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' SUR-REPLY IN FURTHER OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS, STRIKE, AND/OR SEVER

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INTRODUCTION

In their Reply Briefs, Defendants Glen Mills Schools, the Chester County Intermediate Unit ("CCIU"), Andre Walker, and Commonwealth Defendant Pennsylvania Department of Education ("PDE") assert several new legal arguments, rely on new cases, and misconstrue Plaintiffs' position on several key points. While Defendants' arguments are erroneous in many areas, Plaintiffs submit this Sur-reply in order to address these issues and correct specific misstatements of fact and law in Defendants' Reply Briefs.

ARGUMENT

I. THE COURT SHOULD NOT DISMISS PLAINTIFFS' SYSTEMIC CLAIMS

A. Plaintiffs' Systemic IDEA Claims Are Not Susceptible To Resolution Through The Administrative Process

Defendants CCIU, Glen Mills, and PDE in their Reply Briefs raise new arguments incorrectly recasting Plaintiffs' systemic claims as garden-variety special education matters which can be easily remedied through the special education administrative process. This is a distortion of Plaintiffs' allegations and the cases Defendants rely on are inapposite to this case.

Plaintiffs assert systemic claims challenging the wholesale failure of the education system to provide, monitor, or ensure the provision of special education services for any student with disabilities at Glen Mills. The absence of such a system is underscored by all parties' assertions that they bear no responsibility. (CCIU Reply Mem. 7-9; GMS Reply Mem. 8; Com. Reply Mem. 8-9.) The focus of this lawsuit is not a fact-specific, individual inquiry regarding what placement or services a particular student needs, but rather the abject failure to implement, monitor, oversee, and enforce a special education system that complies with the IDEA for any

student in a PRRI like Glen Mills.[1] These are precisely the types of claims where "the IDEA's basic goals [were] threatened on a system-wide basis." *Hoeft v. Tucson Unified Sch. Dist*., 967 F.2d 1298, 1305 (9th Cir. 1992). As shown in Plaintiffs' Opposition Brief, administrative hearing officers clearly lack the authority to address systemic challenges,[2] (Pls'. Opp'n Mem. 48-49), rendering futile any attempt by Plaintiffs to have brought their claims in that forum.

Moreover, adjudicating Plaintiffs' claims will not require fact determinations concerning individual appropriateness of specific special education services. Rather, the Court need only evaluate whether the system could have provided *any* student with a free appropriate public education—a question dealing primarily with the policies and practices that were in place. In contrast to the individualized facts at issue in *Blunt v. Lower Merion School District*, 559 F. Supp. 2d 548, 560 (E.D. Pa. 2008), Plaintiffs seek reform of a system to ensure that children with disabilities in PRRIs have access to a special education system capable of conferring a FAPE. (Compl. ¶¶ 417-422.) That is also why CCIU's late-breaking reliance on *Paul G. by & through Steve G. v. Monterey Peninsula Unified School District*, 933 F.3d 1096 (9th Cir. 2019), is misplaced. There, an individual student sought placement in an in-state residential facility for adult students, which he could obtain from his school district through the administrative process.

[1] While CCIU recasts Plaintiffs' facts as claims concerning an individual student, (CCIU Reply Mem. 4-6), Plaintiffs actually allege that CCIU failed to maintain any system for the provision of a free appropriate public education to Glen Mills students, including a system to evaluate students, ensure parent participation in the special education process, etc. (Compl. ¶ 417.)

[2] Courts have routinely held that hearing officers lack such authority. *See, e.g.*, *N.J. Prot. & Advocacy v. N.J. Dep't of Educ.*, 563 F. Supp. 2d 474, 487 (D.N.J. 2008); *T.R. v. Sch. Dist. of Phila.*, 223 F. Supp. 3d 321, 330 n.7 (E.D. Pa. 2016). Hearing officers themselves have taken the same position. *See, e.g.*, *C.D. v. Mars Area Sch. Dist.*, ODR File No. 15968-14-15 AS, at *15 (PA SEA, Oct. 31, 2015); *A.G. v. Phila. City Sch. Dist.*, ODR File No. 15166-13-14, at *2 (PA SEA, May 26, 2015); *J.S. v. Nw. Lehigh Sch. Dist.*, ODR No. 13350-1213KE, at *12 (PA SEA, Feb. 26, 2013).

Id. at 1102. Unlike the claims in *Paul G.*, neither Plaintiffs' claims against CCIU as the local education agency ("LEA") nor PDE as the state education agency ("SEA") can be resolved administratively because they involve policies of general applicability that cannot be remedied absent a system to provide special education services at PRRIs.

In an attempt to normalize the extraordinary case before this Court, Defendant PDE also attempts to mischaracterize Plaintiffs' claims and the relief sought as individual and student-specific. (Com. Reply. Mem. 6-10.) But, again, Plaintiffs clearly allege system-wide claims and seek system-wide relief—including a compensatory education services plan for all Plaintiffs that is distinct from the administrative compensatory education service awards. (Pls.' Opp'n Mem. 44.)—that cannot be obtained through an administrative hearing. *See, e.g., Komninos by Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778 (3d Cir. 1994). There is solid precedent for awarding such relief to address ongoing harm for multiple students and to create a new prospective education system for them. *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 277 (1977).

Indeed, as CCIU recognizes, this case presents an important legal issue: whether the CCIU, the state, or Glen Mills is the responsible educational agency for students with disabilities at a PRRI under the IDEA. CCIU incorrectly argues for the first time in its Reply that this important legal issue should be decided through the administrative process. (CCIU Reply Mem. 7.) However, while courts require exhaustion where the expertise of an administrative hearing officer is needed to determine a child's placement or specific services, "the court can and should decide legal issues." *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865, 869 (3d Cir. 1990). *See Vultaggio v. Bd. of Educ. of Smithtown Cent. Sch. Dist.*, 216 F. Supp. 2d 96, 103 (E.D.N.Y. 2002) (noting that "pure questions of IDEA law" fall within the futility exception), *aff'd*, 343

F.3d 598 (2d Cir. 2003). This case presents a legal issue of first impression that a hearing officer is not equipped to address, which renders exhaustion of administrative remedies futile.

B. A Finding That Plaintiffs' IDEA Claims Can Proceed Will Not Nullify The Exhaustion Requirement

PDE's new argument that a finding that Plaintiffs' claims against PDE are systemic will "nullify" the exhaustion requirement is also patently false and contrary to precedent. (Com. Reply Mem. 8.) Plaintiffs' claims that PDE's lack of monitoring and oversight of Glen Mills led to the complete lack of any special education system for hundreds of boys is not the same as one student's failure-to-monitor claim against PDE. As explained in *J.T. v. Dumont Public Schools*, a court can easily distinguish an individual student's claim as being fashioned "solely to circumvent the administrative process." No. 09-4969, 2012 WL 1044556, at *11 (D.N.J. Mar. 28, 2012). This is clearly not the case here. Rather, similar to prior Third Circuit and district court rulings, Plaintiffs' IDEA claims against PDE do not require exhaustion. *See, e.g.*, *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 creates a false distinction, not found in any authority, that claims regarding a single school can never be systemic. (Com. Reply Mem. 8.) But the failure of the SEA to monitor and ensure a system for the provision of special education services to students at PRRIs like Glen Mills, which has its own unique policies and procedures, is no less systemic than an alleged failure to ensure such a system at a school district or group of school districts. *See, e.g.*, *V.W. by & through Williams v. Conway*, 236 F. Supp. 3d 554, 588 (N.D.N.Y. 2017) (exhaustion excused based on futility for systemic IDEA claims in a single juvenile detention center).

C. The Gravamen Of Plaintiffs' Complaint Is Not The Denial Of A FAPE

In its Reply Brief, PDE mischaracterizes the holdings in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), and *Wellman v. Butler Area School District*, 877 F.3d 125 (3d Cir. 2017), to argue that Plaintiffs' ADA and Section 504 claims should be dismissed. While both *Fry* and *Wellman* instruct courts to consider the "'substance' of, rather than the labels used in, the plaintiff's complaint" when determining whether the "gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee" of a FAPE, *Fry*, 137 S. Ct. at 755; *Wellman*, 877 F.3d at 131, PDE seeks to narrow this court's inquiry solely to paragraphs within Plaintiffs' Complaint that include the "labels" of education and FAPE. (Com. Reply Mem. 11.) But Plaintiffs' entire eighteen-count complaint—in which only three counts relate at all to the provision of a FAPE under the IDEA—is focused on "extreme and sustained physical violence and psychological abuse and depriv[ation] of an education" to *all* Glen Mills students. (Compl. ¶ 2.) Plaintiffs focus on disability-related discrimination outside the school context that includes disability-related physical force, restraint, isolation, disciplinary sanctions, and exclusion that go well beyond the IDEA's guarantee of a FAPE. Because the gravamen of Plaintiffs' complaint is not a denial of a FAPE, Plaintiffs are not required to exhaust under *Fry*. In fact, PDE urges this Court to commit the exact error that *Fry* corrected—requiring exhaustion for *any* ADA or Section 504 claim involving education. *See Fry*, 137 S. Ct. at 754. Similarly, the *Wellman* court highlighted that claims extending beyond what is required for a FAPE need not be exhausted, even if they may implicate a student's IEP. *Wellman*, 877 F.3d at 132-33.

Nor is exhaustion required for Plaintiffs' claims against Glen Mills. Glen Mills' Reply conflates liability under the IDEA with liability under Plaintiff's other causes of action. (GMS Reply Mem. 8.) As discussed in Plaintiffs' Opposition Brief, the IDEA does not subject all schools to liability with respect to the provision of a FAPE. (Pls'. Opp'n Mem. 43.) Glen Mills

does not meet the definition of an LEA under Pennsylvania law or the IDEA, thus it is not subject to the IDEA and cannot hide behind the IDEA's exhaustion requirement to shield it from other legitimate claims. *See Bardelli v. Allied Servs. Inst. Of Rehab. Med.*, No. 14-0691, 2015 WL 999115, at *6 (M.D. Pa. Mar. 6, 2015) (exhaustion not required against a private school with which "[p]rimary liability under the IDEA . . . does not rest" (internal quotation marks omitted)). However, it does act under color of state law as a state-regulated education institution for adjudicated youth. *C.K. v. Nw. Human Servs.*, 255 F. Supp. 2d 447, 448-51 (E.D. Pa. 2003). As a result, Glen Mills is not liable and has not been sued under the IDEA, but *is* liable for relief under the Fourteenth Amendment, Pennsylvania state law, Title II of the ADA and Section 504 of the Rehabilitation Act.[3] *See* Pls'. Opp'n Mem. at Parts V, IX.

D. Sovereign Immunity Does Not Bar Plaintiffs' Claims

When asserting sovereign immunity from Plaintiffs' ADA claim, PDE in its Reply Brief ignores Plaintiffs' allegations of specific conduct by PDE, misstates governing law, and fails to acknowledge binding Third Circuit precedent, *Bowers v. N.C.A.A.*, 475 F.3d 524 (3d Cir. 2007), which has been cited by at least one district court as proper abrogation for precisely the claim pled by Plaintiffs—students discriminated against on the basis of disability as a result of the SEA's failure to maintain and oversee a system of education under the IDEA and related federal and state laws. (Com. Reply Mem. 5); *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) ("[C]onclud[ing] that Congress validly abrogated

[3] Moreover, a decision to dismiss these claims against Glen Mills would lead to a perverse result that is contrary to congressional intent. The IDEA was intended to *broaden* remedies available to children with disabilities and ensure they "have available to them the full range of remedies to protect and defend their rights to a free, appropriate education." 131 Cong. Rec. 21,391 (July 30, 1985) (statement of Sen. Kennedy). If the exhaustion requirement is used to dismiss disabled Plaintiffs Derrick, Walter, and Thomas, and the Disability Subclass, these claims will remain in this matter with Plaintiff Sean, the sole child without disabilities. This would directly counter the intent of Congress when it passed the IDEA and clarified the exhaustion requirement in 1986. *Id.*

Eleventh Amendment immunity under Title II in the context of education[.]" (citing *Bowers*, 475 F.3d at 550-56)); *see also D.R. v. Mich. Dep't of Educ.*, No. 16-13694, 2017 WL 4348818, at *9 (E.D. Mich. Sept. 29, 2017) (plaintiffs stated Title II claim for SEA's lack of "professional judgment in oversight of the [school district]"); *W.H. by & through M.H. D.R. v. Tenn. Dep't of Educ.*, No. 15-1014, 2016 WL 236996, at *7 (M.D. Tenn. Jan. 20, 2016) (plaintiffs stated an ADA claim for SEA's oversight and funding of a system that violated the IDEA).

Similar to the instant case, *Grieco* plaintiffs alleged that the New Jersey Department of Education "created and maintain[s] a system of public education that fails in the mandates of the [IDEA], and the related federal and state statutes." 2007 WL 1876498, at *2. Citing *Bowers*, the district court denied an argument that sovereign immunity barred this claim against the state. *Id.* at *5 n.2. Here, as in *Grieco,* Plaintiffs properly pled a similar claim against PDE that it discriminated against Plaintiffs Derrick, Walter, and Thomas, and the Disability Class by failing to maintain and oversee a legally compliant education system. *See* Compl. ¶¶ 278, 280, 326, 335, 360-61, 363 & 365; Pls'. Opp'n Mem. at Part IX. Furthermore, PDE presents no case stating that: (1) the failure of an SEA to properly oversee and maintain a legally compliant education system for students with disabilities is not discrimination on the basis of disability; or (2) sovereign immunity is not properly abrogated in the context of public education. As Plaintiffs explained in their Opposition Brief, they properly pled a claim that PDE discriminated against Plaintiffs Derrick, Walter, and Thomas, and the Disability Subclass under Title II of the ADA.

Nor are Plaintiffs' constitutional claims barred by sovereign immunity. In their Reply Brief, Commonwealth Defendants do not contest that compensatory education services qualify as prospective injunctive relief, but dispute whether Plaintiffs seek to end ongoing violations of federal law. Commonwealth Defendants have failed to identify any cases under *Ex Parte Young*

supporting their contention that Counts Three and Four must be dismissed for failure to allege an ongoing violation of federal law under the facts presented. (Com. Reply Mem. 5.) And their reliance on *Christ the King Manor, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 730 F.3d 291 (3d Cir. 2013), is off-base.[4] The plaintiffs in that case challenged prior Medicaid reimbursement rates not then in effect. There were no allegations of continuing harm or prospective relief and plaintiffs did not argue the current rate-calculation methodology violated federal law at all. 730 F.3d at 319. The Court held that the plaintiffs did "not identify any ongoing conduct by the Secretary of DPW that must be enjoined to ensure the supremacy of federal law" and thus the suit only sought "to compensate a party injured in the past." *Id*. (internal quotation marks and citation omitted).

Here, in contrast, Plaintiffs challenge current policies, practices, and customs of Secretary Rivera—described at length in Part V of Plaintiffs' Opposition Brief—and there has been no change to these policies, practices, customs, actions, or inactions that caused harm to Plaintiffs and will continue to violate federal law until declared unconstitutional by this Court.[5] The allegedly unconstitutional state action need not be "in progress against the particular plaintiffs initiating suit" or "imminent" to satisfy the purpose of *Ex parte Young. See Summit Med. Assocs. v. Bill Pryor*, 180 F.3d 1326, 1338 (11th Cir. 1999). In addition, Plaintiffs continue to be harmed

[4] Commonwealth Defendants' citation to *Diamond v. Pa. State Educ. Ass'n*, No. 18-128, 2019 WL 2929875, at *9 (W.D. Pa. Jul. 8, 2019), is also inapposite. The *Diamond* plaintiffs failed to allege that the Commonwealth defendants acted in violation of the Constitution at all, *id*. at *9; the same cannot be plausibly claimed here. (*See* Pls'. Opp'n Mem. Part V and Section VI.C.)

[5] Moreover, while Glen Mills is currently closed, the facility is appealing both the emergency removal order and the revocation of its license, and has publicized its plan to reopen. *See Editorial: Glen Mills 2.0: A new start for troubled school*, DelcoTimes, June 25, 2019, at https://www.delcotimes.com/opinion/editorial-glen-mills-a-new-start-for-troubled-school/article_d3ef92d0-967f-11e9-9c3a-57b07d2e3a0e.html.

by the deprivation of an education at Glen Mills and other PRRIs and the ongoing disparity in opportunity which deprive Plaintiffs of educational services and opportunities provided to nonresident students publicly placed at other institutions. Here, Plaintiffs seek a declaratory judgment to enjoin current policies and practices and continuing violations of Procedural Due Process and Equal Protection, including a comprehensive relief plan for awarding compensatory education services. (Compl. ¶¶ 399, 408, Prayer for Relief.) The relief sought to remedy these ongoing violations of constitutional law is squarely within that permitted under *Ex Parte Young*. *See, e.g.*, *Papasan v. Allain*, 478 U.S. 265, 282 (1986) (finding essence of the Equal Protection claim to be the present and ongoing disparity in educational opportunity, and dismissing an Eleventh Amendment challenge).

II. CONSIDERATION OF CLASS CERTIFICATION IS PREMATURE

In their ongoing effort to pursue a premature ruling on class certification, prior to discovery or class certification briefing, Glen Mills Defendants make several erroneous new assertions. While Defendants contend that the proposed class and subclasses cannot meet the "cohesiveness" requirement under Rule 23(b)(2), (GMS Reply Mem. 2), no factual record exists to assess how similar or dissimilar the putative class members' circumstances may be.

To the extent Defendants contend that monetary damages "cannot be pursued" under Rule 23(b)(2), that is also incorrect. *See, e.g.*, *Sourovelis v. City of Philadelphia*, 320 F.R.D. 12, 27-28 (E.D. Pa. 2017) (Rule 23(b)(2) does not bar plaintiffs from seeking restitution from the city, as "an injunction ordering restitution is itself a form of injunctive relief"). Likewise, Defendants' argument that injunctive relief cannot be pursued because Glen Mills has closed is an inappropriate factual assertion beyond the Complaint, only further highlighting the need for fact discovery—which is much more likely than not to show that injunctive relief is possible, as Defendants conspicuously have not argued that Glen Mills will remain closed. Plaintiffs are unable to review

the relevant records until discovery commences, and those records will be key to a future, appropriately timed class certification briefing.

III. NO CLAIMS SHOULD BE SEVERED FROM THIS CASE

Finally, there is no basis for severance of any claims. Defendant Andre Walker's Reply Brief argues that a verdict in favor of Plaintiff Derrick would decide "the issue of the excessive force . . . and the jury in [the class-action] trial could be instructed accordingly." (Walker Reply Mem. 6.) But that is not so. If Derrick's claim against Walker were tried separately, without the other defendants, a verdict in Derrick's favor would not preclude those absent defendants from re-litigating the issue of excessive force. A defendant cannot be precluded from litigating an issue previously determined in a case to which it was not a party and, hence, had no opportunity to defend itself. *See, e.g.*, Restatement (Second) of Judgments § 27 ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action *between the parties*, whether on the same or a different claim." (emphasis added)); *Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 50-51 (Pa. 2005) (same); *see also Kaller's Inc. v. John J. Spencer Roofing, Inc.*, 565 A.2d 794, 796-98 (Pa. Super. Ct. 1989) (holding that litigant was not barred from proceeding where it was not clear that it had been able to actually litigate the issue in a prior suit). Thus, if Derrick won at a trial against Walker alone, GMS and the other absent defendants would have every right to re-litigate the issue.

CONCLUSION

For the foregoing reasons, along with those in Plaintiffs' Omnibus Memorandum of Law in Opposition to Defendants' Motions to Dismiss, 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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