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

MEMORANDUM OF LAW OF DEFENDANTS, THE GLEN MILLS SCHOOL AND RANDY IRESON, IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL

STRADLEY RONON STEVENS & YOUNG, LLP
By: Joseph McHale (Pa. No. 65706)
Great Valley Corporate Center
30 Valley Stream Parkway
Malvern, PA 19355
610.640.8007
jmchale@stradley.com

Daniel T. Fitch (Pa. No. 53717)
Michael J. Wise (Pa. No. 322890)
2005 Market Street, Suite 2600
Philadelphia, PA 19103
215.564.8063
dfitch@stradley.com
mwise@stradley.com

Counsel for Defendants,
The Glen Mills Schools & Randy Ireson

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Defendants Glen Mills School ("GMS") and Randy Ireson (together, "GMS" or the "GMS Defendants") respectfully submit the below memorandum in opposition to Plaintiffs' Motion for Class Certification and Appointment of Class Representatives and Class Counsel.[1]

Because class certification is a legal determination, GMS has focused its arguments on the legal standards discussed in this motion. The GMS Defendants would note, however, that the Plaintiffs' characterization of the facts in their motion for class certification exhibit numerous deficiencies and frequently mischaracterize the evidence in the record.[2]

INTRODUCTION

Plaintiffs' abandonment of the traditional class action framework in favor of putative "issues classes" under Federal Rule of Civil Procedure 23(c)(4) is—before anything else—an

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[1] This brief is one part of GMS's opposition to Plaintiffs' request for certification. GMS intends to file a Motion for Summary Judgment ("GMS MSJ"), addressing a variety of legal issues that would render much of this motion moot. See, e.g., Harris v. Med. Transp. Mgmt, 77 F.4th 746, 763 (D.C. Cir. 2023) (explaining that "one alternative to class litigation" under Rule 23(c)(4) is "a partial summary judgment motion focused on the issues proposed to be certified."). GMS also intends to file motions challenging certain of Plaintiffs' experts to the extent Plaintiffs seek to use their expert's testimony to establish class-wide harm. See In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015) (holding "a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in Daubert.")

[2] As an example, the Plaintiffs noted that an investigation by Pennsylvania's Auditor General concluded that "GMS did not conduct required background checks on staff who closely and regularly interacted with students and that GMS lacked appropriate training policies and procedures relating to preventing and reporting child abuse." Plaintiff's Brief ("Pls. Br.") at 4. However, the Auditor General's report only stated that: "GMS management, in some instances, did not obtain and maintain required background clearances from its employees, contractors, and volunteers." Pls. Ex. 12, at 2. Similarly, Dr. Spriggs testified that [redacted] See Ex. 1, Spriggs Dep., at 33:21-23. Similarly, Plaintiffs assert that "GMS provided a self-directed program of credit acquisition courses through a one-size-fits-all online tutorial with no live instruction" and cite to the testimony of L. Powers. See Pls. Br. at 8; Pls. Ex. 27, Power Dep. 178:20-24. However, Powers only testified that students received approximately 70 percent of their instruction through Plato (with the remainder from live instruction). See Pls. Ex. 27, Power Dep. at 178:1-19.

admission that the GMS Defendants were correct when, four years ago, they argued that Plaintiffs' class claims were not (and would never be) certifiable under Rules 23(a) and 23(b)(3). As GMS explained at the time, class certification was "impossible" because, whether couched in terms of "abuse" or "education," Plaintiffs' claims "implicate[d] numerous individualized issues bearing on both liability and damages, each of which will require individualized proofs as to each class member." See Dkt. No. 46-1, GMS Motion to Dismiss Br. at 18. Although the Court extended Plaintiffs the benefit of the doubt, holding that any final conclusion regarding Plaintiffs' class claims was premature, see Dkt. 59-1, December 19, 2019 Opinion at 23-25, discovery confirmed certification was always a non-starter.

Having litigated this case for over four years, Plaintiffs are understandably reluctant to simply call it quits. But their motion for certification fails to carry their substantial burden of showing why this litigation is a fitting "'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only[.]" Mielo v. Steak'n Shake Operations, Inc., 897 F.3d 467, 482 (3d Cir. 2018) (quoting Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013)). They concede, for instance, that there are numerous individuals pursuing similar litigation in Pennsylvania state court. See, e.g., Pls. Br. at 36, 43. And they implicitly acknowledge that, even if certification is granted, absent class members will need to step up and individually prosecute the most difficult issues, including injury, causation, and damages. Id. at 35, 42-43

They provide no authority suggesting that this unbalanced divvying of responsibilities is an appropriate use of the class action mechanism. Contrary to Plaintiffs' characterization, Rule 23(c)(4) is not a safe harbor for otherwise uncertifiable class claims. An issues class must meet the same threshold conditions as any other class action. It must generate the kinds of efficiencies necessary to warrant aggregate rather than individual litigation. See Russell v. Ed. Comm'n for

Foreign Med. Grad., 15 F.4th 259, 272 (3d Cir. 2021) (Rule 23(c)(4) analysis requires "rigorous[]" consideration of the "efficiencies . . . gained by resolution of the certified issues"). And it must truly be capable of class-wide adjudication—i.e., that class litigation will be predominated by common questions that are amenable to common evidence and, as a result, aggregate treatment is superior to individual litigation. These are inviolable and unavoidable requirements.[3]

Plaintiffs cannot meet them. Put simply, Plaintiffs' suggestion that issues like duty and breach can be cordoned off and litigated on a class basis (while leaving causation, injury, and damages unresolved and affirmative defenses unspoken) ignores both the varied nature of the class's underlying individual claims and the intertwined nature of the elements of those claims. As explained more fully below, the only way that duty and breach could be litigated on a class-wide basis would be to treat them as high-level abstractions, divorced from the kind of particularity individual claimants will need to prove causation, injury, and entitlement to damages.

The implications for subsequent individual claimants would be significant. If they accept Plaintiffs' framing, they will be forced to choose between (i) struggling to establish a proximal relationship between their individual personal injuries and Plaintiffs' abstract notions of "breach" *or* (ii) basing their individual claims on constitutional injury, thus limiting their recovery to nominal (rather than compensatory) damages. Confronted with a choice between poor quality and small portions, individual claimants will likely reject Plaintiffs' pre-packaged options and instead elect to cook from scratch, forcing GMS to repeatedly litigate issues of duty and breach anew, in a manner tailored to each claimant's individual injury and damages. Either way, *someone's* rights and interests will be compromised. Indeed, the only interests that emerge from Plaintiffs' motion

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[3] In their attempt to capture all possible violations of statutes and standards, would-be Class Representatives Derrick, Thomas, and Walter seek to litigate issues unrelated to their personal claims, thus running afoul of Article III's standing requirements. See, *infra* at §III(A).

for certification unscathed, it seems, are those of Plaintiffs and their counsel. As a result, Plaintiffs are unable to establish the appropriateness and superiority of class treatment of these uniquely individual claims.

BACKGROUND ON THE GLEN MILLS SCHOOLS

GMS is a non-profit Pennsylvania corporation registered with the Pennsylvania Department of Human Servies as a private residential rehabilitative institution ("PRRI"), a facility providing education and rehabilitative services to adjudicated youth. The school admitted students pursuant to contractual agreements from local education agencies and intermediate units in Pennsylvania and from similar agencies and institutions in other states (and District of Columbia) and countries (Bermuda and Germany). See Pls. Ex. 2, GMS Program Description at 10.

New students were enrolled at GMS throughout the year, unlike more traditional schools, where students are assigned to a specific class and begin the school year on the same, standardized dates. In spite of the difficulties inherent to that arrangement, GMS students enjoyed significant, successful outcomes. [redacted] See Ex. 2, Amended Expert Report of Theresa Kreider ("Kreider Am. Rep."), at 1. [redacted] See Ex. 3, GMS Outcome Data, GMSCA0469924.

I. PLAINTIFFS' PROPOSED SUBCLASSES

Plaintiffs ask this Court to certify three "issues" subclasses for their claims against GMS, pursuant to Federal Rule of Civil Procedure 23(c)(4).

A. GMS Abuse Issues Subclass

The first, designated the "GMS Abuse Issues Class" in Plaintiffs' supporting brief, would encompass "all youth at GMS within the Class Period," from April 11, 2017 through April 11, 2019, in order to resolve three questions on a class-wide basis:

> 1. "Whether the policies and practices of the GMS Defendants subjected class members to a substantial risk of serious harm by their policies and practices to which the GMS Defendants were deliberately indifferent in violation of the 8th Amendment[.]"
> 2. "Whether the GMS Defendants undertook or otherwise owed a duty to the class members[.]"
> 3. "Whether the GMS Defendants breached any duty owed to the class members."

Pl. Motion at 3.

B. GMS Education Issues Subclass

The second, designated the "GMS Education Issues Class" in Plaintiffs' supporting brief, would encompass "all school-eligible youth at GMS within the Class Period," from April 11, 2017 through April 11, 2019, in order to resolve four questions on a class-wide basis:

> 1. "Whether GMS failed to provide an appropriate education program under state and federal law[.]"
> 2. "Whether students at GMS were discriminated against based on their placement at the facility which offered an inadequate education[.]"
> 3. "Whether students at GMS were discriminated against based on their placement at the facility when they were deprived of a high school education without due process[.]"
> 4. "Whether students subject to the educational programming at GMS were harmed."

Id. at 3-4.

C. GMS Disability Discrimination Subclass

The third, designated the "GMS Disability Discrimination Issues Class" in Plaintiffs' supporting brief, would encompass "all youth with qualifying disabilities as defined under Rehabilitation Act of 1973 [and] Title II of the Americans with Disabilities Act . . . either before

or during their placement, who were placed at GMS by a court or state or local agency, and resided at GMS after April 11, 2017." This class seeks to resolve three questions:

> 1. "Whether GMS's policies and procedures discriminated against students with qualifying disabilities due to the absence of a system to identify, evaluate, and provide accommodations in violation of Section 504 and the ADA[.]"
> 2. "Whether GMS owed a duty to students with qualifying disabilities[.]"
> 3. "Whether GMS breached any duty it owed to students with qualifying disabilities."

Id. at 4.

As the above reflects, two of the three proposed "issues classes" (related to abuse and disability discrimination) address only GMS's purported deviation from broadly-defined statutory, common law, or constitutional standards. They would thus require absent class members to individually prosecute and prevail on issues of injury, causation, and damages. In other words, even assuming there are certifiable "issues" (there are not), the Court and the putative class members would see no efficiencies gain, and instead would need to spend extensive judicial time and resources determining individual issues. Moreover, although Plaintiffs' education-related subclass would (they contend) resolve the issue of class-wide "harm," they do not identify any reliable or admissible method of doing so. Because "general" or "generic" harm does not provide a basis for individual recovery, subsequent "education" claimants will (as with Plaintiffs' other classes), need to establish their own specific injury, causation, and damages.

II. LEGAL STANDARD

In a series of decisions beginning with Hohider v. United Parcel Service, Inc., 574 F.3d 169 (3d Cir. 2009), the Third Circuit set forth a three-step framework for assessing the propriety of certification under Federal Rule of Civil Procedure 23(c)(4). See also Russell, 15 F.4th at 270-71; Gates v. Rohm & Haas Co., 655 F.3d 255 (3d Cir. 2011). Because Rule 23(c)(4) does not

create a separate, independent mechanism for certifying a class, a court addressing a motion to certify an "issues class" must answer three questions:

> First, does the proposed issue class satisfy Rule 23(a)'s requirements? Second, does the proposed issue class fit within one of Rule 23(b)'s categories? Third, if the proposed issue class does both those things, is it 'appropriate' to certify these issues as a class?

Russell, 15 F.4th at 270 (citing Fed. R. Civ. P. 23(c)(4)). In doing so, "[t]he first two steps will be informed by general class-action doctrine," while "[t]he third step" implicates the "non-exclusive list of factors" first set forth by the Third Circuit in Gates v. Rohm. Id. at 268, 270.

As noted above, class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011) (quoting Califano v. Yamasaki, 442 U.S. 682 (1979)). "In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Id. at 348-49 (internal citation and quotation omitted). This is "ensure[d]" initially through Rule 23(a), which imposes "four requirements," characterized as "numerosity, commonality, typicality, and adequate representation," that, together, "limit the class claims to those fairly encompassed by the named plaintiff's claims." Id. at 349 (internal citation and quotation omitted).

Even if Rule 23(a) is satisfied, however, a plaintiff's proposed class must fit within one of the three categories of class actions established by Rule 23(b). Plaintiffs identify Rule 23(b)(3). See Pls. Br. at 35, 42, 47. Certification under Rule 23(b)(3) is permissible only if, after rigorous analysis, a court concludes "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Finally, a plaintiff seeking to certify an issues class under Rule 23(c)(4) must establish that certification is "appropriate" in light of a variety of "non-exhaustive" factors, including:

- "the type of claim(s) and issue(s) in question";
- "the overall complexity of the case";
- "the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives";
- "the substantive law underlying the claim(s), including any choice-of-law questions it may present and whether the substantive law separates the issue(s) from other issues concerning liability or remedy";
- "the impact partial certification will have on the constitutional and statutory rights of both the class members and the defendant(s)";
- "the potential preclusive effect or lack thereof that resolution of the proposed issue class will have";
- "the repercussions certification of an issue(s) class will have on the effectiveness and fairness of resolution of remaining issues";
- "the impact individual proceedings may have upon one another, including whether remedies are indivisible such that granting or not granting relief to any claimant as a practical matter determines the claims of others"; and
- "the kind of evidence presented on the issue(s) certified and potentially presented on the remaining issues, including the risk subsequent triers of fact will need to reexamine evidence and findings from resolution of the common issue(s)."

Russell, 15 F.4th at 268. Under this framework, courts *may* certify an issues class that "do[es] not resolve a defendant's liability" *only if* certification "substantially facilitates the resolution of the civil dispute, preserves the parties' procedural and substantive rights and responsibilities, and respects the constitutional and statutory rights of all class members and defendants." Id. at 270.

As explained more fully below, Plaintiffs' proposed issues subclasses do not—and cannot—satisfy the above requirements because (i) they lack sufficient commonality, predominance, and superiority, and (ii) class treatment would likely intrude on class members' interests without any corresponding benefits in efficiency.

III. PLAINTIFFS' MOTION AND SUPPORTING BRIEF DO NOT MEET PLAINTIFFS' BURDEN UNDER RULE 23 OR PROVIDE THIS COURT WITH ANY BASIS FOR ALLOWING THIS LITIGATION TO PROCEED

It is Plaintiffs' burden to establish, by a preponderance of the evidence, that the requirements of Rule 23 requirement are satisfied. See e.g., In Re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320-21 (3d Cir. 2008). They cannot. Instead, their motion and brief raise more questions than answers, a fatal defect under Rule 23: "'[w]hen courts harbor doubt as to whether a plaintiff has carried her burden under Rule 23, the class should not be certified.'" Allen v. Ollie's Bargain Outlet, Inc., 37 F.4th 890, 908 (3d Cir. 2022) (quoting Mielo, 897 F.3d at 483).

Those unanswered questions—and the corresponding doubts they spawn —take on added weight here because they implicate the material interests of the absent class members Plaintiffs purport to represent. Although Plaintiffs broadly aver that class certification will "materially advance" this litigation and "streamline individual actions for future adjudication," they provide no insight into the actual "claims" they seek to "streamline" on behalf of their class members. Pls. Br. at 38; see also id. at 43, 44, 50, 61 (all referring to "streamlining" the litigation). Indeed, they do not explain how they intend to litigate the high-level "issues" they identify or, more crucially, how the individual trials of 1700 absent class members will proceed once those issues are resolved. Will they be tried before this Court as part of this litigation? In a different court before a different judge? Who will represent individual claimants?

No one knows. Plaintiffs' silence extends to the core components of the underlying class-wide claims, including the theories of liability that will be available to future litigants, the injuries those litigants will be able to assert, and the damages they may seek. Without a clear understanding of those details—in essence, what future claimants will need to prove and what they will be able to recover—Plaintiffs' cannot establish that the issues they identify, like duty and breach, are truly common and/or amenable to common evidence. And without some understanding of where those

individual claims are headed, Plaintiffs cannot credibly assert that class treatment will help future claimants get there, let alone get there efficiently.

Given the prolix nature of their brief, Plaintiffs' decision not to address these issues is telling—compelling evidence that they, too, remain in the dark about how this litigation might proceed. Those suspicions are confirmed by Plaintiffs' contradicting characterizations of what, precisely, they allege. On the one hand, they portray the issues of duty and breach in broadest imaginable terms, alleging class-wide "exposure" to an overarching "breach," statutory violation, or constitutional infirmity. See, e.g., Pls. Br. at 4, 7, 8. Recognizing, perhaps, that remote and abstract notions of duty and breach will be of little use to subsequent litigants—who will need to establish that their personal injuries were proximately caused by some specific action—Plaintiffs also refer to a wide array of specific deficiencies, many of which are unconnected to their *personal* allegations of harm. See *infra*, at §III. These variations and contradictions give rise to a number of overarching issues related to Article III standing, the substantive differences between Rule 23(b)(2) and (b)(3) class actions, and Plaintiffs' obligation to provide this Court with a roadmap for how this litigation could possibly proceed after certification.

A. Plaintiffs Lack Standing to Litigate Policies, Actions, Or Issues Unrelated to Their Personal Claims

As discussed at length below, Plaintiffs' voluminous, diverse allegations do not give rise to common questions with common answers, as required by Rule 23(a). They also run afoul of Article III. It is axiomatic, after all, that constitutional standing is not dispensed in gross and, as the Supreme Court explained nearly forty years ago, "a plaintiff who has been subject to injurious conduct of one kind" does not "possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." Blum v. Yaretsky, 457 U.S. 991, 999 (1982); see also General Telephone Company of the Southwest v. Falcon, 457

U.S. 147, 159 n. 15 (1982). In Blum, this meant that, while representatives for a class of nursing home patients possessed standing to assert Fourteenth Amendment claims based on *their* specific injuries (related to discharges and transfers to lower levels of care), they did not have standing to mount a Fourteenth Amendment challenge to unconstitutional actions (transfers to *higher* levels of care) they did not personally experience. Blum, 457 U.S. at 1001-02. In Falcon, this meant that a class representative who possessed standing to bring a Title VII claim related to his employer's discriminatory *promotion* policies did not have standing to bring a Title VII claim related to its *hiring* decisions. Falcon, 457 U.S. at 159 n. 15. As the Falcon court explained, the "mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." Id.

Applied here, Blum and Falcon limit Plaintiffs to litigating only those GMS actions, inaction, policies, or policy failures that are directly related to *their* injuries. That other GMS students might have been harmed by *different* policies is beyond the scope of Plaintiffs' standing. Take, for instance, Plaintiffs' assertion that GMS did not always complete fulsome background checks on employees. See Pls. Br. at 33 ([redacted]); Pls. Ex. 8, Muhammad Rep. at 14-15 ([redacted]); Pls. Ex. 31, Gagnon Rep. at 27 [redacted]). Even if true, Plaintiffs Derrick, Thomas, and Walter do not allege that this oversight played any role in *their* individual injuries. Similarly, although Plaintiffs criticize GMS for placing students on a "GED path" without notice to their parents, Plaintiff Walter is [redacted]

[redacted] See Pls. Br. at 9; see also Ex. 4, Pl. Walter's PEP, GMSCA0000609.

B. Plaintiffs' Reliance on Rule 23(B)(2) Class Actions Involving Injunctive Relief Is Misplaced.

In an attempt to get around the lack of a single, class-wide injury, Plaintiffs repeatedly rely on class action authority involving Rule 23(b)(2) certification—including, but not limited to Baby Neal ex rel. Kanter v. Casey, 43 F.3d 48, 63 (3d Cir. 1994), Williams v. City of Philadelphia, 270 F.R.D. 208 (E.D. Pa. 2010), Nat'l L. Ctr. on Homelessness & Poverty R.I. v. N.Y., 224 F.R.D. 314 (E.D.N.Y. 2004), and V.W. by and through Williams v. Conway, 236 F. Supp.3d 554 (N.D.N.Y. 2017)— to argue that individual differences are irrelevant because class members "need not suffer the same harm[.]" Pls. Br. at 46 (citing Williams v. City of Philadelphia). But Rule 23(b)(2) class actions seek prospective, reform-minded relief and, as a result, the analysis is fundamentally different from class actions, like this one, seeking monetary damages.

Indeed, as Baby Neal itself made clear, the viability of an injunctive class is directly related to the remedy sought: the "request[ed] declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them," which eliminates the "need for *individualized* determinations of the propriety of injunctive relief." Baby Neal, 43 F.3d at 57. The district court decision in Williams, which relies heavily on Baby Neal, is no different—it did not hold, as Plaintiffs contend, that class members do not need to "suffer the same harm" to satisfy Rule 23(a). Pls. Br. at 46. Instead, it observed that "[c]lass members need not show that they have all actually suffered the injury alleged in the complaint," only that they "are subject to the same harm" such that relief will inure to the benefit of the class as a whole. Williams, 270 F.R.D. at 215.

Importantly, Plaintiffs' interpretation of Williams was emphatically rejected by the Supreme Court in Dukes, where the Supreme Court held that class representatives and class

members must "suffer the same injury." Dukes, 564 U.S. at 348-49. In the context of an injunctive relief-based Rule 23(b)(2) class action, class-wide subjection to a policy that creates a class-wide risk of injury may well be grounds for relief. The same cannot be said about an action for damages, which, by its very nature, focuses on actual, individual injury. To the extent Baby Neal's broad conception of "commonality" survives Dukes—an argument for another day—its application must be limited to prospective relief.

C. Plaintiffs Cannot Provide A Roadmap for Litigating Their Subclass Claims.

Plaintiffs' motion and supporting brief raise more questions than answers because Plaintiffs *have no answers*. This poses an insurmountable problem because this Court cannot certify Plaintiffs' class action without first setting forth a "full and clear articulation of the litigation's contours," including "the precise parameters defining the class and a complete list of the claims, issues, or defenses to be treated on a class basis." Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of America, 453 F.3d 179, 185-86 (3d Cir. 2006). As the Third Circuit observed in Wachtel, this burden should not fall solely on the Court: "pre-certification presentation of . . . trial plans," it explained, is "an advisable practice within the class action arena," which allows parties and the court "to facilitate Rule 23(c)(1)(B) compliance regarding the claims, issues, or defenses subject to class treatment in the same way that class language proposed by the parties aids trial courts in defining the precise parameters of a given class for certification purposes." Id. at 186, n. 7. In keeping with this, and to meet the practical needs of class action management, the court noted with approval that "[a]n increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible to class-wide proof." Id.

That a pre-certification trial plan is advisable does not make it a hard-and-fast requirement, of course. And where, as here, no amount of game planning can remedy a class action's defects,

perhaps it is beside the point. But Plaintiffs' motion and brief propose a journey into largely uncharted waters, and GMS and the Court are entitled to know where they are going and how they plan on getting there. After all, Rule 23 "does not set forth a mere pleading standard," Dukes, 564 U.S. at 350-51, and, as a result, Plaintiffs must provide affirmative evidence, "not merely a 'threshold showing,'" that "each of the requirements of Rule 23 is met." Ferreras v. Am. Airlines, Inc., 946 F.3d 178, 183 (3d Cir. 2019) (quoting In re Hydrogen Peroxide, 552 F.3d at 307).

It is not enough, in other words, that Plaintiffs promise the Court that their piecemeal approach to class litigation can proceed efficiently, fairly and in compliance with Rule 23. Nor is it enough to point to inapposite authority and offer a cursory "[s]o too here." Pls. Br. at 36 (referring to C.P. v. N.J. Dep't of Educ., No. 19-12807, 2022 WL 3572815 (D.N.J. 2022)). Because Plaintiffs' motion and supporting brief do nothing to quell longstanding, well-founded doubts about the propriety of certification, their motion must be denied. See Allen, 37 F.4th at 908.

IV. PLAINTIFFS' "ABUSE ISSUES" SUBCLASS CANNOT BE CERTIFIED UNDER FEDERAL RULE OF CIVIL PROCEDURE 23

Plaintiffs seek certification of their "Abuse Issues" subclass to address three "issues" arising under the Eighth Amendment and Pennsylvania common law, respectively: (i) "[w]hether the policies and practices of the GMS Abuse Defendants subjected class members to a substantial risk of serious harm to which the GMS Abuse Defendants were deliberately indifferent in violation of the 8th Amendment," (ii) "whether the GMS Defendants undertook or otherwise owed a duty to the class members," and (iii) "whether the GMS Defendants breached any duty owed to the class members." Pls. Br. at 30.

Plaintiffs' "Abuse Issues" class cannot meet the threshold requirements of Rule 23(a) and Rule 23(b). Nor is it "appropriate" for certification under the Third Circuit's Gates-based

framework for assessing Rule 23(c)(4) issues classes.[4] Plaintiffs' diverse abuse-related allegations do not implicate common questions or common injuries under Rule 23(a). And Plaintiffs cannot establish that class treatment of their abuse-related subclass is superior to other forms of litigation because there are existing alternatives to class treatment that are better suited to fully-resolving individual claims.

A. Plaintiffs Have Not Met and Cannot Meet Rule 23(a)'s Commonality Requirements.

According to Plaintiffs, their proposed abuse-related "issues class" satisfies commonality because the class members "share the common contention that GMS had a duty to keep its students safe from harm, and that GMS policies and practices both breached that duty and violated the Eighth Amendment." Pls. Br. at 31. But this "commonality" is nothing more than a restatement of Plaintiffs' cause(s) of action. Both the common law and Eighth Amendment can be violated in a variety of ways, as Plaintiffs' own pleadings and briefing make clear. See, e.g., Pl. Br. at 2-4. That Plaintiffs' sprawling allegations arguably fall under a common rubric (like common law negligence or the Eighth Amendment) does not render them "common" for Rule 23 purposes. See Dukes, 564 U.S. at 350 ("the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once.").

To satisfy Rule 23(a)'s commonality requirement, then, Plaintiffs' "claims must depend upon a common contention," and "[t]hat common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity

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[4] This Court need not reach the issue of certification because, as set forth in GMS's Motion for Summary Judgment, GMS is a private school not a state actor, as necessary to impose liability under Section 1983. See GMS MSJ Br.

will resolve an issue that is central to the validity of each one of the claims in one stroke." Mielo, 897 F.3d at 489 (quoting Dukes, 564 U.S. at 349-50). As explained more fully below, because Plaintiffs' allegations implicate an endless variety of policies, actions, and inaction, they are only "common" at the most abstract and attenuated level.

Plaintiffs first assert—in support of their negligence cause of action, it appears, though they do not specify—that "[e]stablishing that GMS owed and breached a duty to those in their [sic] care requires no individual evidence." Pls. Br. at 31. This argument is predicated on a misreading of the Third Circuit's opinion in Russell, which Plaintiffs characterize as "not[ing] that duty and breach were both issues of law for which only common evidence was required." Pls. Br. at 31. To the contrary, while duty is a legal issue, breach is not: "the existence of a duty is a question of law," but the question of "whether there has been a neglect of such duty is generally for the jury." Emerich v. Phila. Center for Human Dev., Inc., 720 A.2d 1032, 1044 (Pa. 1998); see also Estate of Arrington v. Michael, 738 F.3d 599, 606, n. 3 (3d Cir. 2013) (distinguishing "negligence per se" from traditional negligence in Section 1983 action and explaining that former "is defined as '[n]egligence established as a matter of law, so that breach of the duty is not a jury question.") (quoting Black's Law Dictionary 1135 (9th ed. 2009)).

To the extent the Russell court described "breach" as potentially susceptible to "common" evidence, its characterization was the product of case-specific circumstances. In quick summary, the Russell plaintiffs alleged injury at the hands of a doctor negligently certified by the non-profit Educational Commission for Foreign Medical Graduates, which screens foreign-educated doctors to ensure they possess the necessary training and credentials to practice in the United States. Russell, 15 F.4th at 262-64. Rather than suing the doctor, the Russell plaintiffs sued the Commission. Because the Commission's alleged "breach" was narrow in scope—it focused on the

review and approval of a single doctor's application, to which the plaintiffs were not a party—there were no "individual" facts. Id. at 273 (referring to the "distanced relationship" between plaintiffs and Commission). Under those circumstances, the question and answer would be the same for all claimants. But, critically, nothing in Russell suggests that breach is susceptible to common evidence in all instances.

Here, by contrast, the facts underlying any purported abuse-related breach are not nearly so clear or clean. As portrayed by Plaintiffs, they encompass a broad range of actions and policies related to an equally broad range of subject matter, implicating an unknown number of staff and student perpetrators, various tangible policies, and even intangible environmental stressors. Indeed, Plaintiffs concede as much when they (paradoxically) assert that GMS's purported "culture of abuse manifested in a *multitude* of common ways." Pls. Br. at 2. According to Plaintiffs, that "multitude" included, but was not limited to, GMS's "confrontation culture policy," excessive use of physical restraints by staff, a failure to chronicle and analyze the use of physical restraints, improper training, insufficient employee discipline, the failure to check employee references/engage in background checks, and insufficient "policies and protocols" regarding student abuse reporting and potential retaliation. Pls. Br. at 2-4.[5] All told, Plaintiffs abuse-related class will implicate "breaches" in endlessly varied forms at various levels of the organization,

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[5] According to Plaintiffs' expert David Muhammad, [redacted]

beginning with GMS's hiring practices and including staff training, staff discipline, the investigation and reporting of suspected abuse, and a "high volume" of student-on-student fights. Pls. Br. at 2-4.

Plaintiffs' arguments in support of their Eighth Amendment "issues" class fare no better. Although Plaintiffs characterize their Eighth Amendment allegations as intrinsically "common," Eighth Amendment doctrine as a whole actually encompasses a number of different theories of liability, including conditions of confinement, failure to protect, excessive force, and a failure to provide necessary medical care. See, e.g., Brown v. Haldeman, No. 1:21-cv-2085, 2021 WL 6063220, at *3 (M.D. Pa. 2021) (explaining that "[t]here are several types of Eighth Amendment claims, including claims alleging: denial of, or inadequate access to, medical care; exposure to adverse conditions of confinement; the use of excessive force; and failure to protect from assaults by other inmates."); DeJesus v. Lewis, 14 F.4th 1182, 1195 (11th Cir. 2021) (identifying three "distinct types of claims that can be brought by prisoners alleging cruel and unusual punishment under the Eighth Amendment," including "conditions of confinement," "excessive use of force," and "deliberate indifference" to "serious medical needs"). These different theories impose different burdens and require different evidence. Compare Martin v. GEO Group, Inc., No. 19-cv-5763, 2020 WL 1244184, at *5 (E.D. Pa. 2020) ("To state an Eighth Amendment claim for excessive force, the core inquiry is whether the force was applied in a good-faith effort to maintain or restore discipline, or instead whether it was applied maliciously and sadistically to cause harm.") (Beetlestone, J.) with id., at *4 (to assert a cognizable claim based on conditions of confinement, "a prisoner or detainee must assert that prison officials acted with deliberate indifference, meaning that they consciously disregarded a serious risk to the detainee's health or safety."). Plaintiffs' class allegations could implicate any of these Eighth Amendment theories.

Plaintiffs seek to overcome this by focusing on just one: a "conditions of confinement" claim, framed exclusively in terms of "deliberate indifference." See Pls. Br. at 30, 32. Under that theory, they assert, they need only establish two things on a class-wide basis, neither of which "require individualized inquiry": (i) that "they were incarcerated under conditions that posed a substantial risk of serious harm,"[6] and (ii) GMS's "deliberate indifference" to "a substantial risk of serious harm to youth residents' health of safety." Id. at 32. Once again, however, Plaintiffs merely reiterate the elements of their putative class claim. That the elements of a cause of action asserted on behalf of a class are "common" to the class is true in a tautological sense but it does not establish that, on a practical level, they implicate a *common*, *class-wide* policy or practice or give rise to a *shared, class-wide* injury.

In an attempt to solve this problem, Plaintiffs frame their disparate allegations as a "culture of abuse," Pls. Br. at 32, or "pattern of abuse to which every student was exposed." Pls. Br. at 4. But Plaintiffs cannot turn allegations addressing disparate policies, policy failures, and risks into a "common contention" simply by labeling it a "culture" or "pattern." See DL v. District of Columbia, 713 F.3d 120, 126 (D.C. Cir. 2013) (denying certification and explaining that plaintiffs' allegation that defendant's "pattern" of "failing to provide FAPEs" violated IDEA was "insufficient to establish commonality given that the same provision of law 'can be violated in many different ways,'" and fails to identify a "a policy or practice that affects all members of the class in the manner Wal–Mart requires."); cf. Dukes, 564 U.S. at 352 (commonality absent in spite of class-wide contention "that Wal–Mart engages in a *pattern or practice* of discrimination")

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[6] Plaintiffs have not identified and cannot identify any objective evidence of substantial risk. Although Mr. Muhammad repeatedly opines [redacted]

(emphasis in original). Put differently, because Plaintiffs' abuse-related allegations are "common" only in the sense that they (arguably) fit within the broad parameters a constitutional or common law cause of action—rather than in a factual, administrative, or practical sense—they cannot satisfy Rule 23(a).

B. Plaintiffs Have Not Established, and Cannot Establish, Superiority Under Rule 23(B)(3).

To certify a class under Rule 23(b)(3), a putative class representative must establish, by a preponderance of the evidence, that "(i) common questions of law or fact predominate (predominance), and (ii) the class action is the superior method for adjudication (superiority)." In re Modafinil Antitrust Litig., 837 F.3d 238, 248 (3d Cir. 2016) (quoting Marcus v. BMW of N.A., LLC, 687 F.3d 583, 591 (3d Cir. 2012)). Plaintiffs have not and cannot.

The "predominance inquiry" under Rule 23(b)(3) "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016) (quoting Fed. R. Civ. P. 23(b)(3)). An issue is "individual" when "members of a proposed class will need to present evidence that varies from member to member." Id. (quoting 2 W. Rubenstein and Newberg on Class Actions § 4:50, pp. 196–197 (5th ed. 2012)). An issue is "common" when "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." Id. (quoting 2 W. Rubenstein and Newberg on Class Actions § 4:49, pp. 195–196).

The "superiority" analysis "calls for an inquiry into judicial economy and places great weight on whether the individual members can bring their own claims." In re Modafinil Antitrust Litig., 837 F.3d at 253, n. 11. A presiding court must "balance, in terms of fairness and efficiency,

the merits of a class action against those of alternative available methods of adjudication." In re Community Bank of N. Va., 418 F.3d 277, 309 (3d Cir. 2005) (internal quotations omitted).[7]

With aspiring class plaintiffs increasingly resorting to Rule 23(c)(4) to salvage otherwise uncertifiable classes, Rule 23(b)(3)'s superiority requirement has taken on newfound importance. Issues classes appeal to plaintiffs, the Fourth Circuit recently explained, at least in part because they will "'almost automatically'" meet Rule 23(b)(3)'s predominance requirement: "once the issues to be certified are narrowed down to make them sufficiently 'common,' it is virtually axiomatic that common issues will predominate." In re Marriott Int'l, Inc., 78 F.4th 677, 689 (4th Cir. 2023). Rather than granting putative class plaintiffs carte blanche, however, this "automatic" or "axiomatic" predomination "puts the 'focus [on] Rule 23(b)(3)'s second requirement, superiority,' because the same narrowing process will have cleaved off individualized questions of liability, as well as damages, for separate individual trials, diminishing the efficiency gains of the class proceedings." Id. (quoting Naparala v. Pella Corp., No. 2:14-CV-03465-DCN, 2016 WL 3125473, at *14 (D.S.C. June 3, 2016)); see also Burks v. Islamic Republic of Iran, No. 16-cv-1102, 2023 WL 4838382, at *3 (D.D.C. 2023) ("although 'Rule 23(c)(4) eases the demands of the predominance requirement by isolating specific issues for analysis,' many courts have concluded that the rule 'shifts the focus to Rule 23(b)(3)'s second requirement, superiority.'"). As a result, "the superiority of class proceedings simply cannot be taken for granted, even when common

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[7] The factors relevant to this analysis include: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action." In re Community Bank, 418 F.3d at 309 (quoting Fed. R. Civ. P. 23(b)(3)).

questions predominate as to the certified issues," and "courts must 'evaluate this question of efficiency carefully.'" In re Marriott, 78 F.4th at 690.

Plaintiffs' motion and supporting brief provide little to evaluate, however, because their arguments simply gloss over the unavoidable inefficiency of their proposal. Indeed, they fail to cite a single decision in which a court certified a Rule 23(c)(4) "issues class" where, as here, certification would address only low-hanging fruit, leaving individual class members to litigate complicated issues of causation, personal injury, and damages. Nor do they explain how class-wide resolution of a broadly-defined "duty" would meaningfully advance class member interests. There is no real dispute, after all, that, at the broadest level, GMS owed its students *some* duty of care.

Plaintiffs' silence on these issues speaks volumes; their affirmative arguments ignore reality and strain credulity. They contend, for instance, that their proposed piecemeal approach is superior because "the resolution of the proposed issues do not [sic] 'provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" Pls. Br. at 35-36 (quoting Amchem Prods. v. Windsor, 521 U.S. 591 (1997)). That is clearly untrue. Although Plaintiffs begrudgingly acknowledge that "some members of the putative class have commenced individual actions for related claims," this concession strategically understates the extent of that alternative litigation *and* its clear superiority. Pls. Br. at 36.

As of June 2023, the state court action against GMS—designated a "mass tort action" within the Pennsylvania Court of Common Pleas' Complex Litigation Center—included at least 803 individual claimants. See Ex. 5, In Re: Glen Mills Schools, Case ID: 200600900, Case Management Order #9. In stark contrast to Rule 23 class actions, which commentators and courts

alike acknowledge are ill-suited to mass tort (and mass tort-like) litigation,[8] the Pennsylvania Complex Litigation framework is designed to balance the efficiency of aggregate litigation with the inherently individualized nature of tort-related claims. Lawsuits in the Mass Torts Program often encompass "hundreds, sometimes thousands, of lawsuits, each claiming a separate injury often as the result of the negligence of one or many defendants," but, "unlike class actions," allow "[e]ach plaintiff . . . to be compensated separately and in full for the damages suffered." Engstrom v. Bayer Corp., 855 A.2d 52, 54, n. 1 (Pa. Super. 2004).[9]

As a result, Plaintiffs' proposed Rule 23(c)(4) subclass is not simply "not-superior" to the parallel state court action(s), it is indisputably *inferior*. Plaintiffs, hemmed in by that inferiority, seek to invert their burden. Citing C.P. v. N.J. Dep't of Education, they argue that the state court proceedings are not a "'bar to finding superiority.'"[10] Pls. Br. at 36. That may be so. But it is also

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[8] This Court recently recognized as much, noting in Lloyd v. Covanta Plymouth Renewable Energy, LLC, 585 F.Supp.3d 646, 657 (E.D. Pa. 2022), that "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways." (quoting Advisory Notes to Rule 23(b)(3)).

[9] The Complex Litigation Center was created for precisely this kind of litigation, in which "numerous cases present similar causes of action and theories of liability against the same defendant(s)," providing "coordinated discovery and . . . a singular forum to resolve issues that may apply to multiple, or even all of, the individual cases." Portnoff v. Janssen Pharmaceuticals, Inc., 237 F.Supp.3d 253, 255, n. 1 (E.D. Pa. 2017).

[10] For unknown reasons, Plaintiffs' discussion of superiority devotes more space to venue than efficiency. Citing a dated district court decision, In re Prudential Ins. Co. of Am. Sales Prac. Litig., 962 F.Supp. 450 (D.N.J. 1997) which, itself, relied exclusively on a now-obsolete passage from Newberg on Class Actions, Plaintiffs assert that Rule 23(b)(3) superiority analysis "emphasizes the desirability of the forum selected, not the desirability of claims concentration generally." Pls. Br. at 36. As Newberg now makes clear, the appropriate analysis is two-prong, with a primary focus on efficiency, not venue. Under the first prong, courts must weigh "the desirability of concentrating the trial of the claims by means of a class action, in contrast to allowing the claims to be litigated separately." 2 Newberg and Rubenstein on Class Actions § 4:71 (6th ed.) Under the second, they weigh "the desirability of concentrating the

irrelevant. Rule 23(b) requires that they establish the *superiority* of class treatment, not merely that class treatment is permissible.

Finally, even if Plaintiffs were correct regarding incentives—even if, in other words, there were not 803 individual state court litigants prosecuting similar claims under similar facts—their "Abuse Issues" class would not remedy that problem. The traditional incentive-related "benefits" provided by class actions are significantly "diminished by issue certifications where the remaining individualized issues will also require significant resources." In re Marriott, 78 F.4th at 689 (internal quotation omitted). Plaintiffs cannot credibly contend that a proposal that *requires* absent class members to vindicate their rights by proving individual injury, causation, and damages is a *cure* for absent class members' lack of incentive *to vindicate their rights*.[11]

C. Plaintiffs' Proposed Abuse Issues Subclass Is Not "Appropriate" for Certification Under the Third Circuit's Rule 23(c)(4) Framework.

It is telling that Plaintiffs do not cite a single Rule 23(c)(4) decision approving certification of an issues class like the one they propose here, where the most difficult, complicated issues—injury, causation, and damages—are left unresolved. Moreover, Plaintiffs largely ignore the Third Circuit's opinions in Gates, Hohider, and Russell, which strongly suggest that certification is inappropriate (if not strictly prohibited) where these issues would remain unresolved. See Russell,

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trial of the claims in the particular forum in contrast to forums to which they would ordinarily be brought." Id.

[11] Inversely, Plaintiffs are quick to downplay class members' interests in controlling this litigation. At a minimum, however, and as discussed throughout this opposition, the ability of subsequent individual litigants to recover damages will be contingent on their ability to prove their personal injuries were the inexorable and proximate result of GMS's purported failings. See, e.g., Born v. Monmouth Cnty. Correctional Inst., 458 Fed. App'x 193, 200 (3d Cir. 2012) ("the plaintiff in a [42 U.S.C.] § 1983 case must prove that a constitutional violation has occurred, and that it was the proximate cause of his or her injuries."). Those class members have a significant, undeniable pecuniary interest in how issues like "duty" and "breach" are defined and litigated.

15 F.4th at 272 (cautioning that, "even if the District Court finds that the Commission owed a relevant legal duty to the Plaintiffs that it subsequently breached, each Plaintiff, in individual proceedings, will have to prove that they were injured; that the Commission's breach of the relevant duty actually and proximately caused those injuries; that those injuries are due a particular amount of damages; and that the Commission's affirmative defenses . . . are not decisive."); Gates, 655 F.3d at 274 (certification of issues class inappropriate where "[a] trial on whether the defendants discharged vinylidene chloride into the lagoon that seeped in the shallow aquifer and whether the vinyl chloride evaporated from the air from the shallow aquifer [was] unlikely to substantially aid resolution of the substantial issues on liability and causation.").

It is true that Russell rejected a rigid requirement that "issues classes" resolve liability as a precondition of certification—under certain circumstances, an issues class may remain proper even without a liability determination. See Russell, 15 F.4th at 269-70. Nonetheless, Russell preserves Rule 23's focus on efficiency and judicial economy by *absolutely* requiring that a non-liability issues class "substantially facilitate[] the resolution of the civil dispute." Id. at 270. That requirement is in keeping with both the logic of Gates and the reasoning of courts outside the Third Circuit, both of which overwhelmingly reject Rule 23(c)(4) certification where, as here, weighty issues stand between disposition of class issues and the ultimate resolution of individual claims. See, e.g., Dungan v. Academy at Ivy Ridge, 344 Fed. App'x 645, 648 (2d Cir. 2009) (certification under Rule 23(c)(4) inappropriate where "the significance of individualized issues of reliance, causation, and damages in this case meant that issue certification 'would not meaningfully reduce the range of issues in dispute and promote judicial economy.'") (quoting McLaughlin v. American Tobacco Co., 522 F.3d 215, 234 (2d Cir. 2008)); Marshall v. Hyundai Motor Am., 334 F.R.D. 36, 61 (S.D.N.Y. 2019) (even if "the issue of whether the Class Vehicles possess a common defect

might lend itself to a class proceeding," certification was improper where "[p]laintiffs have failed to argue . . . let alone show" how certification of issues class "would 'materially advance' the litigation, since individual issues of injury, reliance, and causation, and other issues of damages, would remain to be adjudicated in hundreds or even thousands of cases.").[12]

Nothing in Plaintiffs' motion and supporting brief establish that class treatment will "substantially facilitate resolution" of individual claims. That is hardly a surprise, given the weight of the issues that will remain unresolved. See Lisa v. Saxon Mortgage Services, Inc., Nos. 11-4586, 12-5366, 2016 WL 5930846, at *13, n. 8 (E.D. Pa. 2016) ("The individualized nature of the type of claims and issues involved, and the overall complexity they bring to the case, overwhelm any efficiencies that might be gained by granting partial certification."); Romero v. Allstate Ins. Co., 52 F.Supp.3d 715, 738 (E.D. Pa. 2014) ("Where class adjudication 'would not only leave critical remaining liability issues unanswered but also fail to achieve any efficiency in the resolution of class members' claims,' certification is unwarranted.'"). Instead, Plaintiffs' piecemeal approach would *undercut* economy and efficiency by "consum[ing] time and resources (both the parties' and the court's) without fundamentally advancing the resolution of the litigation." In re ConAgra Foods, Inc., 302 F.R.D. 537, 581 (C.D. Cal. 2014).

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[12] See also In re Amla Litig., 282 F.Supp.3d 751, 765 (S.D.N.Y. 2017) (Rule 23(c)(4) certification inappropriate where "later juries will have to decide comparative negligence and proximate causation, both of which overlap with the issue of defendant's negligence."); Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc., 269 F.R.D. 252, 266 (S.D.N.Y. 2010) ("because of the significant, individualized issues of reliance, causation, and damages in this case, issue certification would not meaningfully reduce the range of issues in dispute or promote judicial economy."); In re Baycol Prods. Litig., 218 F.R.D. 197, 209 (D. Minn. 2003) (concluding that issue certification under Rule 23(c)(4) was not appropriate, because "individual trials will still be required to determine issues of causation, damages, and applicable defenses.").

Plaintiffs' inability to justify class treatment is exacerbated by their cursory, threadbare analysis of the Third Circuit's nine-factor framework for "issues class" certification under Rule 23(c)(4). The "Gates factors" serve two intertwined purposes: (i) they provide "a functional framework to aid the district courts tasked with resolving issue-class certification questions," thus (ii) ensuring the interests and constitutional rights of absent class members and defendants are not swallowed whole by speculative arguments regarding "efficiency." Russell, 15 F.4th at 268. Broadly speaking, the factors fall into three categories, with Nos. 1-3 addressing "fit" or "fitness" i.e., whether a suit will benefit from aggregate litigation, Nos. 4-6 addressing the legal implications of certification, including preclusion, and Nos. 7-9 addressing issues of manageability. See id. at 268; see also ALI, Principles of Aggregate Litigation, §§ 2.02-2.05. Although these considerations are "analytically independent," they were originally drafted to address *all* aggregate litigation (not just Rule 23(c)(4) issues classes) and thus run parallel to, and sometimes overlap with, analysis under Rules 23(a) and (b). Russell, 15 F.4th at 274-75 (quoting Gonzalez v. Corning, 885 F.3d 186, 202 (3d Cir. 2018)).

First, Plaintiffs assert that their putative "abuse" class is a good fit for certification under Rule 23(c)(4) because the issues "'apply to the class as a whole" and thus can be litigated "collectively." Pls. Br. at 37. Second, they contend that their proposed class will promote "judicial efficiency" by preventing repetitive discovery and contradictory rulings. Id. Third, they assert that their proposed issues are "severable" because "[b]oth Eighth Amendment law and negligence law separate the proposed class-wide issues about duty and breach from those of liability or remedy." Id. at 37-38. Finally, they broadly deny the potential preclusive impact of class resolution on subsequent individual claimants. Id.

Most of these points are rebutted in the discussion above. But it is worth reiterating the fundamental errors and striking misconceptions that mark Plaintiffs' arguments. Initially, as discussed above, their assertion that both duty and breach are "legal" issues amenable to common evidence is predicated on a misreading of Russell. See *supra*, at §IV(A). Next, and relatedly, their assertion that these issues are "severable" is both unsupported and unsupportable. Pls. Br. at 38. Their sole authority, Wharton v. Danberg, 854 F.3d 234 (3d Cir. 2017), did not involve a Rule 23(c)(4) class action and does not discuss the relationship between a defendant's deliberate indifference and causation. Instead, in the process of affirming the district court's grant of summary judgment, the Third Circuit merely summarized the elements of an Eighth Amendment overcrowding claim—which include "a showing of deliberate indifference and causation." Id. That those elements are *conceptually* distinct does not establish that they are, in practice, separate, severable and/or capable of being litigated on a class-wide basis with no negative impact on subsequent litigants. If anything, Wharton cuts against Plaintiffs' arguments: because an Eighth Amendment plaintiff must show that the unconstitutional policy at issue "directly caused" the harm alleged, the nature of an individual claimant's injury should determine how the constitutional violation is framed, not vice versa. Wharton, 854 F.3d at 243.

These assertions, which implicate both class action management and Plaintiffs' duty to absent class members, cannot be brushed off with conclusory citations to inapposite authority. Here, Plaintiffs point to C.P. v. N.J. Dep't of Educ. (again), a single-issue Rule 23(b)(2) class action, and In re FieldTurf Artificial Turf Mktg. & Sales Pracs. Litig., No. 17-2779, 2023 WL 4551435 (D.N.J. 2023), a product defect/deceptive marketing class action. See Pls. Br. at 38. Unlike Plaintiffs, the class representatives in In re FieldTurf and C.P. were not choosing among competing or conflicting theories of liability—and thus they were not unilaterally limiting the

future recovery of absent class members. And, unlike Plaintiffs' proposed issues, which encompass all aspects of GMS's operations, the "issues" in In re FieldTurf and C.P. were narrow. In C.P., the plaintiffs sought to litigate the "endemic failure to decide due process petitions within the 45-day timeframe guaranteed by the IDEA." C.P., 2022 WL 3572815 at *1. In In re FieldTurf, the plaintiffs' claims involved a single product defect and the defendant manufacturers' public statements in marketing materials. 2023 WL 4551435, at *2.

Plaintiffs, by contrast, have elected to pursue a theory of Eighth Amendment liability based on GMS's purported "deliberate indifference" to students' "conditions of confinement" at the expense of other, more specific theories that may be a better fit for individual claimants (like excessive force and denial of medical care).[13] Pls. Br. at 32. The impact on the rights of absent class members is clear: subsequent litigants who allege, say, physical injuries from an inappropriate restraint or lack of medical treatment will likely be blocked or barred from pursuing their narrower, more individualized theory of liability.[14] See, e.g., Russell, 15 F.4th at 268 (noting that "reexamination" of duty and breach are "disfavored" under Gates factors). Plaintiffs' reason for pursuing this theory of liability at the expense of the others is equally clear: "exposure" to

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[13] As discussed *passim*, Plaintiffs' vagueness regarding the nature of subsequent individual claims frustrates any effort to understand the nature of the underlying claims. Although they raise a failure to provide medical care in their Complaint, for instance, insufficient medical care goes unmentioned in their motion and brief. See, e.g., Dkt. No. 1-1, Compl. at ¶¶ 3, 22, 45, 65. 131.

[14] They may also fall prey to issue preclusion. Under Pennsylvania law, for instance, issue preclusion applies when four requirements are met: "(1) an issue decided in a prior action is identical to the one presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action." Adelphia Gateway, LLC v. Pa. Env. Hearing Bd., 62 F.4th 819, 826 (3d Cir. 2023). All would likely be met here.

"conditions" is, at least arguably "common." Pls. Br. at 4. But this puts Plaintiffs and absent class members at odds: Plaintiffs seek to certify a class in a manner that is amenable to class treatment but detrimental to the interests of subsequent litigants.

Although *Plaintiffs* are clearly willing to make that trade, it will present absent class members with an untenable choice. They could attempt to litigate their individual personal injury claims within Plaintiffs' framework, which would require them to prove a proximal relationship between the specific circumstances of their injury and Plaintiffs' broadly-drawn notions of "breach" or unconstitutionality. This will be a tall task. It is axiomatic that, the more remote a "breach" or unconstitutional action is, the less "proximate" it becomes. "It is not sufficient," in other words, "that a negligent act may be viewed, in retrospect, to have been one of the happenings in the series of events leading up to an injury." Brown v. Phila. College of Osteopathic Med., 760 A.2d 863, 868 (Pa. Super. 2000). Instead, a breach of duty and the subsequent fallout must be shown to have "worked in continuous and active operation up to the time of harm." Eckroth v. Pa. Elec., Inc., 12 A.3d 422, 428 (Pa. Super., 2010); see also Wharton, 854 F.3d at 243 (the "policy, practice or custom" at issue must have "directly caused" the harm). Under this framework, a claimant alleging an injury from (for instance) a student-on-student fight would need to establish an unbroken "continuous and active" series of events tying the specific circumstances of his claim—which would include numerous variables like location, prior conflicts between the participants and/or participant-specific steps taken to mitigate the risk of a fight—to GMS administrators' *general* knowledge that students faced a *generalized* risk of violence. Only by taking specifics into account can a finder of fact distinguish an injury "directly caused" by

officials' alleged deliberate indifference from one that is the product of the unavoidable background risk inherent to a school like GMS.[15]

In the alternative, future claimants could adopt Plaintiffs' framework, forego personal injury, and instead seek to recover based on "exposure" to a "pattern" or "culture" of abuse. Pls. Br. at 2-4. This would significantly limit their potential recovery, however. Because standalone emotional distress damages are barred under the Prison Litigation Reform Act, 42 U.S.C. § 1997e, individual claims would be forced to forego compensatory damages in favor of nominal damages. Mitchell v. Horn, 318 F.3d 523, 533 (3d Cir. 2003) (pursuant to 42 U.S.C. § 1997e, a prisoner must "demonstrate physical injury before he can recover for mental or emotional injury applies only to claims for compensatory damages" but that he can seek "nominal or punitive damages 'to vindicate constitutional rights'") (internal citation omitted). It is possible that this is what Plaintiffs mean when they repeatedly assert class treatment will "streamline litigation"—if so, it is difficult to imagine future litigants will look kindly on Plaintiffs' so-called assistance.[16] Pls. Br. at 38.

Instead, future claimants are more likely to try and relitigate the issue of breach in a manner tailored to their individual circumstances. As noted above, that possibility runs afoul of Gates

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[15] The Eighth Amendment demands such particularity because "not . . . every injury suffered by one prisoner at the hands of another . . . translates into constitutional liability for prison officials responsible for the victim's safety." Farmer v. Brennan, 511 U.S. 825, 834 (1994). Although a school and not a prison, the nature of GMS' mission and the fact that it was populated by juveniles who were adjudicated based on prior criminal conduct, including acts of violence, complicates any attempt to establish proximate cause.

[16] This strategic trade-off also implicates Rule 23(a)'s adequacy prerequisite, which seeks to ensure that "the named plaintiffs have the ability and the incentive to vigorously represent the claims of the class." Duncan v. Gov. of V.I., 48 F.4th 195, 209 (3d Cir. 2022) (quoting In re Cmty. Bank of N. Va. Mortg. Lending Pracs. Litig., 795 F.3d 380, 393 (3d Cir. 2015)). Plaintiffs must possess "a minimal degree of knowledge about the case and have no conflict of interest with class counsel and members of the class." Id. Plaintiffs' interest in preserving this litigation as a class action is squarely at odds with the interests of class members, who will bear the cost of those choices but receive little benefit.

factors 5, 6, and 7 (and, potentially, the Seventh Amendment) which prohibit "reexamin[ation]" of "evidence and findings from resolution of the common issue[s]." Russell, 15 F.4th at 268; see also U.S. Const. amend. VII ("the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States."). In sum, given the minimal benefit absent class members will receive from class treatment, the potential preclusive impact of Plaintiffs' attempt to litigate issues in the abstract, and the risk that subsequent litigants will seek to relitigate Plaintiffs' "issues" in a manner suited to their individual claims, Plaintiffs have not established (and cannot establish) that certification is appropriate.

V. PLAINTIFFS' "EDUCATION ISSUES" SUBCLASS CANNOT BE CERTIFIED UNDER FEDERAL RULE OF CIVIL PROCEDURE 23

The same basic problems plague Plaintiffs' "Education Issues" subclass,[17] which seeks class treatment of four issues:

> (1) whether GMS failed to provide an appropriate education under state and federal law; (2) whether students at GMS were discriminated against based on their placement at the facility which offered an inadequate education; (3) whether students at GMS were discriminated against based on their placement at the facility when they were deprived of a high school education without due process; and (4) whether students subject to the educational programming at GMS were harmed.

Pls. Br. at 39. Of these, two are not related to *GMS's* liability: numbers (2) and (3), which allege unconstitutional *placement* at GMS, are not relevant to any class claim against GMS because GMS did not adjudicate putative class members as delinquent and did not "place" any students at GMS as a result of that determination.

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[17] The primary obstacle to Plaintiffs' certification of an education-based subclass is that neither Pennsylvania nor federal law recognize a corresponding private right of action. See GMS MSJ Br.; see also Pls. Br. at 8 ("Youth placed at GMS had a legal entitlement to receive an appropriate meaningful education compliant with applicable Pennsylvania and federal laws.").

That leaves issues (1) and (4) for this Court's consideration. Neither present a common question capable of generating common answers. See, *infra*, at §V(A). Further, Plaintiffs do not explain how they will establish, though common evidence, that GMS's educational policies *in fact* harmed all class members. Finally, like Plaintiffs' other issues subclasses, their "Education Issues" subclass cannot satisfy the "superiority" requirements of Rule 23(b)(3), will not "facilitate resolution" of individual claims, and cannot survive the Third Circuit's Gates-based analytical framework.

A. Plaintiffs Have Not Met and Cannot Meet Rule 23(a)'s Commonality Requirement.

As described above, Plaintiffs' assertion that their education issues subclass meets the requirements of Rule 23(a) relies on an impermissibly over-broad definition of commonality. "The questions common to all class members," they contend, "are whether GMS's education program was deficient and whether GMS bears liability." Pls. Br. at 40. If a would-be class representative could satisfy commonality merely by restating the elements of her or his putative class claim, however, Rule 23(a) would be rendered superfluous—and defective class actions like Dukes and Mielo would have come out differently.

Regardless, however, Plaintiffs' characterization is belied by their own arguments. As the paragraph containing that statement reflects, Plaintiffs' allegations of "deficiency" encompass a litany of independent issues, "include, *but are not limited to*, providing all students with a self-directed online asynchronous program and deficient curriculum," "an inadequate number of instruction hours required by 24 P.S. § 13-1327," a lack of "instruction from trained Counselor-Teachers," which allegedly "imped[ed] students' abilities to obtain credits to earn a high school diploma or diverting students entitled to a high school education to a GED program." Id. (emphasis added). Other allegations address internal training, staffing levels, and the effect of (non-

instructional) environmental factors, including a "culture of violence and intimidation." Pls. Br. at 10. As such, Plaintiffs' proposed "issue" does not present a singular "*discrete question* of law whose determination 'will resolve an issue that is central to the validity of each of [the individual[]] [plaintiff's] claims in one stroke.'" M.D. ex rel. Stukenberg v. Perry, 675 F.3d 832, 843 (5th Cir. 2012) (emphasis added) (first brackets in original) (quoting Dukes, 564 U.S. at 350).

A major problem with Plaintiffs' mosaic approach to "deficiency" under Rule 23(a) is that, to the extent any individual class member suffered an education-related "harm," that harm is the product of specific failures related to the class member's specific needs. Inversely, even if general deficiencies did exist, that does not mean that every student experienced every deficiency. A handful of examples prove helpful. If, as Plaintiffs' experts contend, GMS's employment of uncertified teachers constitutes evidence of a system-wide deficiency—notably, Plaintiffs' experts acknowledge that, under *Pennsylvania law*, teachers employed by PRRIs are not required to be certified[18]—that does not mean that every uncertified teacher was "deficient."[19] An uncertified teacher *can* provide a quality education. Similarly, even if Plaintiffs' experts are correct that GMS *generally* relied too heavily on the PLATO online learning system—as above, they do not assert that GMS's use of PLATO violated any affirmative statutory or regulatory standard—that does

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[18] Indeed, of the education "experts" who provided testimony and opinion in this litigation, only Dr. Kreider addressed [redacted]. See, e.g., Ex. 2, Kreider Am. Rep. at 8. Dr. Gagnon specifically testified [redacted]

[19] [redacted] ee Ex. 2, Kreider Am. Rep., at 15-16.

not mean that every student who used PLATO received a "deficient" education.[20] Some students may have found PLATO preferable and more effective than other teaching methods; other students may have received in-person assistance that compensated for their struggles.[21]

As the Third Circuit explained in Gates, *truly* common proof of class-wide harm does not allow for individual exceptions. See Gates, 655 F.3d at 266 (holding that evidence was "not 'common' because it is not shared by all (possibly even most) individuals in the class" and that "[a]verages or community-wide estimations would not be probative of any individual's claim because any one class member may have an exposure level well above or below the average.").[22] Nothing Plaintiffs identify in their brief (indeed, nothing in the existing record) is capable of establishing class-wide harm in the way Rule 23(a) demands. In sum, because Plaintiffs cannot establish "deficiency" or "harm" with common, class-wide evidence, they cannot satisfy Rule 23(a)'s requirements.

B. Plaintiffs Have Not Established, and Cannot Establish, Predominance or Superiority Under Rule 23(B)(3).

Like each of their proposed "issues classes," Plaintiffs' "Education Issues" subclass must also satisfy one of the classifications under Rule 23(b). Plaintiffs again seek certification under

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[20] Although Dr. Gagnon criticizes [redacted] See Pls. Ex. 31, Gagnon Rep. at 31.

[21] In fact, Plaintiff Derrick testified [redacted] ee Ex. 7, Pl. Derrick Day 2 Dep., at 135:6-10, 141:15-23.

[22] Other examples abound. For instance, [redacted] See Ex. 2, Kreider Am. Rep. at 56; see also Ex. 3, GMS Outcome Data, GMSCA0469924.

Rule 23(b)(3). Here, however, Plaintiffs' assertion that they can establish class-wide "harm" implicates predominance in a way that their other, non-causal "issues" do not.

There are "three key aspects" to Rule 23(b)(3)'s predominance inquiry, each of which highlights the empirical nature of Plaintiffs' burden:

> First, the court must "find[]" that the requirements of Rule 23 are met and any factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence. Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits. Third, the court must consider all relevant evidence and arguments, including expert testimony, whether offered by a party seeking class certification or by a party opposing it.

In re Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 191 (3d Cir. 2020) (internal citations and quotations omitted). Moreover, "'[b]ecause the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.'" Id. (quoting Marcus, 687 F.3d at 600). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." Id.

Plaintiffs cannot certify an "issues class" as to whether GMS's alleged educational shortcomings "harmed" its students because any determination of "harm" is inherently individualized. For instance, although Plaintiffs broadly allege that GMS's purported deficiencies "result[ed] in the loss of future educational and employment opportunities," See Dkt. No. 1-1, Compl., ¶ 406; id., ¶ 411 (same), any attempt to prove GMS *in fact* caused the loss of future opportunities will require Plaintiffs to go beyond alleged deficiencies in GMS's instruction. The analysis would need to address "educational and employment opportunities" *prior* to enrollment, opportunities *after* enrollment, and, ultimately, provide tangible evidence that only GMS's actions

(rather than some other factor) explain the difference. Cf. Ex. 2, Kreider Am. Rep. at 55 (explaining that [redacted] Plaintiffs' experts [redacted] See Ex. 8, Gagnon PM Dep. at 237:10-242:10. In his own words, Dr. Gagnon's opinions [redacted] Id.

This approach also fails to account for significant differences among GMS students. [redacted], see, e.g., Pls. Ex. 49, Belfield Rep. at 16-17 and Table A1, [redacted] See Pls. Ex. 37, Student Data Spreadsheet, GMSCA0381084. Similarly, students arrived at GMS at various ages, ranging from 12 and 18, from different schools, different jurisdictions, different states, and even different countries. See Ex. 9, L. Power Dep. at 165:11-22; Pls. Exhibit 2, GMS Program Description at 8, 10. [redacted]. See Ex. 9, L. Power Dep. at 44:22-45:13. Plaintiffs cannot establish actual harm to individual class members without taking these individualized factors into account. See, e.g., Gates, 655 F.3d at 267 (rejecting general causation as evidence of predominance because expert's analysis did "not reflect that different persons may have different levels of

exposure based on biological factors or individual activities over the class period," and explaining that factors "which affect a person's exposure to toxins can include activity level, age, sex, and genetic make-up.").

Nor can Plaintiffs rely on mere exposure to "deficient" instruction to establish class-wide harm because, as the Third Circuit has repeatedly made clear, exposure to a defect or deficiency does not automatically equate to harm-in-fact. See Marcus, 687 F.3d at 604 (explaining that, because "*any* tire can 'go flat' for myriad reasons" and "[e]ven 'defective' tires can go flat for reasons completely unrelated to their defects," class-wide causation "requires an individual examination of that class member's tire.") (emphasis in original). In other words, class-wide harm cannot be *presumed*. See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 326 ("Applying a presumption of impact based solely on an unadorned allegation of price-fixing would appear to conflict with the 2003 amendments to Rule 23, which emphasize the need for a careful, fact-based approach, informed, if necessary, by discovery").[23]

Would-be class representatives often seek to overcome the difficulty of establishing a "reliable means of proving classwide injury" through "the assistance of experts," Reyes v.

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[23] See also Am. Seed Co., Inc. v. Monsanto Co., 271 Fed. App'x 138, 141 (3d Cir. 2008) (causation-related predominance issues cannot be resolved "by presuming impact based on the allegations in the complaint that appellees violated the antitrust laws, and that, therefore, there was a class-wide injury"); Norman v. Trans Union, No. 18-5225, 2023 WL 2903976, at *21 (E.D. Pa. 2023) ("But injury cannot be presumed and, under the precedent that controls here, Plaintiffs cannot show common proof of injury in the form of diminished credit scores."); cf. Prantil v. Arkema, 986 F.3d 570, 580 (5th Cir. 2021) ("'[C]ourts must certify class actions based on proof, not presumptions.'") (brackets in original); Flecha v. Medicredit, 946 F.3d 762, 768 (5th Cir. 2020); In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013) ("plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy."); In re Zetia (Ezetimibe) Antitrust Litig., MDL No. 2:18-md-2836, 2020 WL 5778756, at *16 (E.D. Va. 2020) ("And it is no answer to inefficiency to presume injury without reliable classwide evidence and thus deny the defendants the right to raise potentially meritorious defenses.").

Netdeposit, LLC, 802 F.3d 469, 489 (3d Cir. 2015) (quoting In re Rail Freight, 725 F.3d at 252-53), who, in turn, often rely on mathematical models intended to isolate causation. Their ability to do so is far from a given and inherently context-dependent. As the Third Circuit observed in Gates, "[a]ttempts to meet the burden of proof using modeling and assumptions that do not reflect the individual characteristics of class members have been met with skepticism." Gates, 655 F.3d at 266; see also In re Niaspan Antitrust Litig., 464 F.Supp.3d 678, 714 (E.D. Pa. 2020) (predominance requirement not met where expert's model "does not purport to show that all class members were injured."); Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, No. 04-cv-5898, 2010 WL 3855552, at *27 (E.D. Pa. 2010) (predominance not established where expert evidence "d[id] not show that *all* class members paid supra-competitive prices for generic or branded sustained release bupropion, or that this determination can be made with common proof.") (emphasis in original).

Here, by contrast, Plaintiffs' experts do not provide any objective evidence of class-wide injury—no data, no models, no regression analysis. Although Dr. Gagnon's Report states [redacted] See Pls. Ex. 31, Gagnon Rep. at 2; see also id. [redacted] On the contrary, and as touched on above, Dr. Gagnon has [redacted]. See Ex. 8, Gagnon PM Dep. at 237:10-242:10.

Dr. Gagnon's willingness [redacted] Ex. 6, Gagnon AM Dep. at 78:1-15. Outside of litigation, Dr. Gagnon's research [redacted]. See Ex. 8, Gagnon PM Dep. at 252:18-21 [redacted] Indeed, in keeping with that self-described ethos, Dr. Gagnon [redacted] See, e.g., Ex. 6, Gagnon AM Dep. at 77:8-81:20.

It is noteworthy, then, that Dr. Gagnon [redacted][24] See Ex. 6, Gagnon AM Dep. at 182:15-183:12 ([redacted]

[24] To his credit, Plaintiffs' economics expert, Dr. Belfield, [redacted] See Ex. 10, Belfield Dep. at 200:2-24 [redacted]

[redacted][25]

Even assuming that a broad-based "deficiency" could be established without objective standards or data analysis, Plaintiffs' inability to tailor their analysis and arguments to individual class members means the best they can offer is something akin to general or generic harmfulness—that GMS's students were exposed to poor instruction that *could have* harmed them.[26] Even thirty years ago, however, when certification was more freely granted, courts repeatedly found that general or generic causation could not satisfy Rule 23(b)(3)'s predominance requirement. See, e.g., Gates, 655 F.3d at 266[27]; Barnes v. Am. Tobacco Co., 161 F.3d 127, 145 (3d Cir. 1998); cf. Pryor

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[25] Plaintiffs' experts [redacted] See Ex. 2, Kreider Am. Report at 46, 50.

[26] See Johnson v. Arkema, Inc., 685 F.3d 452, 468–69 (5th Cir. 2012) (quoting Knight v. Kirby Inland Marine Inc., 482 F.3d 347, 351 (5th Cir. 2007)) ("General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury."); see also GENERAL CAUSATION, Black's Law Dictionary (11th ed. 2019) ("The potential of an agent to produce the general occurrence of injuries in a population."); Federal Judicial Center, Reference Manual on Scientific Evidence, Ch. 549 (general causation is the "[i]ssue of whether an agent increases the incidence of disease in a group and not whether the agent caused any given individual's disease").

[27] In Gates, the Third Circuit identified numerous authorities addressing the insufficiency of general causation: In re Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990) ("It is evident that these statistical estimates deal only with general causation, for population-based probability estimates do *not* speak to a probability of causation in any one case; the estimate of relative risk is a property of the studied population, not of an individual's case." (internal quotation omitted) (emphasis in original)); In re "Agent Orange" Prod. Liab. Litig., MDL No. 381, 818 F.2d 145, 165 (2d Cir. 1987) (noting that "generic causation and individual circumstances concerning each plaintiff and his or her exposure to Agent Orange ... appear to be inextricably intertwined" and expressing concern that if the class had been certified for trial "the class action would have allowed generic causation to be determined without regard to those characteristics and the individual's exposure"); and 2 McLaughlin on Class Actions: Law and Practice § 8:9, at 8–55 to –57 (3d ed. 2006) ("Permitting a class to proceed with its suit without linking its

v. Nat'l Collegiate Athletic Ass'n, No. 00-3242, 2004 WL 1207642, at *4 (E.D. Pa. 2004) (explaining that "plaintiffs could not avoid individual showings of causation by merely asserting that products of the defendants generally cause injury" and that "[c]ausation issues would have to be tried individually.").

It is worth noting that, in Gates, the Third Circuit rejected a far more rigorous general causation-based approach to Rule 23(c)(4) certification. See Gates, 655 F.3d at 272 (affirming district court's denial of certification and noting that "both the fact of damages and the amount of damages 'would remain following the class-wide determination of any common issues;' and further that causation and extent of contamination would need to be determined at follow-up proceedings."). The Third Circuit's criticism of the Gates plaintiffs is prescient:

> Plaintiffs have neither defined the scope of the liability-only trial nor proposed what common proof would be presented. The claims and issues here are complex and common issues do not easily separate from individual issues. A trial on whether the defendants discharged vinylidene chloride into the lagoon that seeped in the shallow aquifer and whether the vinyl chloride evaporated from the air from the shallow aquifer is unlikely to substantially aid resolution of the substantial issues on liability and causation.

Id. at 274.[28] Plaintiffs' proposal is silent regarding the scope of both class and individual trials, fails to establish that "class" and "individual" issues can actually be separated, and would leave the most complicated issues untouched, leaving individual claimants to shoulder an inordinate

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proof to even a single class member would contravene the overwhelming authority recognizing the individualized nature of the causation inquiry in mass tort cases.").

[28] Aware that their inability to establish class-wide causation is fatal under Rule 23(b)(3), Plaintiffs argue (without explanation) that, contrary to their earlier characterization, the common questions posed by their Education Issues class "focus on the liability of Defendant GMS, not causation or damages" and thus will not "require 'individualized review' in order to dispose of them." Pls. Br. at 42-43. Clearly, however, Plaintiffs cannot resolve Education Issue No. 4 (whether GMS students "were harmed") without addressing causation.

burden. Their argument in support of certification is far less compelling than even the proposal and trial plan rejected by the Third Circuit in Gates.

C. Plaintiffs' "Education Issues" Subclass Is Not Appropriate for Certification Under the Third Circuit's Rule 23(c)(4) Framework.

Plaintiffs' defense of their "Education Issues" subclass devotes just two paragraphs to the Third Circuit's Rule 23(c)(4)-specific Gates factors. See Pls. Br. at 44. As a result, their supporting arguments are cursory and conclusory, relying primarily on a pat assertion that, because this litigation is "complex," certifying their issues class "would be efficient because litigating the actions of GMS regarding education would focuses [sic] on common actions and policies relating to GMS's provision of education services as well as the role of other Defendant PDE." Pls. Br. at 44. But they do not explain how litigating "common actions and policies" will meaningfully aid individual claimants asserting individualized claims.

Take, for instance, Plaintiffs' assertion that certification of their education issues would "prevent subsequent triers of fact from needing to re-analyze the high volume of education records and testimony produced [in this litigation]." Pls. Br. at 44. If true, and if applicable, this factor could weigh in favor of certification. But Plaintiffs fail to explain why an individual plaintiff would need to sort through a "high volume" of documents that are not directly-related to his claim. An individual claimant pursuing individual recovery for deficient instruction need only establish that GMS's educational practices and policies failed to meet *his* specific needs, not that the school's instruction was *generally* deficient.

As a result, even if Plaintiffs could establish a general deficiency or generalized harm, any recovery by individual members of the Education Issues subclass will nonetheless remain contingent on their ability to establish that they were *specifically* harmed by some *specific* practice or policy. Like the Abuse Issues subclass members, they will be forced to choose between (i)

accepting the prefab constraints imposed by *Plaintiffs'* decision to litigate "deficiency" on an abstract level and (ii) seeking to "reexamine" that issue in a manner tailored to their individual claim.[29] Pls. Br. at 43-44. Either choice would contravene the Third Circuit's guidance in Gates.

And, even if that were not the case, Plaintiffs' framework will not shield class members from the cost of litigation because individual claimants' recovery will remain contingent on their ability to prove injury, causation and damages—issues that will likely require expert witnesses. That is no small thing if, as Plaintiffs contend, absent class members are unlikely to have the resources to litigate their claims. Id.; see also In re Marriott, 78 F.4th at 689 (explaining that similar framework "diminishes" any incentive for individual claimants because "the remaining individualized issues will also require significant resources.").[30] As a result, class treatment of Plaintiffs' education issues subclass is clearly inappropriate under the Third Circuit's Gates-based framework.

VI. PLAINTIFFS' "DISABILITY DISCRIMINATION ISSUES" SUBCLASS CANNOT BE CERTIFIED UNDER FEDERAL RULE OF CIVIL PROCEDURE 23

Plaintiffs' proposed "Disability Discrimination Issues Class" would consist of "all youth at GMS after April 11, 2017, who had qualifying disabilities as defined under Section 504 and the

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[29] This trade-off once again implicates adequacy under Rule 23(a). See, *surpa* at §IV(C). Plaintiffs' interest in preserving this litigation as a class action is squarely at odds with the interests of class members, who will bear the cost of those choices but receive little benefit.

[30] On several occasions in their brief, Plaintiffs assert that this litigation is not remunerative enough to drive individual litigation. See Pls. Br. at 28 (referring to "small recoveries"). That is at odds with the analysis of their expert, Dr. Belfield, [redacted] If accurate, "the economic viability" of these claims "on an individual basis makes individual trials a realistic procedural alternative," and the risks posed by Plaintiffs' unorthodox class claims become "unnecessary." ALI, Principles of the Law of Aggregate Litigation § 2.02 (2010).

ADA, specifically 42 U.S.C. § 12102, either before or during their placement at GMS." Pls. Br. at 45. They seek to certify the class to resolve three issues:

> (1) whether GMS's policies and practices discriminated against students with qualifying disabilities due to the absence of a system to identify, evaluate, and provide accommodations in violation of Section 504 and the ADA; (2) whether GMS owed a duty to students with qualifying disabilities; and (3) whether GMS breached any duty it owed to students with qualifying disabilities.

Id.[31] This class, and these issues, suffer from the same commonality, superiority, and Gates-related infirmities as Plaintiffs' other classes—with the additional problem that, because the class encompasses individuals who were not formally identified as "qualifying," it is not sufficiently ascertainable under Third Circuit law.

A. Plaintiffs Have Not Met and Cannot Meet Rule 23(a)'s Commonality Requirement.

Plaintiffs once again allege overarching "breaches" or "violations"—in this case, violation of Section 504 of the Rehabilitation Act and Title II of the ADA—that are more accurately viewed as a loosely-bundled collection of distinct and discrete policies and/or policy failures, some of which relate directly to education, some of which do not. They include a lack of "formal process in place to ensure students with known existing psychiatric care or prescriptions would continue to receive that care," a lack of "positive behavior support plans" for "students with known emotional disturbance or other mental or behavioral health needs," a "fail[ure] to take students' disabilities into account when imposing restraints and disciplinary sanctions," a "fail[ure] to implement any system to identify students who would be eligible for special education services." Pls. Br. at 12-13. They also include GMS's implementation of a "computer-based program" for

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[31] Because GMS is not a "public entity" as defined under Title II of the ADA, Plaintiffs' ADA claim against GMS is not cognizable. See GMS MSJ Br.

instruction "that was not individualized for students with disabilities," a denial of "access" to education when students were placed "on concern," the "exclusion" of parents from "decision-making," and otherwise insufficient provision of disability-focused educational services. Id.

Plaintiffs' bare assertion that commonality is "satisfied" because all class members were "discriminated against based on GMS's failure to address students with disabilities or make any accommodations" is "not enough" to satisfy Rule 23(a) because—as their exhaustive allegations confirm—the federal statutes at issue "can be violated in many different ways." Mielo, 897 F.3d at 489; DL, 713 F.3d at 127 (commonality not established where "the harms alleged to have been suffered by the plaintiffs here involve different policies and practices at different stages of the District's Child Find and FAPE process; the district court identified no single or uniform policy or practice that bridges all their claims."). As explained at length above, the mere fact that the allegations can be loosely "aggregated" under a single label or statute does not render them "common" for Rule 23(a) purposes.

Even within the narrower subset of Plaintiffs' instruction-specific allegations, the underlying questions and answers are too varied to constitute a "common contention" or give rise to the "same injury." Dukes, 564 U.S. at 350, 353. A class member who was not provided an IEP, for instance, suffered a harm distinct from a class member who received an IEP but whose instruction was insufficiently individualized or otherwise deficient. Compare Ex. 6, Gagnon AM Dep. at 184:23-185:5 (testifying [redacted] with Pls. Ex. 31, Gagnon Rep. at 45 [redacted]

A class member who struggled with self-guided learning under PLATO suffered a harm that is factually and legally distinct from a student who was not assigned a computer. Compare Dkt. No.

1-1, Compl., ¶ 161 ("Thomas found the computer-based recovery system very difficult"); id., ¶ 90 ("Glen Mills required Derrick to participate in a computer-based credit recovery program, which was not differentiated and did not accommodate for his disabilities") with id., ¶ 185 ("Although youth on Jackson participated in a computer-based recovery program . . . Sean was never provided with a computer."). Moreover, because different disabilities implicate instruction in different ways, they do not generally present a common, class-wide issue amenable to class-wide evidence. See Ex. 2, Kreider Am. Report, at 59-60 (noting how [redacted]).

Of course, Plaintiffs do not limit themselves to *just* instruction. They also challenge GMS's handling of medical and psychiatric issues and an alleged lack of behavior-related policies tailored to individual behavioral and psychiatric diagnoses. Pls. Br. at 12. As in Mielo, this attempt to aggregate "a wide array of different claims by different [class] members" does not give rise to common questions or answers and, as a result, "fails to meet the commonality requirements of Rule 23(a)(2)." 897 F.3d at 490.

B. Plaintiffs Have Not Established, and Cannot Establish, That Their Disability Issues Subclass Is Ascertainable or Superior Under Rule 23(B)(3).

Even if Plaintiffs' proposed Disability Discrimination Issues sub-class satisfied Rule 23(a)'s commonality requirement, certification must nonetheless be denied because the sub-class cannot satisfy Rule 23(b)(3)'s ascertain ability and superiority requirements.

In addition to predominance and superiority, the Third Circuit also recognizes a "a final implicit requirement" under Rule 23(b)(3): "'[t]he class must be currently and readily ascertainable based on objective criteria.'" Butela v. Midland Credit Mgmt. Inc., 341 F.R.D. 581, 600 (W.D. Pa., 2022) (quoting Marcus, 687 F.3d at 593). To meet this threshold requirement, a plaintiff must show that "(1) the class is defined with reference to objective criteria; and (2) there is a reliable

and administratively feasible mechanism for determining whether putative class members fall within the class definition." Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015) (internal quotations omitted). Importantly, a "plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership." Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013) (citing Marcus, 687 F.3d at 593).

Both Plaintiffs' proposed class and its proposed "issues" implicate students who were never formally determined to possess a disability. Indeed, one of Plaintiffs' core contentions is that GMS did not have a policy in place to "identify" students who may have needed more assistance than their files indicated. Pls. Br. at 12 (alleging GMS discriminated by "failing to implement any system to identify students who would be eligible for special education services"); id. (alleging GMS discriminated when it "failed to evaluate [students] for *previously unidentified disabilities*") (emphasis added). This "issue" is reflected in Plaintiffs' class definition, which includes any student "with qualifying disabilities," not just those with a previously *identified* disability qualification. Id. at 45. Membership in the class therefore cannot be readily ascertained using objective criteria.[32] Instead, some GMS students will need to establish—for the first time, in court—that they have a disability. That is precisely the kind of factual investigation and/or mini-trial the Third Circuit's ascertain ability requirement prohibits. See Carrera, 727 F.3d at 307-08.

Nor are Plaintiffs' proposed half-measures a "superior" method of adjudicating core components of what are ultimately individualized claims of disability discrimination. As with

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[32] In support of ascertain ability, Plaintiffs cite [redacted]. But this does not solve this specific ascertain ability problem because, according to Plaintiffs, [redacted] See Dkt. No. 1-1, Compl., ¶¶ 86-104.

Plaintiffs' other proposed subclasses, it will not relieve individual litigants of the costs and burdens of litigation, eliminating the primary purpose of aggregate treatment. Moreover, there is a substantial risk that any attempt to litigate duty and breach in the abstract will unnecessarily burden or constrain future litigants asserting highly-personalized claims. After all, an individual disability claimant does not need to establish *systemic* deficiencies in order to prove that GMS breached a statutory obligation to *him*. Here, as above, superiority "cannot be taken for granted" when it comes to Rule 23(c)(4) issues classes, and the disability subclass's lack of individual benefit, increased risk of preclusion, and inefficiency render class treatment inferior and improper. In re Marriott, 78 F.4th at 688-90.

C. Plaintiffs' Proposed Disability Issues Subclass Is Not "Appropriate" for Certification Under the Third Circuit's Rule 23(c)(4) Framework.

For the same reasons identified above with regard to Plaintiffs' Abuse Issues and Education Issues sub-classes, Plaintiffs have not met their burden of showing that certification of their Disability Issues subclass is appropriate under the Third Circuit's Gates guidelines. Class treatment will not relieve the burden on individual litigants or facilitate resolution of individual disability discrimination claims because class members will still be left to their own devices, with their recovery of damages contingent on their ability to navigate the complicated, burdensome issues of causation, injury, and damages. And, as with Plaintiffs' other issues classes, they will be forced to do so within the artificial constraints imposed by Plaintiffs' attempt to "resolve" elements of their claims in the abstract, divorced from their individual circumstances.[33] The risk of issue preclusion

[33] This trade-off also implicates adequacy under Rule 23(a). See, *surpa* at §§IV(C), V(C). Plaintiffs' interest in preserving this litigation as a class action is squarely at odds with the interests of class members, who will bear the cost of those choices but receive little benefit.

or, inversely, the possibility that subsequent claimants will seek to relitigate Plaintiffs' issues counsel against certification.

VII. CONCLUSION

For these reasons, the GMS Defendants respectfully request that Plaintiffs' Motion for Class Certification and Appointment of Class Representatives and Class Counsel be denied.

Date: October 31, 2023

Respectfully submitted:

/s/ Joseph McHale

STRADLEY RONON STEVENS & YOUNG, LLP
By: Joseph McHale (Pa. No. 65706)
Daniel T. Fitch (Pa. No. 53717)
Michael J. Wise (Pa. No. 322890)

Counsel for Defendants,
The Glen Mills Schools & Randy Ireson

CERTIFICATE OF SERVICE

I, Joseph McHale, Esquire, hereby certify that on October 31, 2023, I caused a true and correct copy of the foregoing Opposition to Plaintiffs' Motion for Class Certification and Appointment of Class Representatives and Class Counsel to be served on all counsel of record via the Court's ECF system.

Joseph McHale

Joseph McHale, Esquire
STRADLEY RONON STEVENS & YOUNG, LLP
Great Valley Corporate Center
30 Valley Stream Parkway
Malvern, PA 19355
610.640.8007
jmchale@stradley.com

Daniel T. Fitch, Esquire
Michael J. Wise, Esquire
STRADLEY RONON STEVENS & YOUNG, LLP
2005 Market Street, Suite 2600
Philadelphia, PA 19103
215.564.8118
dfitch@stradley.com
mwise@stradley.com

Counsel for Defendants,
The Glen Mills Schools & Randy Ireson

Dated: October 31, 2023