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

DERRICK, through and with his next Friend and mother, TINA, et al. Plaintiffs	:	
v.	:	Civil Action No. 2:19-cv-01541-HB
GLEN MILLS SCHOOLS, et al. Defendants	:	(The Honorable Harvey Bartle, III)

REPLY BRIEF IN SUPPORT
OF DEFENDANT'S, CHESTER COUNTY INTERMEDIATE UNIT,
MOTION TO STRIKE AND MOTION TO DISMISS THE PLAINTIFFS' COMPLAINT

Defendant, Chester County Intermediate Unit ("CCIU"), by and through its attorneys, Sweet, Stevens, Katz & Williams, LLP, presents the following Reply Brief in support of its Motion to Strike and Motion to Dismiss the Plaintiffs' Complaint (Docket No. 12), and in opposition to Plaintiffs' Omnibus Memorandum of Law in Opposition (Docket No. 52), filed in the above referenced matter.

I. The Complaint Should be Stricken for Failure to Plead a "Short and Plain Statement" of the Claims.

Plaintiffs' principal argument in response to the motions to strike filed by CCIU and Glen Mills appears to be that they filed a very complex action against many defendants, consisting of multiple counts. (Plaintiffs' Brief in Opposition, pp. 10-13). Much of this feigned "complexity" derives from Plaintiffs' choice to weld two completely different actions, with two completely different cores of common fact, into a single mega-action (undoubtedly in part to confound the fact finder by intentionally intertwining allegations of physical abuse and neglect in the residential counseling program with less sanguine allegations concerning the appropriateness of educational programming). Also contributing to the appearance of "complexity" is the use of the same core of broadly-pled facts to support multiple legal theories, with each theory earning its own "count."

A lengthy complaint with more legal background would also be understandable had even one named plaintiff exhausted his administrative remedies. *See Rayan R. v. Northwestern Educational Intermediate Unit No. 19*, No. 3:11-CV-1694, 2012 WL 398781 at *4 (M.D. Pa. Feb. 7, 2012). In *Rayan R.*, a 34-page, 98-paragraph complaint that "elaborates rather substantially on its claims" was permissible because in a review of administrative proceedings the "Court understands that such a complaint may be lengthier and contain more legal background than it might in simpler circumstances" such as the present Complaint where no administrative proceedings occurred. *Ibid.* Lacking the actual complexity that an administrative record would have offered, Plaintiffs here focus on the self-created complexity of their case. In doing so, they ignore the point of the motions to strike—which was that dozens of the "allegations" in the complaint contained no factual allegations at all but consisted of novel-like dramatic conclusions and citations to and summaries of literature and press articles that cannot be answered with an admission, a denial, or with some other response appropriate to an allegation of *fact*, in the manner anticipated by the Federal Rules. (*See* CCIU Mem. Supp. Mot. Strike, pp. 5-7.) It is these extraneous "facts" that cause the Complaint to violate the Rules of Civil Procedure because, as observed by the Plaintiffs, "courts disfavor 'irrelevant' facts that do not 'satisfy the elements of any of the causes of action it attempts to raise.'" (Plaintiffs' Brief in Opposition, p. 11 (citing *Bolick v. Northeast Industrial Services Corporation*, 666 F.Appx. 101, 104 (3d Cir. 2016))).

Plaintiffs' position would be more meritorious had they offered the *factual* complexity they suggest would be necessary to elaborate upon the *legal* "complexity" of their case. For example, in support of their claims that the IEPs developed for the plaintiff class representatives lacked individualization, Plaintiffs might have offered examples from the IEPs of each of the three IDEA-eligible plaintiffs showing why any common element on those IEPs was actually inappropriate for

a given named plaintiff.[1] Since reading goals for two students who are both reading at the sixth-grade level might be very similar, if not identical, as would anxiety management goals for two students with anxiety, Plaintiffs might have shared in their Complaint at least a few details about *their* individual needs that were unmet by these allegedly "generic" IEPs. Providing actual facts in support of their claims might actually have *extended* the length of Plaintiffs' pleading, and Plaintiffs are correct that truly "complex" cases warrant that elaboration. However, complexity achieved by the inclusion of irrelevant "facts" from literature and press articles and the Plaintiffs' choice to combine separate allegations of physical abuse and neglect with allegations of denial of a FAPE does not excuse the conversion of a federal pleading into a novella.

II. Plaintiffs' Claims Must be Dismissed as Plaintiffs Have Failed to Exhaust Their Administrative Remedies.

The failure to exhaust administrative remedies under the IDEA is jurisdictional. *Batchelor v. Rose Tree Media School District*, 759 F.3d 266, 272 (3d Cir. 2014). Dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction is not a judgment on the merits of the Plaintiffs' case, but a determination that the court lacks the authority to hear the case. *Falzett v. Pocono Mountain School District*, 150 F.Supp.2d 699, 701 (M.D. Pa. 2001) (citing *Mortensen v. First Federal Savings and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). In their Opposition Brief, Plaintiffs assert that they are excused from exhaustion as they have pleaded "systemic violations" against the CCIU thereby making exhaustion futile. (Plaintiffs' Brief in Opposition, pp. 44-49).

[1] As discussed further below, the lack of sufficient factual allegations regarding educational harm also demonstrates why administrative exhaustion is required in this case to determine, at least for the named plaintiffs, whether they actually required the services provided in their IEP or not. For example, an administrative hearing could, as a routine matter, determine if it was actually inappropriate for, as alleged, any of the named plaintiffs' IEP to state that "[Student] will participate fully in the regular classroom with a highly structured learning environment." (Complaint ¶ 307).

Plaintiffs make a conclusory assertion that somehow the very administrative system designed to ensure IDEA compliance in every aspect of a student's educational program would be unable to determine if the protections of the IDEA, "including developing IEPs, involving parents in the IEP process, evaluating students, and providing … individualized special education service", were provided to the named plaintiffs. (*Id.* at p. 47). Plaintiffs' educational allegations, however, are *exactly* the kind of complaints that Pennsylvania's IDEA-mandated administrative system addresses on a daily basis.[2] Simply describing individual experiences as "system-wide" and "systemic" is insufficient for Plaintiffs to meet their burden to show that they may circumvent this jurisdictional requirement, especially as in this case, where agency expertise would provide significant benefit to any judicial resolution.

This Court could not have been more clear in *Blunt v. Lower Merion School District*, 559 F. Supp.2d 548, 560 (E.D. Pa. 2008), *aff'd*, 767 F.3d 247 (3d Cir. 2014), about the need to exhaust the administrative remedies that Congress established in the IDEA, even in the face of allegations raised by purported class claimants that deficiencies in their individual evaluations and IEPs constituted "systemic" violations. As discussed above, sameness between two IEPs is not evidence of either individual inappropriateness or "systemic" inappropriateness. Reading goals for two students both reading at the sixth grade level, for example, might be very similar, if not identical. Anxiety management goals for two students with anxiety might also resemble each other without making them individually inappropriate for either student. Group behavior management systems employing common rewards and consequences for defined behaviors might be appropriate for the majority of students in a common therapeutic setting—and for some students they might not be.

[2] *See generally* 34 C.F.R. § 300.507 (a) (Parents may file an administrative due process complaint to address and resolve every aspect of a student's educational program from identification, evaluation, and educational placement to the provision of FAPE to a student with a disability.)

Only child-specific evidence would support that a shared goal, shared behavior management system, or other common program element was inappropriate for the individual child and provided as a result of any "systemic" practice.

Plaintiffs have frankly failed to show that their claims are "systemic" in that their allegations do not implicate the integrity or reliability of the IDEA resolution procedures or require restructuring of the educational system itself; but only involve substantive claims having to do with the students' educational program which is capable of being addressed by the administrative process. A claim is systemic, and therefore sufficient to excuse exhaustion, if it concerns "the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act." *Paul G. by and through Steve G. v. Monterey Peninsula Unified School District*, 933 F.3d 1096 (9th Cir. 2019) (citing *Doe by and through Brockhuis v. Arizona Dept. of Educ.*, 111 F.3d 678, 682 (9th Cir. 1997) (reviewing cases to define when a claim is "systemic")).

In *Paul G.*, the plaintiff was required to exhaust administrative remedies despite alleging a "systemic" violation by the California Department of Education for failing to provide any residential placements at all for disabled students over the age of eighteen. *See id.* By contrast, in the underlying Complaint, the Plaintiffs are alleging failures against the CCIU at a single school, Glen Mills, and not alleging any failure that even approaches a concern with the education system itself beyond that which the individual named plaintiffs experienced at Glen Mills. As in the *Paul G.* case decided last month or the *Blunt* case previously decided by this Court, Plaintiffs do not

allege a policy that cannot be changed, absent an order of this Court; nor do they allege a procedural violation that effectively deprives them of access to an administrative forum.[3]

The "individual" in "IEP" means that the plan is designed to allow the individual child to attain "meaningful benefit" given his or her unique circumstances, not that every IEP be different for difference's sake. *See generally Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, —— U.S. ——, 137 S.Ct. 988, 999 (2017). Reevaluations for most students under the IDEA, moreover, are required every three years, with more frequent testing and assessment occurring only when a child-specific need for more data is present. *See* 20 U.S.C. § 1414 (a)(2). An IEP team that has the information needed to develop an IEP for a student is not charged with the responsibility to reevaluate for the sake of reevaluating. The bottom line is plain: broad allegations of same or similar treatment can only be established though a fact-intensive inquiry of the individual circumstances of the child, and that examination is exactly, as the Court recognized in *Blunt*, the point of the administrative process.

This case, moreover, presents another issue the resolution of which the IDEA administrative process is uniquely suited, for which that process is unquestionably available, and to which the exhaustion requirement applies: the identity of CCIU as the responsible LEA for juvenile offenders housed at Glen Mills. This issue is explored in more detail below.

[3] *See also Grieco v. New Jersey Dept. of Educ.*, No. 06-CV-4077, 2007 WL 1876498 at *7 - *9 (D.N.J. June 27, 2007) (unreported) (proposed class action of students alleged systemic failures of providing meaningful inclusion was dismissed for failing to exhaust) (alleged "state's failure to provide these children with a FAPE in the least restrictive environment [requires] individualized fact-intensive inquiry… To permit plaintiffs to circumvent the exhaustion requirement by merely alleging a systemic failure, without any logical mechanism to draw reasonable conclusions about individual needs with respect to such a large category of students, would undermine the IDEA and rationale for the exhaustion requirement.")

III. Determining the Responsible Educational Agency for Glen Mills Residents is a Fact Intensive and State-Law-Specific Inquiry Requiring Administrative Exhaustion.

CCIU has not contended that it is not *an* LEA under Pennsylvania law and applying the very broad definition of the term as used in the IDEA. For some purposes and for some students, it clearly is. It is an LEA just as the Erie School District, the Philadelphia School District, and the Montgomery County Intermediate Unit are all LEAs under Pennsylvania law for certain constituencies. The question in this case is whether CCIU is *the* LEA that is responsible for the education of students placed at Glen Mills. The resolution of that question requires a fact-laden inquiry into some of the more obscure and seldom-visited corners of the Pennsylvania Public School Code. As they do in their Complaint, Plaintiffs cite in their Brief to Section 1306 of the School Code, 24 P.S. § 13-1306, which charges *school districts* only (and not IUs) with the obligation to educate children housed in certain institutions located within their boundaries. In doing so, they ignore not only that Section 1306 does not apply to IUs, such as CCIU, but also that Section 1306 by its own terms does not govern the education of students, such as Plaintiffs in this action, housed in PRRIs. *See* 24 Pa. Stat. § 13-1306(e). In other words, Section 1306 of the School Code is irrelevant to this case.

The only provisions of the School Code governing PRRIs — all bundled into a single section, *see* 24 Pa. Stat. § 9-914.1-A — are admittedly confusing. PRRIs receive funding from the Commonwealth to educate juvenile offenders placed in their residential programs, but for reasons lost to modern reckoning, that funding flows from the Commonwealth through either an IU or a school district, whose only obligation is to enter into a Commonwealth-sanctioned contract to disburse such funding, *see id*. at § 9-914-A(a), which the Commonwealth extracts from the various school districts in which the parents of these adjudicated students reside, *see id*. at § 9-914-A(b)(3).

Whether this contractual role of fiscal manager on behalf of the Commonwealth renders the contracting IU an LEA for any purpose appears to be firmly resolved by the General Assembly in the final subsection of the PRRI provisions in the Code, which clearly establish that "[a] private residential rehabilitative institution *shall be exempt from administrative control by the intermediate unit* contracting therewith other than those controls necessary to assure proper expenditure of funds for the maintenance of the minimum educational program provided for in the contract." 24 Pa. Stat. § 9-914.1-A(d) (emphasis added). As CCIU points out in its principal Brief, the Commonwealth-approved contract it has with Glen Mills supports this narrow view of its role as fiscal watchdog. (*See* CCIU Mem. Supp. Mot. Strike, pp. 14-15.) CCIU is plainly not "legally constituted" to exercise "administrative control or direction of" the Glen Mills educational program, and suggesting that minding money flowing from the state to a private school constitutes performance of "a service function for" a "public elementary or secondary school" is contrary to any plain understanding of this language in the IDEA definition of "LEA," 34 C.F.R. § 300.28(a). It is possible that the Pennsylvania General Assembly has established a system under which a PRRI acts as the LEA for juvenile offenders placed in their programs; equally possible is that this system retains in the State Educational Agency responsibility for PRRI-placed students.

This issue, however, is not one the Court can determine at this juncture. As with the individual appropriateness of evaluations and IEPs, the identity of the LEA responsible for a student's FAPE is within the purview of issues that are subject to the IDEA's administrative exhaustion requirement. Hearing Officers have the authority to determine which entity is the responsible LEA, subject, of course, to judicial review after that determination is made. *See, e.g.*, *I.H. ex rel. D.S. v. Cumberland Valley School Dist.*, 842 F.Supp.2d 762, 771-73 (M.D. Pa. 2012); *L.T. v. North Penn School District*, 342 F.Supp.3d 610, 615-16 (E.D. Pa. 2018). This case presents

a critical example of the importance of the administrative process. The determination of whether CCIU or Glen Mills, or perhaps even the Department of Education itself, is the responsible educational agency for Glen Mills residents is a fact intensive and state-law-specific inquiry requiring at least a first look by the educational authorities responsible for Pennsylvania's IDEA compliance. *See Paul G. by and through Steve G.*, 933 F.3d at 1096 ("A principal purpose of requiring administrative exhaustion … is to ensure the agency has had an opportunity to rule on a claim before a plaintiff goes to court.")

IV. CONCLUSION

WHEREFORE, for the foregoing reasons as well as those articulated in the CCIU's Motion to Dismiss/Strike, the CCIU requests that this Honorable Court grant its Motion to Dismiss Counts III through X, or in the alternative, to Strike the Plaintiffs' Complaint in its entirety.

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