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

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

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

Henry E. Hockeimer, Jr.
Paul Lantieri III
Kaitlin M. Gurney
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Tel.: 215.665.8500
Fax: 215.864.8999

Attorneys for the Commonwealth Defendants

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. Eleventh Amendment Immunity Bars Plaintiffs' Constitutional Claims (Counts Two Three, and Four) and ADA Claim (Count Ten) 2

1. Notwithstanding Plaintiffs' Self-Serving Label, Count Two Is an Official Capacity Claim Against the DHS Defendants and Therefore Should Be Dismissed 2

2. Counts Three and Four Against PDE Secretary Rivera Should Be Dismissed Because There Is No Ongoing Violation of Federal Law 4

3. PDE Is Immune From Plaintiffs' ADA Claim (Count Ten) Because Plaintiffs Do Not Adequately Allege a Violation of Title II of the ADA 5

B. Plaintiffs' Special Education Claims (Counts Six through Ten) Should Be Dismissed Because Plaintiffs Have Not Exhausted Administrative Remedies 6

1. Counts Six, Seven, and Eight Seek Relief That Is Available through the Administrative Process 6

2. The Gravamen of Plaintiffs' ADA and Section 504 Claims (Counts Nine and Ten) Is the Denial of a FAPE 10

C. All Eight Claims Against the Commonwealth Defendants Should Be Dismissed for Failure To Plausibly Allege a Claim for Relief 12

III. CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Andrew M. v. Del. Cty. Office of Mental Health & Mental Retardation,
490 F.3d 337 (3d Cir. 2007)....................13

Batchelor v. Rose Tree Media Sch. Dist.,
759 F.3d 266 (3d Cir. 2014)....................6, 7, 9, 10

Blunt v. Lower Merion Sch. Dist.,
No. 07-cv-3100, 2008 U.S. Dist. LEXIS 11918 (E.D. Pa. Feb. 15, 2008)....................8

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

Butch v. Morales,
No. 15-2514, 2016 U.S. Dist. LEXIS 130203 (E.D. Pa. Sept. 23, 2016)....................3

Carlisle Area Sch. Dist. v. Scott P.,
62 F.3d 520 (3d Cir. 1995)....................7

Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.,
No. 08-cv-982, 2008 U.S. Dist. LEXIS 61447 (E.D. Pa. Aug. 8, 2008)....................10, 12

Charlene R. v. Solomon Charter Sch.,
63 F. Supp. 3d 510 (E.D. Pa. 2014)....................7

Christ the King Manor, Inc. v. Secretary of United States HHS,
730 F.3d 291 (3d Cir. 2013)....................4, 5

Diamond v. Pa. State Educ. Ass'n,
No. 3:18-cv-128, 2019 U.S. Dist. LEXIS 112169 (W.D. Pa. July 8, 2019)....................5

Ferren C. v. Sch. Dist. of Phila.,
612 F.3d 712 (3d Cir. 2010)....................7

Fry v. Napoleon Cnty. Schs.,
137 S. Ct. 743 (2017)....................11

G.L. v. Ligonier Valley Sch. Dist. Auth.,
802 F.3d 601 (3d Cir. 2015)....................9

Gaskin v. Pa.,
No. 94-cv-4048, 1995 U.S. Dist. LEXIS 4272 (E.D. Pa. Mar. 28, 1995)....................8

Hesling v. Avon Grove Sch. Dist.,
428 F. Supp. 2d 262 (E.D. Pa. 2006) 6, 10

J.D.G. v. Colonial Sch. Dist.,
748 F. Supp. 2d 362 (D. Del. 2010) 13

J.M. v. Francis Howell Sch. Dist.,
850 F.3d 944 (8th Cir. 2017) 9

J.T. v. Dumont Pub. Sch.,
No. 09-cv-4969, 2012 U.S. Dist. LEXIS 42671 (D.N.J. Mar. 28, 2012), *aff'd*,
533 F. App'x 44 (3d Cir. 2013) 8

LeJeune G. v. Khepera Charter Sch.,
2019 U.S. App. LEXIS 22360 (3d Cir. July 25, 2019) 8

M.M. v. Tredyffrin/Easttown Sch. Dist.,
No. 06-cv-1966, 2006 U.S. Dist. LEXIS 62918 (E.D. Pa. Sept. 1, 2006) 12

Moyer v. Aramark,
No. 18-cv-02267, 2019 U.S. Dist. LEXIS 37165 (E.D. Pa. Mar. 7, 2019) 3

Price v. Commw. Charter Acad. Cyber Sch.,
No. 17-cv-1922, 2018 U.S. Dist. LEXIS 59394 (E.D. Pa. Apr. 6, 2018) 13

Rena C. v. Colonial Sch. Dist.,
890 F.3d 404 (3d Cir. 2018) 7

T.L. v. Pa. Leadership Charter Sch.,
224 F. Supp. 3d 421 (E.D. Pa. 2016) 7

United States v. Georgia,
546 U.S. 151 (2006) 5

Wellman v. Butler Area Sch. Dist.,
877 F.3d 125 (3d Cir. 2017) 9, 11, 12

Woodson v. Prime Care Med. Inc.,
No. 12-cv-04919, 2013 U.S. Dist. LEXIS 8861 (E.D. Pa. Jan. 23, 2013) 3

Ex Parte Young,
209 U.S. 123 (1908) 4

I. INTRODUCTION

In their initial memorandum in support of their motion to dismiss, the Commonwealth Defendants[1] demonstrated that the *Derrick* plaintiffs reached too far in attempting to expand the reach of their claims to the DHS and PDE Defendants. All of the claims asserted against them fail for threshold legal reasons (immunity or failure to exhaust administrative remedies), and because they are insufficiently pled in any event. Plaintiffs' omnibus response only underscores these deficiencies. As in their complaint, plaintiffs group the Glen Mills defendants with the Pennsylvania officials, thus comingling the scant facts pled against the Commonwealth Defendants with the incendiary allegations leveled against the Glen Mills defendants, and conflating the legal issues implicated by the starkly different claims against the distinct groups of defendants. When considered on their own, none of plaintiffs' claims against the Commonwealth Defendants can survive dismissal.

***First*,** neither the law nor the facts plaintiffs have alleged allow the plaintiffs to avoid sovereign immunity, which bars their constitutional claims against the DHS Defendants and the Secretary of Education (Counts Two, Three, and Four), as well as their ADA claim against PDE (Count Ten).

***Second*,** plaintiffs acknowledge that they failed to exhaust administrative remedies for their special education claims against the PDE Defendants (Counts Six through Ten), but contend that pursuing such remedies would have been "futile" because their claims are for allegedly "systemic" violations. This argument is belied by the allegations of plaintiffs' complaint, in which plaintiffs assert claims arising from the educational needs of particular

[1] Acronyms and capitalized terms herein have the meanings used in the Commonwealth Defendants' initial memorandum in support of their motion to dismiss ("Initial Memorandum" (Doc. 47).)

students at a single school and seeking individualized compensatory educational relief. Those are precisely the types of claims and relief that plaintiffs bypassed and that the local administrative procedures were designed to consider.

Third**,** try as they might, plaintiffs cannot salvage their claims against the Commonwealth Defendants by clouding the allegations against them with those asserted against the Glen Mills and CCIU defendants. Plaintiffs have not alleged facts sufficient to support any of their claims against the Commonwealth Defendants.

Finally, plaintiffs' omnibus response to the various motions to dismiss muddles the distinct issues implicated by plaintiffs' many, disparate claims, further showing why – in the event the Court does not dismiss all of the claims against the PDE Defendants – it should sever any remaining education claims from any remaining abuse claims.

II. ARGUMENT

A. Eleventh Amendment Immunity Bars Plaintiffs' Constitutional Claims (Counts Two Three, and Four) and ADA Claim (Count Ten).

1. Notwithstanding Plaintiffs' Self-Serving Label, Count Two Is an Official Capacity Claim Against the DHS Defendants and Therefore Should Be Dismissed.

Plaintiffs essentially concede that Count Two – their only claim against the DHS Defendants – is an individual capacity claim in name only: they seek Section 1983 relief for official actions and inactions that allegedly violated the Eighth and Fourteenth Amendments. (*See* Pls.' Resp. at 29.) Ignoring the controlling law, plaintiffs contend that simply because the Complaint "explicitly state[s] that Miller, Dallas, and Utz are each being sued in their individual capacities," immunity does not apply. (Id. at 28.) Not so. Because Plaintiffs have not alleged that any of the DHS Defendants were personally involved in the alleged abuse at Glen Mills, the Eleventh Amendment bars the claim against the DHS Defendants. (*See* Init. Mem. § III(A)(1).)

Courts in this district have found the transparent pleading artifice that plaintiffs employ here insufficient to evade the application of immunity. *See, e.g.*, Moyer v. Aramark, No. 18-cv-02267, 2019 U.S. Dist. LEXIS 37165, at *12-14 (E.D. Pa. Mar. 7, 2019) (dismissing individual capacity claims because the complaint "described actions taken by the individual defendants in their official roles"); Butch v. Morales, No. 15-2514, 2016 U.S. Dist. LEXIS 130203, at *13-14 (E.D. Pa. Sept. 23, 2016) (same); *see also* Woodson v. Prime Care Med. Inc., No. 12-cv-04919, 2013 U.S. Dist. LEXIS 8861, at *9-11 (E.D. Pa. Jan. 23, 2013) ("The distinction between personal and official capacity suits is more than a mere pleading device."). Even the case plaintiffs cite in support of their argument that "courts have shown flexibility in allowing plaintiffs' personal-capacity claims to proceed" actually dismissed the individual capacity claims against all but one defendant because the plaintiff in that case, like plaintiffs here, failed to allege specific facts demonstrating individual liability. (*See* Pls.' Resp. at 29 (citing Bradley v. W. Chester Univ. of the Pa. State Sys. Higher Educ., 182 F. Supp. 3d 195, 198 (E.D. Pa. 2016)).) Plaintiffs' substantive allegations reveal that that plaintiffs' real dispute is with DHS, not with the DHS Defendants personally. (*See, e.g.*, Compl. ¶¶ 201-235.) Accordingly, sovereign immunity bars the claim against the DHS Defendants.

The claim is subject to dismissal on qualified immunity grounds for the same reason. As set forth in the Initial Memorandum, plaintiffs must show that a defendant had "personal involvement in the alleged wrongs." Bradley, 182 F. Supp. 3d at 198 (cited in Init. Mem. at 8). Plaintiffs' only substantive allegations against the DHS Defendants are that they held their official positions at the times the alleged abuse occurred at Glen Mills, and that they did not act quickly enough to shut the school down. (*See* Pls.' Resp. at 32-33.) In other words, plaintiffs

allege that the DHS Defendants did not do their official jobs properly, not that they had personal involvement in any alleged wrongs.

2. Counts Three and Four Against PDE Secretary Rivera Should Be Dismissed Because There Is No Ongoing Violation of Federal Law.

Plaintiffs' official capacity claims alleging that Secretary Rivera violated plaintiffs' procedural due process and equal protection rights are likewise barred by sovereign immunity. Plaintiffs stake the viability of these claims on the judicially-created exception to the Eleventh Amendment established in Ex Parte Young, 209 U.S. 123 (1908), which permits suits against state officials when they seek (1) prospective injunctive relief (2) to end an ongoing violation of federal law. Plaintiffs focus their response on their contention that the compensatory education they seek as a remedy qualifies as "prospective injunctive relief." (Pls.' Resp. at 34-35.) But it is plaintiffs' failure to satisfy the second part of the test – an ongoing violation of federal law – that is fatal to Counts Three and Four. As set forth in the very first paragraph of the Complaint, plaintiffs are no longer at Glen Mills and the school itself is no longer operating. (Compl. ¶ 1.) Thus, there can be no ongoing violation of federal law.

Plaintiffs look outside the Third Circuit for law purportedly supporting their view that their claims should proceed even though "the allegedly unconstitutional state action is no longer imminent." (Pls.' Resp. at 35.) But the Third Circuit and its district courts have hewed much closer to the plain meaning of the Young exception. In Christ the King Manor, Inc. v. Secretary of United States HHS, 730 F.3d 291 (3d Cir. 2013), the Third Circuit found that the compensatory remedies the plaintiffs sought – "prospective corrective payments from the state" – demonstrated that their claim was not really "designed to end a continuing violation of federal law." Id. at 319 ("[T]hey do not identify any ongoing conduct by the Secretary of DPW that must be enjoined to ensure the supremacy of federal law."). Finding that the claim instead

sought "to compensate a party injured in the past by the action of a state official," the Third Circuit held that it was barred by sovereign immunity. Id.; *see also* Diamond v. Pa. State Educ. Ass'n, No. 3:18-cv-128, 2019 U.S. Dist. LEXIS 112169, at *25-27 (W.D. Pa. July 8, 2019) (dismissing claim for failure to allege ongoing violation of federal law).

Although plaintiffs suggest that these claims are supported by Secretary Rivera's "ongoing failure to monitor PRRIs" (Pls.' Resp. at 37), their suggestion is undercut by the relief they seek. To compensate them for the Commonwealth's alleged failures, plaintiffs request "compensatory education services for Named Plaintiffs and members of the Education Subclass" (Pls.' Resp. at 34), not an end to any continuing violation of federal law. Because this is "precisely the kind of suit that is barred by the Eleventh Amendment," Counts Three and Four should be dismissed. *See* Christ the King Manor, 730 F.3d at 319.

3. PDE Is Immune From Plaintiffs' ADA Claim (Count Ten) Because Plaintiffs Do Not Adequately Allege a Violation of Title II of the ADA.

In its Initial Memorandum, PDE explained that under United States v. Georgia, 546 U.S. 151 (2006), the ADA's statutory limitation of immunity for Title II claims applies only if plaintiffs have adequately pled a Title II claim. (Init. Mem. at 13-14.) Thus, plaintiffs oversimplify the issue when they assert, in a footnote without any analysis, that the statute "waive[s] sovereign immunity defenses." (Pls.' Resp. at 51 n.22.) Because plaintiffs have not alleged any specific conduct of PDE that could plausibly establish that the department itself was responsible for excluding students from participation in education because of their disabilities, plaintiffs have not made out a viable Title II claim. The Court therefore need not consider the second part of the inquiry – *i.e.*, the constitutional issue whether the alleged conduct also violates the Fourteenth Amendment (which, as pled here, it would not) – and should dismiss plaintiffs' ADA claim.

B. Plaintiffs' Special Education Claims (Counts Six through Ten) Should Be Dismissed Because Plaintiffs Have Not Exhausted Administrative Remedies.

1. Counts Six, Seven, and Eight Seek Relief That Is Available through the Administrative Process.

In the IDEA, Congress guaranteed students with disabilities access to a free appropriate public education (FAPE). Congress also prescribed the means by which students could vindicate their right to a FAPE: an administrative process in which students can seek relief from the educational agencies most familiar with the students' needs. In that process, federal court is not the first stop; it is the last resort. *See* 20 U.S.C. § 1415(i); Batchelor v. Rose Tree Media Sch. Dist., 759 F.3d 266, 273 n.9 (3d Cir. 2014); Hesling v. Avon Grove Sch. Dist., 428 F. Supp. 2d 262, 275-76 (E.D. Pa. 2006) ("administrative procedures must be exhausted before a civil action is filed to vindicate the educational rights of a handicapped child" (emphasis omitted)).

Plaintiffs seek to circumvent this Congressionally-mandated remedial scheme by contending that their IDEA claim against PDE requests "systemic" relief that the administrative process cannot provide. But plaintiffs' conclusory language about "wholesale" failures and "system-wide" remedies does not turn individual FAPE claims into systemic claims. Again, plaintiffs' own arguments undermine their position. According to plaintiffs, PDE's alleged failure of oversight resulted in plaintiffs being "deprived of . . . individualized programming, parent participation in the process, an education provided by special education teachers, availability of related services, etc." (Pls.' Resp. at 45.) These are the very types of alleged failures that IDEA's local administrative process is designed to remedy.[2] *See, e.g.*, 22 Pa. Code

[2] Plaintiffs apparently agree. They assert that "CCIU [as an LEA] had . . . ultimate responsibility to provide for the proper education and training of children with disabilities" within its jurisdiction. Pls.' Resp. at 39 (citing 24 P.S. § 13-1372(4)). The following responsibilities cited in the plaintiffs' response are all services Chester County Intermediate Unit agreed to provide to Glen Mills Schools pursuant to their written agreement: "monitoring Glen Mills to ensure compliance with federal and state laws; ensuring Glen Mills has staff necessary to implement

§ 14.162; Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 717 (3d Cir. 2010) ("The core of [the] entitlement [to a FAPE] is provided by the IEP, the package of special educational and related services designed to meet the unique needs of the disabled child." (quotation omitted)).

Plaintiffs admit that the "restructuring of the educational system" they seek is in reality compensatory educational relief for them and their classmates. (Pls.' Resp. at 44 & n.21.) Compensatory education is the hallmark IDEA remedy, routinely granted by an administrative officer following a finding that a student's educational experience was inadequate. *See, e.g.*, Rena C. v. Colonial Sch. Dist., 890 F.3d 404, 411 (3d Cir. 2018) (noting that a hearing officer had determined that a student received inadequate educational services at a former school and awarded compensatory educational relief); *see also* Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 536 (3d Cir. 1995) ("Congress intended compensatory education to be available to remedy the deprivation of the right to a free appropriate education."). In other words, plaintiffs speak of

---

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" (Pls.' Resp. at 39-40; *see also* Pls. Resp. at 41 ("ensuring the provisions of a FAPE to all students with disabilities," "monitor[ing] the educational program," and "notify[ing] PDE of noncompliance").

To remedy these alleged failures, students must first engage local administrators to provide relief for deficient provision of these services by invoking the statute's remedial process—***not seek relief directly from PDE***. *See* Batchelor, 759 F.3d at 277 ("[The] IDEA offers comprehensive educational solutions," which the statute requires to be "addressed first and foremost during the IDEA's administrative process." (citations omitted)); T.L. v. Pa. Leadership Charter Sch., 224 F. Supp. 3d 421, 425 (E.D. Pa. 2016) ("The SEA in turn apportions funds to [LEAs] who actually provide services to children."); Charlene R. v. Solomon Charter Sch., 63 F. Supp. 3d 510, 512-13 (E.D. Pa. 2014) (explaining that, while the state is responsible for general supervision and apportionment of funds, the LEA "is responsible for the direct provision of services under IDEA, including the development of an individualized education program (IEP) for each disabled student, the expenditure of IDEA funds to establish programs in compliance with IDEA, and the maintenance of records and the supply of information to the SEA as needed to enable the SEA to function effectively in its supervisory role under IDEA"); *see also* 20 U.S.C. § 1414(d)(4) (providing that the LEA is responsible for reviewing and administering a student's IEP).

supposedly "systemic" harms, but they do not seek systemic relief. Their grievances are redressable through the IDEA's administrative due process procedures.

Although the Commonwealth is "responsible for the general supervision of the IDEA's implementation throughout the state," invoking this broad obligation does not give a student a ticket to federal court. *See* Blunt v. Lower Merion Sch. Dist., No. 07-cv-3100, 2008 U.S. Dist. LEXIS 11918, at *23 (E.D. Pa. Feb. 15, 2008) (citing 34 C.F.R. § 300.149). This case is about educational services at a single school, and not like Blunt or Gaskin, in which a student has alleged a failure to monitor district- or state-wide policies that are inconsistent with the IDEA. *See* id. at *11 (describing the district's "routine[] place[ment of] African-American students in classes which provide a below-grade-level and modified curriculum"); Gaskin v. Pa., No. 94-cv-4048, 1995 U.S. Dist. LEXIS 4272, at *17 (E.D. Pa. Mar. 28, 1995) (alleging that multiple school districts were "unnecessarily segregating [the students] from regular classes with students who do not have disabilities"). Plaintiffs also fail to make a plausible allegation that the LEA is defunct or incapable of providing the relief they seek. *See, e.g.*, LeJeune G. v. Khepera Charter Sch., 2019 U.S. App. LEXIS 22360, at *7 (3d Cir. July 25, 2019) (observing that courts "have generally held" that PDE may be responsible for providing a FAPE when the school or LEA is defunct). Rather, plaintiffs allege the denial of a FAPE to students at a single school. If plaintiffs' allegations against PDE here portray a systemic issue, so too would the same conclusory failure-to-monitor claim made by any student that complains that his school did not provide him with a FAPE – essentially, any claim brought under the IDEA. The exhaustion requirement would be rendered a nullity. *Cf.* J.T. v. Dumont Pub. Sch., No. 09-cv-4969, 2012 U.S. Dist. LEXIS 42671, at *50 (D.N.J. Mar. 28, 2012), *aff'd*, 533 F. App'x 44 (3d Cir. 2013)

(finding that plaintiff characterized a school's alleged improper treatment as "the product of an illegal policy, i.e., as a 'systemic' problem, solely to circumvent the administrative process").

Plaintiffs claim that PDE's monitoring failed to compel adequate educational services at a single school. An administrative hearing officer must address such claims before they can be brought to court. Accordingly, this Court lacks jurisdiction to hear such claims. *See* G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 608 (3d Cir. 2015) ("To the extent a school district fails to provide a student with a FAPE, a parent may file a due process complaint on behalf of his or her child, with a subsequent hearing held before an administrative hearing officer.").

Even if the Court determines that plaintiffs seek relief from PDE that cannot be obtained through the administrative process, dismissal still is warranted. Plaintiffs concede that they request at least some relief that an administrative hearing officer can provide, including compensatory educational services. *See* Pls.' Resp. at 44 n.21 (clarifying that the "injunctive relief" they seek is a "compensatory education services plan"); Batchelor, 759 F.3d at 277-78 (explaining the compensatory relief available under the IDEA). It is well-settled that, in such a circumstance, the IDEA requires plaintiffs to exhaust those claims administratively. *See* Batchelor, 759 F.3d at 276-77; *see also* Wellman v. Butler Area Sch. Dist., 877 F.3d 125, 133 (3d Cir. 2017) ("[Plaintiff] also claims the administrative process would not have addressed all her claims. This, however, does not excuse exhaustion." (quoting J.M. v. Francis Howell Sch. Dist., 850 F.3d 944, 951 (8th Cir. 2017)).

Enforcing the exhaustion requirement even when a student asserts a claim that the administrative process cannot redress "ensures that the purpose of the IDEA remains intact," *i.e.*, that "educational harms suffered by children with disabilities will be addressed first and foremost

during the IDEA's administrative process," after which "victims may seek further remedy in court." Batchelor, 759 F.3d at 278. Allowing "a remedy-by-remedy exhaustion analysis would be inconsistent with the exhaustion doctrine's purpose of ensuring that judicial decisions are rendered in light of administrative fact finding . . . [and] would also clash with the doctrine's purpose of avoiding the judicial inefficiency involved in resolving disputes in piecemeal fashion." Hesling, 428 F. Supp. 2d at 275-76. These cases demonstrate that if any administrative relief is available for plaintiffs' IDEA claim, then the Court lacks jurisdiction as to the entire claim, and it must be dismissed. Centennial Sch. Dist. v. Phil L. ex rel. Matthew L., No. 08-cv-982, 2008 U.S. Dist. LEXIS 61447, at *12 (E.D. Pa. Aug. 8, 2008) ("[I]f a party has failed to exhaust administrative remedies as to a particular claim, the entire claim must be dismissed for lack of subject matter jurisdiction, even if a portion of the claim seeks relief not available under the IDEA."); *see also* Batchelor, 759 F.3d at 276-77 (holding that students cannot circumvent the administrative process by choosing to seek only relief that the administrative process cannot provide).

Plaintiffs concede that the purportedly injunctive relief they seek from PDE is compensatory educational services – relief that will require individualized assessments of each student's needs, and that necessarily will fall to the LEA to provide. Because plaintiffs thus seek to enforce rights that Congress created under the IDEA, they must do so in the way that Congress mandated. Thus, their IDEA claims in Counts Six through Eight should be dismissed.

2. The Gravamen of Plaintiffs' ADA and Section 504 Claims (Counts Nine and Ten) Is the Denial of a FAPE.

Plaintiffs contend that the IDEA's exhaustion requirement does not apply to their Section 504 and ADA claims because, according to them, those claims are not grounded in the denial of a FAPE. They advance two arguments: first, that their discrimination claims "go[] beyond what

is required for a FAPE" (Pls.' Resp. at 54), and second, that their claims center on plaintiffs' alleged physical abuse, which could not be remedied through the IDEA administrative process (Pls.' Resp. at 55-56).

Neither theory holds water. The Third Circuit has broadly interpreted the Supreme Court's decision in Fry, holding that a court must consider the "entire complaint" and assess whether the plaintiff's "grievances all stem from the alleged failure to accommodate his condition and ***fulfill his educational needs***." Wellman, 877 F.3d at 133 (emphasis added) (citing Fry v. Napoleon Cnty. Schs., 137 S. Ct. 743 (2017)). Regardless of the factual nuance of a plaintiff's allegations, if the complaint is "about the [student's] educational experience," or if the "factual allegations are intertwined with [the student's] complaints about the school's failure to accommodate his educational needs," the claims are subject to exhaustion. Id. at 134-35.

Accordingly, plaintiffs cannot cherry-pick their allegations to portray their ADA and Section 504 claims as something that they are not. Reading the complaint as a whole, like the Court did in Wellman, the essence of plaintiffs' allegations against the PDE Defendants is that plaintiffs were provided inadequate educational services at Glen Mills. (*See, e.g.*, Compl. ¶ 237 (abuse and violence "directly undermined [Plaintiffs'] ability to learn"); id. ¶ 303 (Plaintiffs were denied a FAPE because "they [were] not offered or provided appropriate behavioral interventions"); id. ¶ 325 (same, because plaintiffs were "prohibited from participating in [career training] programs due to disability-related behaviors"); id. ¶ 333 ("Students with disabilities were denied a FAPE and disproportionately burdened by the conditions of confinement and the limited educational program at Glen Mills."); id. ¶ 344 (stating that certain types of discipline may not be included in a student's IEP).) Any allegations that, standing alone, might conceivably be "unrelated to a FAPE" (Pls.' Resp. at 55), are nevertheless inescapably

"intertwined with [plaintiffs'] complaints about the school's failure to accommodate [their] educational needs." Wellman, 877 F.3d at 134-35; *see also, e.g.*, M.M. v. Tredyffrin/Easttown Sch. Dist., No. 06-cv-1966, 2006 U.S. Dist. LEXIS 62918, at *20-23 (E.D. Pa. Sept. 1, 2006) (exhaustion required for claims related to, *inter alia*, "the safety of [the plaintiff's] school environment"). Under the IDEA, therefore, plaintiffs must exhaust the claims they bring in Counts Nine and Ten before seeking relief in court.[3]

C. All Eight Claims Against the Commonwealth Defendants Should Be Dismissed for Failure To Plausibly Allege a Claim for Relief.

The Commonwealth Defendants have also asserted that all eight of plaintiffs' claims are subject to dismissal pursuant to Rule 12(b)(6). Plaintiffs address certain of those arguments and ignore others but cannot cure any of their pleading deficiencies in any event.

- ***Count Two***: Plaintiffs concede that the Eighth Amendment does not apply and rest the viability of their claim on a Fourteenth Amendment analysis. (Pls.' Resp. at 15-16.) But the Court need not reach this constitutional question: plaintiffs' failure to plead anything more than generalized, conclusory allegations requires dismissal pursuant to Rule 12(b)(6).

- ***Counts Three and Four***: Plaintiffs ask the Court to be the first in the Third Circuit to hold that a "materially inferior education" violates procedural due process. (Pls.' Resp. at 22.) They further rely on foreign precedent for their argument that even though Glen Mills is closed, the education it provided violated the Equal Protection Clause. (Id. at 25.) Again, the Court need not reach these constitutional questions because plaintiffs have failed to allege any involvement by Secretary Rivera, let alone any PDE policy upon which they base their claims, and thus both claims are subject to dismissal for failure to state a claim.

- ***Claims Six, Seven, and Eight***: Plaintiffs do not address, let alone refute, PDE's argument that their IDEA claims fail to state a plausible claim for relief. Nor could they. As PDE argued in the Initial Memorandum, even putting aside plaintiffs' concession that PDE adhered to its oversight requirements (Compl.

---

[3] Alternatively, as with plaintiffs' IDEA claims, the Court should dismiss the Section 504 and ADA claims even if it finds that some of the relief plaintiffs seek is unavailable in the administrative process. *See, e.g.*, Centennial Sch. Dist., 2008 U.S. Dist. LEXIS 61447, at *15-16 (dismissing a Section 504 claim for failure to exhaust even though the plaintiffs sought, in part, declaratory relief that would have been unavailable in an administrative hearing).

¶ 326), plaintiffs' conclusory allegations that PDE's failure to monitor led to the individualized harms faced by the students at Glen Mills are bereft of the detail necessary to raise the right to relief beyond a speculative level. *See, e.g.*, J.D.G. v. Colonial Sch. Dist., 748 F. Supp. 2d 362, 370 (D. Del. 2010) (dismissing IDEA claims against department of education pursuant to Rule 12(b)(6)); Price v. Commw. Charter Acad. Cyber Sch., No. 17-cv-1922, 2018 U.S. Dist. LEXIS 59394, at *18-19 (E.D. Pa. Apr. 6, 2018) (same).

- ***Claims Nine and Ten***: Plaintiffs' Section 504 and ADA claims, which the parties agree are subject to the same analysis, similarly fail to state a claim. "A plaintiff cannot make out [a discrimination] claim simply by proving (1) that he was denied some service and (2) he is disabled. The state must have failed to provide the service for the sole reason that the child is disabled." Andrew M. v. Del. Cty. Office of Mental Health & Mental Retardation, 490 F.3d 337, 350 (3d Cir. 2007) (emphasis added). Plaintiffs do not allege facts that any failure on the part of PDE resulted in discrimination based solely upon plaintiffs' disabilities. Moreover, plaintiffs raise the question, unaddressed in the Third Circuit, whether a failure of oversight alone, without more, is sufficient to state a claim for violation of the ADA or Section 504 of the Rehabilitation Act. (Pls.' Resp. at 51.) But Andrew M., the Third Circuit case that plaintiffs suggest holds that an agency's failure of oversight constitutes discrimination under the ADA and Section 504, says nothing of the sort. *See* id. at 349.

III. CONCLUSION

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

Respectfully submitted,

Dated: September 16, 2019

/s/ Kaitlin M. Gurney

Henry E. Hockeimer, Jr.
Paul Lantieri III
Kaitlin M. Gurney
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Tel.: 215.665.8500
Fax: 215.864.8999

Attorneys for the Commonwealth Defendants