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

DERRICK, et al.,	:	Civil Action No. 2:19-cv-01541-HB
Plaintiffs	:	
v.	:	
THE GLEN MILLS SCHOOLS, et al.,	:	
Defendants	:	

REPLY BRIEF OF DEFENDANTS, THE GLEN MILLS SCHOOLS AND RANDY IRESON, IN SUPPORT OF THEIR MOTION TO STRIKE AND/OR DISMISS PLAINTIFFS' COMPLAINT

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Defendants, The Glen Mills Schools ("Glen Mills") and Randy Ireson (collectively, the "Glen Mills Defendants"), submit this reply brief in further support of their Motion to Strike and/or Dismiss Plaintiffs' Complaint (the "Motion").

A. The Court Should Strike Plaintiffs' Complaint.

The Glen Mills Defendants move to strike Plaintiffs' Complaint because it fails to satisfy the requirements of Rule 8. The sprawling, 506-paragraph tome is not a "short and plain statement" of Plaintiffs' claims, as required by Rule 8(a), and is laden with dramatic prose and hyperbole instead of the "simple, concise and direct" allegations required by Rule 8(d)(1). In response, Plaintiffs argue that striking the Complaint is "a drastic remedy" and that the complexity of this case justifies Plaintiffs' unwieldy pleading. (Pls.' Opp. at 11-13.) Plaintiffs nonetheless concede that if the Court finds a violation of Rule 8, the appropriate remedy is to require Plaintiffs to replead. (*Id.* at 13, n.1.) Rule 8 contains no exception for "complex" cases, and the Complaint plainly violates the rule. The Court should require Plaintiffs to replead.

B. Plaintiffs' Claims Cannot Be Maintained as a Class Action under Rule 23.

Plaintiffs assert highly individualized claims arising from alleged incidents of physical abuse and intimidation at Glen Mills and allegations that the school failed to meet Plaintiffs' individual educational needs. Despite the individualized nature of their claims, Plaintiffs nevertheless seek to pursue their claims on a class basis under Rule 23(b)(2) and 23(b)(3). As set forth in the Glen Mills Defendants' opening brief, it is clear from the face of Plaintiffs' Complaint that Plaintiffs' claims cannot be maintained as a class action under either Rule 23(b)(2) or 23(b)(3).[1]

[1] Similar to their Rule 8 argument, in opposing the Glen Mills Defendants' motion to strike their class allegations, Plaintiffs note that courts rarely strike class allegations at the pleading stage. (Pls.' Opp. at 13-14.) Nevertheless, "where it is clear from the complaint itself that the requirements for maintaining a class action cannot be met, a defendant may move to strike the allegations before a motion for class certification is filed." *Semenko v. Wendy's Int'l, Inc.*, No. 12-cv-0836, 2013 WL 1568407, at *3 (W.D. Pa. April 12, 2013).

Plaintiffs offer no explanation for how their highly individualized claims can be squared with the "cohesiveness" requirement for a one-size-fits-all Rule 23(b)(2) class. As the Supreme Court explained, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011). The rule does not allow class certification when class members would be entitled to different injunctive relief or individualized damages. *Id.* Here, Plaintiffs do not seek only uniform injunctive or declaratory relief for the class or any of the subclasses defined in the Complaint. Instead, Plaintiffs seek individualized relief, including "compensatory and punitive damages" and "compensatory education services," which cannot be pursued under Rule 23(b)(2). *See Thompson v Merck & Co., Inc.*, No. 01-cv-1004, 2004 WL 62710, at *2 (E.D. Pa. Jan. 6, 2004) ("Plaintiffs' request for compensatory and punitive damages on behalf of each class member would necessarily require individualized proof of injury."); *M.A. ex. rel. E.S. v. Newark Pub. Sch.*, 2009 WL 4799291, at *13-15 ("The individual inquiries which a compensatory education claim would necessarily involve threaten to overwhelm the action and render it unmanageable."); *Blunt v. Lower Merion Sch. Dist.*, 262 F.R.D. 481, 490 (E.D. Pa. 2009) (denying certification of Rule 23(b)(2) class because claim for "compensatory education" negated cohesiveness).

Moreover, Plaintiffs' claims are not based on a single allegedly violative policy or practice that is common across the class or any of the sub-classes. Rather, the claims are based on a wide variety of alleged violations of state and federal law with respect to the manner in which Glen Mills provided educational services to Plaintiffs. As is evident from the Complaint, the types of alleged violations at issue vary even among the named Plaintiffs. For example, Plaintiffs allege that Glen Mills issued an Individualized Education Program ("IEP") for Derrick

but failed to conduct a proper IEP meeting with Derrick's mother. (Compl. ¶¶ 93-99.) With respect to Thomas, Plaintiffs allege that Glen Mills failed to issue an IEP at all. (*Id.* at ¶159-60.) Thomas also claimed he was denied access to "career technical education." (*Id.* at ¶ 167.) Walter's claims, on the other hand, are based on allegations that he was placed in a GED program and was denied access to the special education resource room. (*Id.* ¶¶ 130, 141.) Finally, Sean claims that he was enrolled in a computer-based learning program but was not given access to a computer. (*Id.* ¶ 185.) The varied nature of Glen Mills' allegedly violative practices renders Plaintiffs' claims incompatible with class certification under Rule 23(b)(2).[2] *See D.L. v. District of Columbia*, 713 F.3d 120, 125-29 (D.C. Cir. 2013) (vacating certification of Rule 23(b)(2) IDEA class because "the harms alleged to have been suffered by the plaintiffs here involve different policies and practices at different stages of the [defendant's] . . . FAPE process . . . [with] no single or uniform policy or practice that bridges all their claims.").

Even if Plaintiffs could identify a uniform policy or practice that spans their proposed class or any of their proposed subclasses and could articulate a one-size-fits-all injunctive remedy to stop such policy or practice, Plaintiffs lack standing to seek such relief. Glen Mills was closed, and all of the Plaintiffs had left the school, before Plaintiffs filed this action (Compl. ¶¶ 1, 17, 19, 21, 22); therefore, Plaintiffs have no basis to seek prospective injunctive relief. *See Richardson v. Bledsoe*, 829 F.3d 273, 278 (3d Cir. 2016) ("While [Plaintiff], of course, still has standing to seek damages for any *past* constitutional violations [at the prison from which he was

[2] Although Plaintiffs cite case law for the proposition that a class can be certified under Rule 23(b)(2) to "attack the [defendant's] rote policy [as opposed to] challenging the application of it in any given circumstance" (*see* Pls.' Opp. at 14, quoting *Wilburn v. Nelson*, 329 F.R.D. 190, 195 (N.D. Ind. 2018)), they fail to identify the single "rote policy" at Glen Mills that is susceptible to class treatment.

transferred] . . . he must have separate standing for forward-looking, *injunctive* relief.")[3] Moreover, unless and until Glen Mills is reopened, any purported claim for prospective injunctive relief is not ripe. *See Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 411-12 (3d Cir. 1992) ("Where the plaintiff's action is based on a contingency, it is unlikely that the parties' interests will be sufficiently adverse to give rise to a case or controversy within the meaning of Article III.") Here, any claim for forward-looking injunctive relief is necessarily premised on hypothetical contingencies (*i.e.*, that Glen Mills will reopen and will continue to employ the same alleged policies and practices challenged by Plaintiffs), the likelihood, timing, and circumstances of which are unknown and about which the parties can only speculate. Accordingly, there is no justiciable claim for prospective injunctive relief. *Id.* at 420 (holding that a contingent claim is not ripe for judicial review).

Plaintiffs' claims likewise cannot be certified under Rule 23(b)(3). As set forth in the Glen Mills Defendants' opening brief, Plaintiffs' proposed subclasses are not ascertainable. (Defs.' Br. at 14-15.) In their Opposition, Plaintiffs state in conclusory fashion that the putative class members "are readily identifiable based on Glen Mills' own records." (Pls.' Opp. at 14.) Plaintiffs do not explain, though, how Glen Mills' records will allow the parties, for example, to objectively and reliably determine which students "were deprived of an education in accordance with the requirements of the Pennsylvania Code" in order to ascertain the so-called "Education Subclass." (Compl. at ¶ 40.) Nor do they explain by what objective, reliable, and administratively feasible means the parties can determine which students were "suspected of being students with disabilities who were never identified and/or evaluated while at Glen Mills"

[3] In *Richardson*, the court permitted the plaintiff to seek certification of class claims for injunctive relief even after he was transferred from the prison at issue (rendering any individual claim for injunctive relief moot) because the plaintiff *had standing when he filed his complaint* and the class claims therefore related back to that date. 829 F.3d at 276. That, of course, is not the case here, where the Plaintiffs did not have standing to pursue prospective injunctive relief when they filed the Complaint.

in order to ascertain the so-called "Suspected-To-Be-Eligible Special Education Sub-Class." (*Id.* at ¶ 42). It is plain from the allegations of the Complaint that individual fact-finding and "mini-trials" will be necessary to identify the class members Plaintiffs purport to represent, and the putative classes therefore are not ascertainable. *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership.")

Further, Plaintiffs' claims cannot proceed on a class basis under Rule 23(b)(3) because individualized issues predominate over common issues. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) ("If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.") (citations and quotations omitted). In their opening brief, the Glen Mills Defendants offered examples of the individualized questions, requiring individualized proofs, necessary to adjudicate Plaintiffs' claims. (*See* Defs.' Br. at 18.) For example, with respect to Plaintiffs' physical abuse claims, the factfinder must determine for each class member: Was he physically abused? If so, how, when, by whom, and under what circumstances? Did he suffer any damages? If so, of what nature and in what amount? None of these questions can be answered through common proofs on a class-wide basis, and, in their Opposition, Plaintiffs do not even attempt to argue otherwise. Similarly, with respect to Plaintiffs' education-based claims, Glen Mills identified several of the myriad questions that a factfinder may need to answer: In what educational programs was the class member enrolled, and why? Was the class member evaluated for a qualifying disability? If not, why not? Was an IEP developed for the class member? If so, under what circumstances and with whose involvement? Again, Plaintiffs have no response. Plaintiffs' claims are hopelessly individualized and "cannot be adjudicated in a one size fits all format, as required by Rule

23(b)(3)." *Semenko*, 2013 WL 1568407, at *11. Accordingly, Plaintiffs' class allegations should be stricken.

C. The Court Should Dismiss Plaintiffs' Education-Based Claims for Plaintiffs' Failure to Exhaust Their Administrative Remedies.

The Glen Mills Defendants explained in their opening brief that Plaintiffs' education-based claims are subsumed by the IDEA and therefore administrative exhaustion is required for the Court to have subject matter jurisdiction. Attempting to skirt the exhaustion requirement, Plaintiffs contend – incredibly – that their "state law, Equal Protection and Procedural Due Process claims *do not* focus on a denial of a FAPE [free appropriate public education] and therefore exhaustion is not required." (Pls.' Opp. at 50 (emphasis added).) Likewise, citing the Supreme Court's "gravamen of the complaint" analysis in *Fry v. Napoleon Cmty. Sch.*, 137 S.Ct. 743, 755 (2017), Plaintiffs insist that the "gravamen" of their claims under the ADA and Section 504 *is not* a denial of a FAPE and therefore the IDEA's exhaustion requirement is not implicated. (Pls. Opp. at 52-54.) This argument is remarkable when considered against the numerous allegations in Plaintiffs' Complaint that frame Plaintiffs' claims in terms of Defendants' failure to provide an appropriate education:

- In Count III, Plaintiffs contend that Defendants "violated the procedural due process rights of the Education Subclass ***by depriving them of their right to an education***[.]"[4] (Compl. at 115 (emphasis added).) Plaintiffs allege that Glen Mills violated the Plaintiffs' due process rights because it "***failed to provide a legally compliant education***." (*Id.* at ¶ 390 (emphasis added).)
- In Count IV, Plaintiffs contend that the Glen Mills Defendants "violated the Fourteenth Amendment rights of the Education Subclass ***by depriving Plaintiffs equal access to a public education***." (*Id.* at 118.) Again, Glen Mills is charged with "***denying these students a free public education***." (*Id.* at ¶ 402 (emphasis added).)

[4] Notably, Plaintiffs' Complaint defines the "Education Subclass" as "all class members who, while at Glen Mills, were ***deprived of an education*** in accordance with the requirements of the Pennsylvania School Code." (*Id.* at ¶ 40 (emphasis added).)

- In Count V, Plaintiffs contend that the Glen Mills Defendants "violated the rights of the Education Subclass to a public education under Pennsylvania law." (*Id.* at 120.) Plaintiffs allege that Glen Mills violated Pennsylvania law "***by denying these students a free public education to which they were legally entitled***." (*Id.* at ¶ 410 (emphasis added).)

- In Counts IX and X, Plaintiffs contend that the Glen Mills Defendants violated Section 504 and the ADA by "[f]ailing to reasonably modify its policies, practices, and procedures ***with respect to the educational program*** to account for the disabilities of Plaintiffs Derrick and Walter and the Disability Class." (*Id.* at ¶¶ 449(b) and 460(b).)

Each of the foregoing counts incorporates by reference the "factual" allegations that precede them, including a section of the Complaint titled "**CHILDREN AT GLEN MILLS WERE DEPRIVED OF AN EDUCATION**," which spans 40 pages and is replete with allegations regarding the ways in which Plaintiffs contend the Defendants failed to provide an appropriate education to students at Glen Mills. (*Id.* at 69-109.) The Complaint manifestly demonstrates that the gravamen of Plaintiffs' education-based claims is the denial of a free appropriate public education, and any argument to the contrary is absurd.

Plaintiffs also appear to argue that because they framed certain of their claims as state law and constitutional claims (and not under the IDEA), exhaustion is not required. (*See* Pls.' Opp. at 50.) But the Supreme Court foreclosed that form of artful pleading in *Fry*. 137 S.Ct. at 754-55 (explaining that the Court must "examine whether a plaintiff's complaint – the principal instrument by which she describes her case – *seeks relief for the denial of an appropriate education*" (emphasis added)).[5] Plaintiffs unconvincingly argue that "denial of access to educational opportunity" is separately cognizable from a denial of a FAPE under the ADA and Section 504. (Pls.' Opp. at 52.) They also contend that "the gravamen" of their ADA and

[5] Plaintiffs' citations to *Blunt v. Lower Merion Sch. Dist.* and *S.B. by and through Kristina B. v. California Dept. of Ed.* for the proposition that exhaustion is not required for constitutional claims miss the mark. (Pls.' Opp. at 50.) *Blunt*'s Section 1983 claims involved race discrimination – claims Plaintiffs are not making here. 559 F. Supp. 2d 548, 561 (E.D. Pa. 2008). *Kristina B.*'s constitutional claim involved a denial of procedural safeguards *prior to* denying her an appropriate education – again, those are not the denial of an appropriate education claims that Plaintiffs allege here. 327 F. Supp. 3d 1218, 1251 (E.D. Cal. 2018.)

Section 504 claims is "imposing discipline, including removal from the classroom and removal from educational opportunities such as career programs, due to disability-related behavior." (*Id.* at 55.) But, as set forth above, that it is not what the Complaint says. Regardless of how Plaintiffs now try to repackage their allegations, the inevitable result is that their education-based claims required exhaustion of administrative remedies.

In a passing reference in their introduction, and later in a footnote, Plaintiffs argue that because Glen Mills is a private school, it is "outside the [IDEA's] administrative hearing process and thus, for it, exhaustion is a meaningless concept." (Pls.' Opp. at 3; 43, n.20.) This is yet another example of Plaintiffs asking the Court to ignore the allegations in their Complaint. Plaintiffs assert educational claims against Glen Mills based on the contention that, *unlike* the private/parochial schools in the cases they cite in footnote 20, Glen Mills is charged with providing a public education to adjudicated-delinquent juveniles. Plaintiffs cannot have it both ways – either Glen Mills is a private school, free from the reach of the IDEA and the requirement to provide a FAPE, or it is a state-regulated education institution for adjudicated-delinquent youth that is serving a state custodial and public-school function. Plaintiffs plainly allege the latter, and therefore must satisfy the legal prerequisites for bringing their education-based claims against the Glen Mills Defendants. Plaintiffs failed to do so, and their education-based claims against the Glen Mills Defendants should be dismissed.

D. Under Controlling Third Circuit Law, the Eighth Amendment Standard Applies to Adjudicated Juveniles at Glen Mills.

Plaintiffs purport to assert violations of *both* the Eighth and Fourteenth Amendments for the same allegedly abusive conduct. They cite no authority allowing them to do so, and the Third Circuit's decision in *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 259-61 (3d Cir. 2010), adopting the "more-specific-provision" rule, forecloses Plaintiffs from seeking redress

under both Amendments. Plaintiffs offer no argument why the more-specific-provision rule does not apply to their Section 1983 claim in this case. Instead, relying primarily on out-of-Circuit decisions, Plaintiffs contend that the Fourteenth Amendment, not the Eighth Amendment, applies to adjudicated-delinquent juveniles.[6] The Third Circuit's decision in *Betts*, however, disposes of Plaintiffs' argument.

The plaintiff in *Betts*, like the Plaintiffs here, was an adjudicated-delinquent juvenile asserting constitutional claims arising from his treatment while in confinement. *Betts*, 621 F.3d at 252. And, like the Plaintiffs here, the plaintiff in *Betts* asserted claims under both the Eighth and Fourteenth Amendments arising from the same alleged misconduct. *Id*. at 260. The court in *Betts* explicitly adopted the more-specific-provision rule, holding that the plaintiff could not assert claims under both the Eighth and Fourteenth Amendments for the same conduct. *Id.* at 261. Then, citing the Supreme Court's decision in *Whitley v. Albers*, 475 U.S. 312, 327 (1986), the court held that the Eighth Amendment, not the Fourteenth Amendment, applied to the plaintiff's claims. *Id.* at 260. The Third Circuit explained that (like Plaintiffs' claims here), "Betts's claims concern his conditions of confinement and an alleged failure by Defendants to ensure his safety." *Id.* at 261. Those allegations, the court concluded, "fit squarely within the Eighth Amendment's prohibition on cruel and unusual punishment[.]" *Id.*

Plaintiffs ask this Court to ignore *Betts*, arguing that the Third Circuit's decision in *A.M. ex rel. J.M.K. v. Luzerne Cty. Juvenile Det. Ctr.*, 372 F.3d 572 (3d Cir. 2004), supports their position that the Fourteenth Amendment applies to claims by adjudicated-delinquent juveniles in confinement. But Plaintiffs misconstrue the distinction drawn by the court in *A.M.*, which focused on the difference between a "detainee" and a "prisoner," not the difference between a

[6] Notwithstanding this contention, Plaintiffs have neither withdrawn their Eighth Amendment claim nor explained why they asserted the claim in the first place if, as Plaintiffs argue, the Eighth Amendment does not apply to adjudicated-delinquent juveniles.

convicted adult and an adjudicated-delinquent juvenile. 372 F.3d at 575. *A.M.* involved a juvenile at a detention center for juveniles "awaiting final disposition and placement." *Id.* Because A.M. "was a detainee and not a prisoner," the court analyzed his claim under the Fourteenth Amendment. *Id.* at 584. This framework is entirely consistent with the Glen Mills Defendants' position: If the person is in custody but has not yet had a final disposition and placement, the Fourteenth Amendment is the correct standard, but when there has been a final disposition and placement – as Plaintiffs had been at Glen Mills – the Eighth Amendment governs. The distinction between detainees and prisoners was acknowledged by the Supreme Court. *See Whitley v. Albers*, 475 U.S. 312, 327 (1986). Ignoring this continuum of applicable constitutional standards, Plaintiffs contend that the Glen Mills Defendants' citation to *Whitley* for the proposition that the Eighth Amendment standard applies to juveniles is "patently false." (Pls.' Opp. at 19 n.6.) Plaintiffs overlook (and apparently hope that the Court will overlook) that the Third Circuit in *Betts* expressly cited *Whitley* in ruling that the Eighth Amendment applies to confined adjudicated-delinquent juveniles. *See Betts*, 621 F.3d at 260. There is no doubt that *Betts* controls here and compels dismissal of Plaintiffs' Fourteenth Amendment claim.

II. CONCLUSION

For all the foregoing reasons and those set forth in the Glen Mills Defendants' opening brief, the Glen Mills Defendants respectfully request that the Court grant their Motion.

Date: September 16, 2019

Respectfully submitted:

/s/ Joseph McHale

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