the ADA and Section 504.

B. Plaintiffs' ADA And Section 504 Claims Of Denial Of Access To Educational Opportunities Are Separately Cognizable From A Denial Of FAPE And Not Subject To Exhaustion

Because Plaintiffs' claims under the IDEA do not require exhaustion of administrative remedies, Plaintiffs' claims brought under the ADA and Section 504 likewise escape exhaustion requirements. *See, e.g.*, *Handberry*, 446 F.3d at 344 (denying school district's motion to dismiss ADA and Section 504 claims based on the determination that IDEA claims did not require exhaustion); *see also Bardelli*, 2015 WL 999115, at *6 (denying private school's motion to dismiss based on the determination that IDEA exhaustion was not required). Even if exhaustion were required under the IDEA, exhaustion is not required under the ADA and Section 504 of the Rehabilitation Act because denial of a FAPE is not the gravamen of the plaintiffs' ADA and Section 504 claims.

In *Fry v. Napoleon Community Schools*, the Supreme Court considered the scope of the IDEA's exhaustion requirement and held that "exhaustion is not necessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee" of a FAPE. 137 S. Ct. at 748. When determining whether a plaintiff seeks relief for the denial of a FAPE, a court should look to the "'substance' of, rather than the labels used in, the plaintiff's complaint" and the court's inquiry "does not ride on whether a complaint includes" the words "FAPE" or "IEP." *Id* at 755. While the IDEA guarantees eligible children "individually tailored educational services," *id.* at 756, and "concerns only their schooling," *id.* at 755, the ADA and Section 504 are much broader; they "cover people with disabilities of all ages, and do so both inside and outside schools." *Id.* at 756. Thus, a complaint under the ADA and Section 504 might "seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation" and therefore not require exhaustion under the IDEA. *Id.*

According to *Fry*, courts should ask two questions when determining whether the gravamen of a complaint concerns the denial of a FAPE: (1) "could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school[?]" and (2) "could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?" *Id.* If the answers are "yes," exhaustion is not required. *Id.*

To illustrate this point, the Court proposed a hypothetical factually similar to the instant case, where "a teacher, acting out of animus or frustration, strikes a student with a disability." *Id.* at 756 n.9. Concluding that the "gravamen of the plaintiff's complaint does not concern the appropriateness of an educational program," the Court explained that, while the claim relates to the child's education, it "is unlikely to involve the adequacy of special education—and thus unlikely to require exhaustion" because "a child could file the same kind of suit against an official

at another public facility for inflicting such physical abuse—as could an adult subject to similar treatment by a school official." *Id.*

The gravamen of Plaintiffs' ADA and Section 504 claims regarding mistreatment based on disability and the denial of equal access to educational opportunities is not a denial of FAPE and, therefore, not subject to the IDEA's exhaustion requirement. In *Fry*, the Supreme Court clarified that not all allegations of disability discrimination involving education implicate the IDEA; rather, exhaustion applies if the allegation involves a service "needed to fulfill the IDEA's FAPE requirement." 137 S. Ct. at 754. Claims that extend *beyond* what is required for a FAPE are not subject to exhaustion even if they may implicate an IEP. *Wellman v. Butler Area Sch. Dist*., 877 F.3d 125, 133 (3d Cir. 2017) (citing *J.S. III v. Houston Cty. Bd. of Educ*., 877 F.3d 979, 986 (11th Cir. 2017)). In *J.S.*, the Eleventh Circuit explained that claims regarding the removal of educational opportunities, such as those raised by Plaintiffs, "implicate those further, intangible consequences of discrimination . . . that could result from isolation, such as stigmatization and deprivation of opportunities." 877 F.3d at 987. When the discrimination reaches beyond what constitutes a FAPE, it is "cognizable as a separate claim." *Id.* at 986; *see also Lawton v. Success Acad. Charter Sch., Inc.*, 323 F. Supp. 3d 353, 362 (E.D.N.Y. 2018) (exhaustion not required for ADA and Section 504 claims brought by students with disabilities regarding removal from the classroom, repeated suspension, and failure to provide academic instruction); *S.G. v. Success Acad. Charter Sch., Inc.*, No. 18-2484, 2019 WL 1284280, at *10 (S.D.N.Y. Mar. 20, 2019) (exhaustion not required for ADA and Section 504 claims regarding suspension, failure to provide coursework, and threats to call law enforcement).

Here, Counts IX and X allege intentional discrimination regarding access to educational programs for youth with qualifying disabilities that goes beyond what is required for a FAPE.

Similar to *J.S.*, *Lawton*, and *S.G.*, this discrimination includes imposing discipline, including removal from the classroom and removal from educational opportunities such as career programs, due to disability-related behavior. (Compl. ¶¶ 347, 355-56.) The discrimination occurred throughout Glen Mills—on the units, in the classrooms, in the vocational programs, and in the cafeteria. (Compl. ¶¶ 105, 112-14, 129-36, 257, 329, 347-48, 351, 359.) In addition, Plaintiffs allege the complete denial of a legally compliant education, which disproportionately burdened youth with disabilities based on the failure to reasonably modify the educational program to address their disability-related needs. (Compl. ¶¶ 329, 352.) As *Fry* directs, these claims could be, and were, brought outside of a school setting and by adults—for example, against an employer who suspends an adult employee without pay for disability-related conduct or against a prison that isolates an inmate for days without considering disability-related behavior. Exhaustion is not required under the ADA and Section 504 of the Rehabilitation Act.

C. Plaintiffs' ADA And Section 504 Claims Alleging Discriminatory Physical Abuse And Denial Of Access To Rehabilitation Programs Do Not Constitute A Denial Of FAPE

The Third Circuit has recognized that allegations of physical abuse occurring in or out of the school context are unrelated to a FAPE and are not subject to exhaustion. *See Wellman*, 877 F.3d at 133 (noting that a plaintiff's abuse claim, although "arising from her school experience," in reality "has nothing to do with her access to a FAPE and IDEA relief"). Because the alleged injuries "go beyond the student's educational experience," the Third Circuit determined that "[s]urely the [Supreme] Court would not have envisioned that such a claim would be subject to the IDEA's procedural requirements, nor would subjecting such a claim to these procedural requirements necessarily result in any benefit to either the parties or court reviewing the matter at a later date." *Id*.

Other circuit courts have similarly concluded that allegations of verbal and physical abuse—like those alleged by Plaintiffs here—are "non-educational injuries." *See F.H. ex rel. Hall v. Memphis City Sch.*, 764 F.3d 638, 645 (6th Cir. 2014) (holding that, because the "gravamen of [the student's] complaint is the verbal, physical, and even sexual abuse [of the student]," which are "non-educational injuries," IDEA exhaustion was not required); *Muskrat v. Deer Creek Pub. Sch.*, 715 F.3d 775, 785 (10th Cir. 2013) (nothing it would "make[] little sense" to require parents to raise claims of physical abuse without "any legitimate disciplinary goal" under an IDEA administrative hearing because, "[e]ven though random violence may occur in the course of a child's education, we do not believe the child's parent must request a 'no random violence' clause in the IEP.").[23]

Here, Counts IX and X allege that Glen Mills, CCIU and PDE "discriminated against Plaintiffs Derrick and Walter and the Disability Subclass based on their disabilities" by subjecting them to disability-related physical force, restraint, isolation, and disciplinary sanctions (Compl. ¶¶ 449-50, 460.) Both counts go beyond education and the classroom setting by alleging that Plaintiffs were denied equal access not only to education programs but also to the school's "rehabilitative programs." (Compl. ¶¶ 449-50, 460-61.) Counts IX and X incorporate all of the Complaints' preceding paragraphs, including the description of the "almost daily violence by Glen Mills staff

[23] Other courts, relying on *Fry*, have also found that exhaustion is not required when students allege that teachers, administrators, or other students have physically abused or harassed them in the classroom. *See, e.g., P.G. by & through R.G. v. Rutherford Cty. Bd. of Educ.*, 313 F. Supp. 3d 891, 903 (M.D. Tenn. 2018) (noting allegations of physical abuse fall outside the scope of a FAPE because they are "not tied to [the student's] individualized education plan, classroom discipline, or enforcement of school special education policies in any way"); *K.G. by & through Gosch v. Sergeant Bluff-Luton Cmty. Sch. Dist.*, 244 F. Supp. 3d 904, 922 (N.D. Iowa 2017) (noting that "subjecting [a student] to unwarranted and unnecessary physical force in disciplining him and/or seeking his compliance" is "well beyond the scope of a FAPE" (internal quotation marks and citation omitted)).

on youth," the fact that "Glen Mills staff encourage[ed] youth to fight other youth," and the "Glen Mills Leadership Defendants' . . . and staff members' failure to properly supervise youth to ensure protection from abuse." (Compl. ¶ 54.) This violence was entirely unrelated to a denial of FAPE.

Defendants' reliance on *Batchelor v. Rose Tree Media School District* is misplaced. Plaintiffs in *Batchelor* did not allege physical abuse and all of their allegations directly related to the provision of a FAPE alone. 759 F.3d at 274 (holding that exhaustion was required where allegations related "unmistakably" to the provision of a FAPE: student's mother alleged she was bullied and denied reimbursement in retaliation for exercising her IDEA rights, and student was improperly placed in a class with a bullying teacher); *see also M.C. ex rel. R.C. v. Perkiomen Valley Sch. Dist.*, No. 14-5707, 2015 WL 2231915, at *7 (E.D. Pa. May 11, 2015) (excusing exhaustion for abuse claims and holding that *Batchelor* was non-binding).[24] Requiring exhaustion for abuse claims would unfairly "impose [an] extra procedural burden upon Plaintiffs here when non-IDEA eligible students need not meet this burden" and "would expand the scope of the IDEA process to non-educational issues." *M.C.*, 2015 WL 2231915, at *6.

Here, the gravamen of Plaintiffs' ADA and Section 504 claims are not an alleged denial of FAPE-related services but rather focused on general allegations of discriminatory mistreatment, physical abuse, denial of access to rehabilitation programs, and educational access for all youth with disabilities. Accordingly, the IDEA's exhaustion requirement is inapplicable.

[24] Similar Third Circuit decisions requiring exhaustion never touch on claims of physical abuse. *See S.D. by A.D. v. Haddon Heights Bd. of Educ.*, 722 F. App'x 119 (3d Cir. 2018) (discriminatory attendance policy implicated a FAPE); *J.L. by and through Leduc v. Wyo. Valley W. Sch. Dist.*, 722 F. App'x 190 (3d Cir. 2018) (school's seatbelt policy implicated a FAPE).

X. THE COURT SHOULD NOT SEVER CLAIMS AGAINST ANY DEFENDANTS BECAUSE PLAINTIFFS' CLAIMS ARE INTERWOVEN AND SEVERANCE WOULD SIGNIFICANTLY BURDEN VULNERABLE PLAINTIFFS AND UNDERCUT JUDICIAL EFFICIENCY

The Court should deny Taylor's, Walker's, PDE's and Rivera's motions to sever. All of Plaintiffs' claims involve conduct or actions that took place within the classrooms, common areas, and residences of Glen Mills Schools. These claims are all interwoven, involve the same students and staff, and could more efficiently be dealt with in a single case.

Trial courts have significant discretion when ruling on motions to sever under Federal Rules of Civil Procedure 21 and 42(b).[25] *See, e.g.*, *Kimmel v. Cavalry Portfolio Servs., LLC*, 747 F. Supp. 2d 427, 434 (E.D. Pa. 2010) ("District courts are given broad discretion when deciding whether to sever a case pursuant to Rule 21 or Rule 42(b)") (citations omitted); *Miller v. Hygrade Food Prods. Corp.*, 202 F.R.D. 142, 145 (E.D. Pa. 2001).

As Defendants have noted, courts evaluate four factors to determine whether severance is appropriate: "(1) whether the issues sought to be tried separately are significantly different from one another, (2) whether the separable issues require the testimony of different witnesses and different documentary proof, (3) whether the party opposing the severance will be prejudiced if it is granted, and (4) whether the party requesting the severance will be prejudiced if it is not granted." *Official Comm. of Unsecured Creditors v. Shapiro*, 190 F.R.D. 352, 355 (E.D. Pa. 2000) (citations omitted). The moving party bears the burden of proving prejudice. *Corrigan v. Methodist Hosp.*, 160 F.R.D. 55, 57 (E.D. Pa. 1995). Defendants have not met the burden to sever claims.

[25] While Defendants Taylor and Walker request that their claims be severed under Rule 21, they frequently conflate severance with bifurcation under Rule 42(b). (Taylor Mem. 4-6; Walker Mem. 11-15.) Although bifurcation results in separate trials and severance creates discrete independent actions, "the same concerns are considered by the court." *Official Comm. of Unsecured Creditors v. Shapiro*, 190 F.R.D. 352, 355 (E.D. Pa. 2000) (internal quotation marks omitted).

A. The Excessive Force And Assault And Battery Claims Against Andre Walker And Robert Taylor Are Part Of The Pattern And Policy Of Violence That Plaintiffs Experienced At Glen Mills Schools

Defendants Walker and Taylor both request that the Court sever their excessive force and assault and battery claims from the lawsuit, misconstruing these claims as separate and isolated, and contending they will face prejudice if the case is litigated together. However, the four-factor analysis from *Shapiro* heavily favors keeping the claims together. First, the allegations against Walker and Taylor are the same allegations as those against the Glen Mills Schools and the Glen Mills Leadership Defendants. Plaintiffs have brought Eighth and Fourteenth Amendment claims against Glen Mills Schools and Leadership as well—they are not "significantly different from one another." Although Walker and Taylor claim that their assault issues are "isolated" and not related to the unlawful policies and practices of Glen Mills and Leadership, the issues presented are inextricably intertwined. Walker's and Taylor's violence toward Plaintiffs are specific examples of the "policies, practices, and customs" of Glen Mills, from which the Glen Mills Leadership Defendants failed to protect students, and that Plaintiffs will have to relitigate if the cases are severed. In *Lopez v. City of Irvington*, for example, the court declined to sever a case involving multiple abuse allegations from several plaintiffs involving different police officers. No. 05-5323, 2008 WL 565776 (D.N.J. Feb. 28, 2008). Plaintiffs alleged that the city and police department had failed to properly supervise and monitor its police officers, permitting a pattern of excessive force to exist among various officers that led to the various instances of abuse. *Id.* at *3. Because each of the allegations of abuse arose from the overall pattern of abuse that the city and police department failed to curtail, the court held that all the allegations should not be severed. *Id.* Similarly, Plaintiffs allege that Walker's and Taylor's abuse of Plaintiffs are part of the pattern of abuse that Glen Mills and Leadership permitted, and even encouraged, through their practices and policies.

The second factor regarding whether the issues require the testimony of different witnesses and documentary proof, also necessitates that the claims be kept together. The same students and staff that would be witnesses to the assault and excessive force allegations against Taylor and Walker would also be witnesses to the broader abusive culture of Glen Mills as a whole. Separating the trials would require the same witnesses to testify and duplicative review of the documentary evidence regarding the school's policies and practices.

Duplicating trials is especially problematic considering the vulnerability of Plaintiffs—children who have been severely abused. Requiring them to recount the traumatic experiences of their abuse repeatedly as they sit through multiple discovery and trial procedures would be extremely burdensome. This re-traumatization can be avoided by keeping the claims together. Moreover, while Walker and Taylor argue that judicial efficiency will be promoted if the case is severed (Walker Mem. 11-12; Taylor Mem. 5-6), the opposite is true—requiring witnesses to be deposed or testify multiple times and courts to repeatedly analyze the same evidence defies judicial efficiency.

Finally, the questions of prejudice to the Plaintiffs and Walker and Taylor also favors Plaintiffs. Even if there will be some issues at trial that do not pertain to Walker or Taylor, as courts have held, even when "'all evidence adduced is not germane to all counts against each defendant' or some evidence adduced is 'more damaging to one defendant than others,'" it is not enough to justify severance on the basis of prejudice. *United States v. Console*, 13 F.3d 641, 655 (3d Cir. 1993) (quoting *United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991)). Any prejudice can be resolved by providing jury instructions that require the jury to compartmentalize the evidence to prevent prejudice. *See Console*, 13 F.3d at 655-56. In contrast, the prejudice against

Plaintiffs, who will suffer the heavy burden of relitigating traumatic issues multiple times, will be much more difficult to overcome.

B. The Court Should Not Sever Claims Against Rivera Or PDE Because They All Involve The Unlawful And Unconstitutional Culture Of Glen Mills

The *Shapiro* factors also highlight why the abuse claims should not be severed from the claims brought against PDE and Secretary Rivera—the abuse, intimidation, disability discrimination, and denial of education are manifestations of the Glen Mills culture and inextricably linked together. Commonwealth Defendants mischaracterize the claims brought against PDE and Secretary Rivera as "education claims" that should be separated from the "abuse claims." (Com. Mem. 30.) However, Plaintiffs have alleged numerous violations of Plaintiffs' rights under the IDEA, ADA, and Section 504 that involve both insufficient education and the physical abuse Plaintiffs suffered at school. (Compl. ¶¶ 336-59.) The same physical abuse that constitutes a violation of Plaintiffs' Fourteenth and Eighth Amendment rights to be free from excessive force, also constitutes improper restraint, punishment, and discrimination under the IDEA, ADA, and Section 504; the issues are not "significantly different" from one another so as to require severance. Plaintiffs' allege abuse occurred in classrooms and in the same units where they both lived and received computer instruction—thus all of the abuse they witnessed on their units impacted their ability to learn as well. (*See* Compl. ¶¶ 114-15, 156, 169-77, 237.) The Glen Mills sports program was used both to hide evidence of abuse (Compl. ¶ 61) and to deprive students of class time. (Compl. ¶ 256.) Complaining about the lack of education could lead to additional discipline. (Compl. ¶¶ 128-29.) And, the lack of specialized instruction and required disability accommodations prevented students from progressing, which caused them to remain at Glen Mills longer (Compl. ¶¶ 332-33)—subjecting them to even more abuse and intimidation. As described in Section VIII.A, PDE and Secretary Rivera were responsible for monitoring Glen Mills and

ensuring that youth's rights under the IDEA, ADA, and Section 504 were upheld, which they failed to do, as evidenced by Plaintiffs' lack of education and physical abuse.

Because Plaintiffs' IDEA, ADA, and Section 504 claims against PDE and Secretary Rivera involve the same physical-abuse incidents as in their Fourteenth and Eighth Amendment claims, the same school officials and students will be witnesses to the abuse and the same records and discovery will be required to prove all claims. The same witnesses and school records will also be required to litigate the additional claims against PDE and Secretary Rivera. For example, the unit staff or "Counselors" at Glen Mills also supervised Glen Mills' computer-based credit recovery program and could testify on issues of both physical abuse and educational program deficiencies. (Compl. ¶¶ 156, 178.) Making Plaintiffs relitigate these issues would be exceedingly traumatic and undercut judicial efficiency, especially when any prejudice to Defendants can be effectively mitigated through the use of jury instructions. *See Console,* 13 F.3d at 655-56.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny all motions to dismiss, strike, and sever claims.

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Respectfully submitted,

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