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

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| DERRICK, et al., | ) |
| | ) |
| Plaintiffs, | ) CIVIL ACTION NO.: 2:19-CV-01541-HB |
| | ) |
| v. | ) **EVIDENTIARY HEARING** |
| | ) **REQUESTED** |
| GLEN MILLS SCHOOLS, et al., | ) |
| | ) **PUBLIC REDACTED** |
| Defendants. | ) |
| | ) |

**MEMORANDUM OF LAW OF THE PENNSYLVANIA DEPARTMENT OF EDUCATION AND THE SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF EDUCATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL**

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## I. INTRODUCTION

In their Complaint, Plaintiffs purported to bring claims against the Pennsylvania Department of Education and the former Secretary of the Department (the "PDE Defendants") on behalf of various subclasses for which they claimed to seek injunctive relief in the form of compensatory education under Rule 23(b)(2). More than four years of litigation have laid bare the legal and evidentiary flaws with that approach. In their motion for class certification ("Motion"), Plaintiffs propose a new approach: certification of five issue classes, comprising a total of fourteen different sub-issues, under Rules 23(b)(3) and (c)(4). But the issues for which Plaintiffs seek certification are unmoored from the requirements of Rule 23, and from the elements of Plaintiffs' claims. Indeed, the legal and evidentiary flaws with Plaintiffs' new approach are legion.

Plaintiffs cannot establish the elements of Rule 23 for six independent, overarching reasons applicable to all of their proposed issue classes. *First*, they cannot establish predominance because—as this Court held in *Blunt v. Lower Merion School District*, 262 F.R.D. 481, 489 (E.D. Pa. 2009)—a "highly individualized" analysis is required for each element of each of the more than 1,600 putative class members' claims. *Second*, Plaintiffs have failed to show, or even argue, that class certification is appropriate for each of their fourteen proposed issues, as required by the Third Circuit's recent ruling in *Russell v. Educational Commission for Foreign Medical Graduates*, 15 F.4th 259, 266 (3d Cir. 2021). *Third*, the nine factors set forth by the Third Circuit in *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 274 (3d Cir. 2011), weigh against certifying any issues classes. *Fourth*, Plaintiffs' fourteen class issue proposal would be so cumbersome and inefficient as to preclude a finding that class treatment would be superior to individual actions. *Fifth*, Plaintiffs have no evidence showing that joinder is impracticable, as is necessary for establishing numerosity. *Sixth*, Plaintiffs cannot establish typicality or adequacy for any of their issues classes because their claims against PDE were mooted by their settlement with the Chester

County Intermediate Unit (CCIU), and their voluntary dismissal of CCIU from this litigation puts the interests of the named Plaintiffs in conflict with those of absent class members.

In addition to these overarching problems, each of the proposed issue classes individually fails to satisfy the requirements of Rule 23.

Thus, Plaintiffs have failed to meet the rigorous standards for class certification, and the Court should deny their Motion.

## II. FACTUAL BACKGROUND

### A. Pennsylvania Law Delegates Substantial Responsibility for Educating Youth to Local Officials and Agencies

Pennsylvania law delegates to local education agencies (LEAs), which include 500 school districts and 29 intermediate units (IUs), substantial authority for providing educational services. *See, e.g.*, 24 P.S. §§ 5-501–5-528 (granting authority to school districts); §§ 9-901-A–9-924-A (granting authority to IUs); § 13-1372 (granting IUs responsibility for providing special educational services). PDE has general oversight responsibility for youth education; it develops standards, distributes funding, and provides technical assistance to local agencies and officials. *See, e.g.*, 24 P.S. § 1-116 (PDE may provide technical assistance to failing school districts); §§ 1-122, 1-123 (determining funding allocations). But apart from its responsibility for supervising compliance with federal special education laws—which is discussed further below—PDE has little direct involvement in educating individual students or overseeing individual schools. Ex. 1, Clancy Tr. 86:11-22, 105:20-25.

PDE directly engages with individual schools or administrators only with respect to two discrete responsibilities relevant here. First, PDE collects and monitors data on classroom physical restraints, serious instances of which may prompt a PDE investigation and corrective actions. *See* Ex. 1, Clancy Tr. 223:11–224:20. Second, PDE is responsible for approving the eligibility of

minors to take the GED exam. *See* Ex. 2, PDE Resp. & Objs. to Pls.' First RFAs, Nos. 10 & 11; *accord* 22 Pa. Code § 4.72 (establishing requirements for obtaining a secondary school diploma). PDE fulfilled both responsibilities with respect to GMS. *See, e.g.*, Ex. 3, MacLuckie Day I Tr. 297:19–331:22 (detailing the restraint reporting system and CCIU's role in ensuring GMS provided timely and accurate reporting to the Commonwealth).

### B. GMS Was a Private Residential Rehabilitative Institution for Court-Adjudicated Youth

GMS consisted of up to fourteen separate licensed entities (each a different residential hall) that together comprised a private residential rehabilitate institution (PRRI), a type of private school recognized under Pennsylvania law and regulated by the Pennsylvania Department of Human Services (PA-DHS). Ex. 4, Cahill Tr. 354:2-12; Ex. 5, Riccio Tr. 119:15-17. Residents of GMS, like all PRRIs, primarily were youth who were adjudicated delinquent and committed to GMS by juvenile justice systems across the country. Ex. 6, PDE00000532 at 3; Ex. 7, MacLuckie Day II Tr. 429:4-8. GMS closed in April 2019 when PA-DHS revoked its licenses to operate and removed all youth residing there. Ex. 8, PA-DHS00010839.

### C. Pennsylvania Law Required CCIU—Not PDE—To Oversee and Provide Educational Services to GMS

As a PRRI, GMS was required to contract with its local IU—the Chester County Intermediate Unit (CCIU)—to secure educational services and programming for its residents. 24 P.S. § 9-914.1-A; Ex. 5, Riccio Tr. 119:15–120:4; Ex. 9, Power Tr. 54:5-18; *see also* Ex. 10, Compilation of CCIU Contracts, 2012-2019. By contract, CCIU provided educational and auxiliary services, ensured GMS's compliance with federal law relating to accommodating

students with disabilities, and served as a pass-through for funding from PDE and other sources.[1] *See, e.g.*, Ex. 11, Pikes Tr. 328:7–330:3 (testifying that CCIU reviewed IEPs and was GMS's resource for questions related to special education); Ex. 12, Chobany Tr. 119:6-14 (CCIU provided GMS with special education support, curriculum support, ESL services, and a reading specialist. and was the "pass through" for federal Title I funds for GMS). GMS administrators worked closely with and relied on CCIU for all education-related needs. *See, e.g.*, Ex. 12, Chobany Tr. 118:24–119:14; Exs. 3 & 14, MacLuckie Day I Tr. 80:21–83:16 & MacLuckie Tr. Ex. 4 (CCIU_0000110) (testifying that she met regularly with GMS staff to review procedures and address concerns).

It was thus CCIU's responsibility to monitor GMS, provide necessary services, and report data to PDE about the resident population relevant for PDE's distribution of funding and other functions. *See* Ex. 1, Clancy Dep. 166:21–167:20 (CCIU was responsible for monitoring whether students received a FAPE); *id.* at 294:9-11, 303:13-24 (CCIU was responsible for reporting restraint data to PDE). PDE ensured that GMS annually contracted with CCIU for these necessary services. Ex. 15, Hanft Tr. 96:1–97:10; Ex. 16, PDE's Resp. & Objs. to Pls.' First Interrogs. At No. 2 ("PDE ensured that the GMS School entered into a contract each year with an LEA to provide educational services, support, and oversight; each year, the contracting LEA for the GMS School was CCIU.").

Because GMS was a private institution, PDE did not have any further supervisory responsibilities or enforcement authority over GMS's residential education curriculum. Ex. 1, Clancy Tr. 228:10-14 ("PDE . . . does not have the authority to review the educational program [at GMS]."). Rather, PDE provided training and other resources, and investigated education-related

[1] PDE provided [redacted] for GMS's education programs. *See, e.g.*, Ex. 13, Compilation of Payments Records (showing [redacted] in payments to Glen Mills [redacted]).

complaints concerning GMS. Ex. 1, Clancy Tr. 280:2-7; Ex. 7, MacLuckie Day II Tr. 486:7-16. Through the Pennsylvania Training and Technical Assistance Network (PaTTAN), PDE provided "an array of trainings to the [GMS] staff," Ex. 1, Clancy Tr. 213:19-24, and reviewed all reported classroom restraints. *Id.* at 223:11–224:20. And although PDE reviews and investigates complaints regarding PRRI education programming, *id.* at 280:2–7; Ex. 7, MacLuckie Day II Tr. 486:7–16, PDE never received such a complaint regarding GMS. *See* Ex. 17, Ewing Tr. 359:6–360:2; Ex. 7, MacLuckie Day II Tr. 485:21–486:21; Ex. 9, Power Tr. 330:24–331:9.

### D. PDE Had "General Supervision" Responsibilities Under the Federal IDEA Funding Scheme for the Education of Students with Disabilities

Central to Plaintiffs' disability education claims are the requirements of the Individuals with Disabilities Education Act (IDEA), a federal funding scheme designed to afford appropriate educational opportunities to students with disabilities. *See* 20 U.S.C. § 1400, *et seq.* To receive funding, states must implement "policies and procedures" that: ensure all students with disabilities receive a free appropriate public education ("FAPE"); educate students with disabilities in the "least restrictive environment"; implement systems to identify students with disabilities ("child find" requirement); develop individual education programs ("IEPs") for students with disabilities to provide them with a FAPE; and establish procedural safeguards, including administrative procedures to resolve disputes. 20 U.S.C. § 1412; 34 C.F.R. §§ 300.101–300.199. These safeguards also include protections for parental rights—schools must notify parents prior to IEP meetings and permit them to participate, send Notices of Recommended Educational Placement and Prior Written Notices to report IEP decisions, and advise parents of the availability of administrative remedies. *See, e.g.*, 20 U.S.C. §§ 1414(a)(1)(D), (b)(1) & (4), (c)(3), (d)(1)(B)–(D), (e); 1415(b)(1) & (3), (c)(1), (d), (k)(1)(E)–(H).

Under the IDEA regulatory scheme, state education agencies (SEAs) have "general supervision" responsibilities and must allocate funding to and monitor LEAs. *See* 20 U.S.C. § 1412(a)(11); 34 C.F.R. § 300.149. Local education agencies—not SEAs like PDE—have the immediate responsibility to ensure that students receive required services. *See* 20 U.S.C. § 1413.

### E. PDE Fulfilled Its General Supervision Obligation as to GMS by Conducting Cyclical Monitoring and Administering a Public Complaint System

Within PDE, the Bureau of Special Education (BSE) oversees IDEA programs. Ex. 1, Clancy Tr. 12:2-10 (the primary duties of BSE are to ensure enforcement of IDEA and provide technical assistance to service providers). Consistent with the IDEA, BSE's role is to work with LEAs and offer resources for meeting IDEA requirements. *Id.* at 12:2-10 (BSE's role is to provide technical assistance and ensure IDEA compliance); *id.* at 166:21–167:20 (PDE expected CCIU to monitor GMS's provision of a FAPE to students with disabilities, the IEP process and evaluation, and child-find obligations); *id.* at 275:4-18 (PDE's role was to ensure that "LEAs provide FAPE for students eligible under [the] IDEA"). BSE supervises LEAs' compliance with the IDEA principally in two ways: (i) through the cyclical monitoring process, and (ii) through the Commonwealth's education complaint system. *Id.* at 279:1-15.

BSE evaluates each LEA in Pennsylvania for compliance with the IDEA on a six-year cycle. *See* Ex. 18, PDE00003988 (PDE letter describing monitoring requirements); Ex. 1, Clancy Tr. 41:16-24 (PDE conducts cyclical monitoring of LEAs to ensure compliance with the IDEA); *id.* at 46:19–47:1 (explaining that regional area support teams (RAST) conduct monitoring for PRRIs and their LEAs). The monitoring process is extensive and "thorough." Ex. 11, Pikes Tr. 348:23-24. BSE assesses compliance with the IDEA's substantive and procedural requirements by scrutinizing school self-assessments and conducting file and policy reviews, campus visits and classroom observations, and student, teacher, and administrator interviews. Ex. 19, Compilation

of documents relating to PDE's 2009 and 2015 cyclical monitoring of GMS [hereinafter 2009 and 2015 Monitoring Documents]. According to undisputed testimony, PDE's process for monitoring GMS was the same as the process for all other schools and institutions. Ex. 1, Clancy Tr. 279:16–280:7.

PDE completed cyclical monitoring of GMS in 2009 and 2015. *Id.* at 228:15-20; *see* Ex. 19, 2009 and 2015 Monitoring Documents. [redacted]. *See* Ex. 20, PDE00000557 (2009); Ex. 21, PDE00014770 (2015). [redacted] Ex. 22, PDE00007972 (2009); Ex. 23, PDE00014768 (2015).

CCIU assisted GMS with the cyclical monitoring process. Ex. 1, Clancy Tr. 212:5–214:2 (describing the ways in which BSE relied on CCIU to assist GMS, and stating that "it was evident that they [CCIU] were heavily involved" in GMS's programs); *see also, e.g.*, Ex. 3, MacLuckie Day I Tr. 68:6–71:12 (testifying that she assisted GMS with the cyclical monitoring). Additionally, pursuant to its contract with GMS, CCIU conducted its own annual review of GMS's special education files and procedures, and advised on areas of noncompliance or potential improvement. Ex. 11, Pikes Tr. 332:3–333:19 (explaining the annual review and testifying that "if CCIU gave me a directive to do something, then we followed that directive").

PDE also supervises compliance with the IDEA through the administrative dispute process, as required by the IDEA. 20 U.S. Code § 1415. The Office for Dispute Resolution fields complaints from students, parents, and LEAs, and facilitates due process hearings. *See* Ex. 24,

*Due Process*, Office for Dispute Resolution (https://odr-pa.org/due-process/). Aggrieved individuals can appeal to the state from a hearing officer's decision, 20 U.S.C. § 1415(g), and then may seek review in a civil action. 20 U.S.C. § 1415(i)(2)(A). Pennsylvania also permits individuals to file complaints about educator misconduct or programmatic concerns directly with BSE or PDE. Ex. 25, *Understanding Special Education Due Process Hearings*, Off. for Dispute Resolution, 14 (2022); *see also* Ex. 1, Clancy Tr. 222:7–223:6 (describing the "formal and informal" complaints students can submit). PDE investigates complaints and determines appropriate interventions where necessary, including further investigation, targeted monitoring, technical assistance, or training. Ex. 1, Clancy Tr. 280:11–281:24 (PDE conducts on-site investigations and, if necessary, its monitoring staff make interventions); *id.* at 283:10-23 (BSE also employs investigators to respond to complaints). Neither BSE nor PDE ever received a single complaint about educational programs or services at GMS. Ex. 17, Ewing Tr. 359:6–360:2; Ex. 7, MacLuckie Day II Tr. 485:21–486:21; Ex. 9, Power Tr. 330:24–331:9.

### F. The United States Department of Education at All Relevant Times Certified that PDE Complied with Its Supervisory Obligations under the IDEA

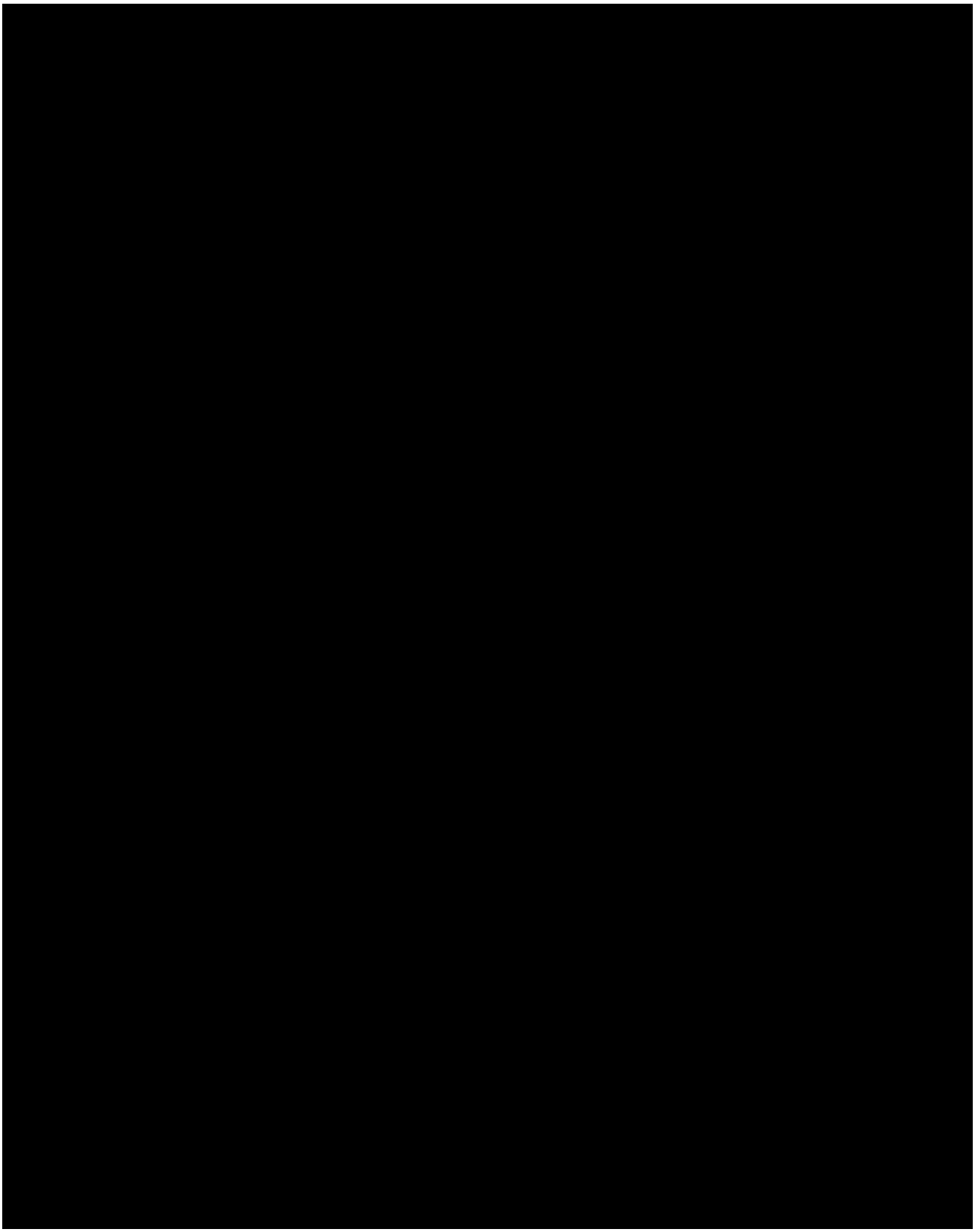
SEAs are monitored by the United States Department of Education (USDOE): each state must submit yearly reports to USDOE on its performance under the IDEA, 20 U.S.C. § 1416(b), which USDOE then must review to determine whether the state "meets the requirements and purposes of [the law]" and, thus, qualifies for funding, *id.* § 1416(d). PDE submits annual reports to USDOE, and at all times relevant to this case—*i.e.*, in each year from 2014 to 2019, USDOE certified that PDE was in compliance with the IDEA. Ex. 26, Compilation of USDOE Certification Letters from 2014 to 2019.

### G. Plaintiffs Received Most, If Not All, of the Services They Now Claim To Have Been Denied, and They Did Not Make Any Complaints While at GMS

[redacted]. *See, e.g.*, Ex. 11, Pikes Tr. 32:24–45:17 ([redacted]). [redacted] *Id.* at 340:9–343:12. [redacted] *Id.* at 26:13–27:2, 194:14–195:23, 290:4-13; *see also, e.g.*, Ex. 27, Tina Tr. 295:10-12 ([redacted]). [redacted] Ex. 11, Pikes Tr. 194:23–195:9; Ex. 5, Riccio Tr. 314:3–315:14.

#### 1. Derrick and Tina

[redacted] Ex. 28, DERRICK_002219; Ex. 29, GMSCA0001011; Ex. 30, DERRICK_004703. [redacted]. Ex. 31, GMSCA0000171. [redacted]. *Id.* at 4. [redacted]. *Id.* at 5. [redacted]. *Id.*



[redacted]

**2. Walter and Janeva**

[redacted]

[redacted]

**3. Thomas**

[redacted]

### H. Plaintiffs Have Obtained Compensatory Education Through Their Settlement with CCIU

In January 2023, Plaintiffs reached a settlement with CCIU pursuant to which Plaintiffs dismissed their claims against CCIU in exchange for CCIU establishing two separate funds from which former GMS residents can apply for payments. ECF No. 148; ECF No. 148-1 ("Settlement Agreement") §§ X(A), II. The "Compensatory Education Program Fund" provides former GMS residents with compensatory education damages. *Id.* Eligibility for the fund requires individualized analyses based on the length of stay at GMS, special education status, and primary

language, all to be determined by a neutral claims administrator. *See id.* at § II.H. Individuals determined to be disabled and/or an English learner can receive additional compensatory education. *Id.* at § II.H.1.b. The "Education Damages Fund" provides qualifying applicants compensatory damages arising from physical restraints or other specified harms, again based on individualized factors to be determined by a neutral claims administrator. *See id.* § III.

Pursuant to the Settlement Agreement, the named Plaintiffs are "automatically" qualified to receive compensation from both funds, including compensatory education, as well as payment of their attorney's fees. *Id.* §§ II.C.2, III.B.3, XI.A. Despite the named Plaintiffs receiving such complete relief from CCIU for their education-based claims, the Settlement Agreement characterizes the relief for other former GMS residents as "wholly insufficient." *Id.* § X.D.

## I. Plaintiffs Seek Certification of Five Different Issues Classes, Comprising Fourteen Different Issues, for Their Claims against the PDE Defendants

In their Complaint, Plaintiffs asserted a total of seven claims against one or the other of the PDE Defendants: (i) a Section 1983 claim for depriving Plaintiffs of their right to an education (Count 3); (ii) a Section 1983 claim for depriving Plaintiffs of equal access to a public education (Count 4); (iii) an IDEA claim for depriving certain Plaintiffs of their right to receive an appropriate, individualized education program in the least restrictive environment (Count 6); (iv) an IDEA claim for violating one Plaintiff's right to be identified as a student with a disability (Count 7); (v) an IDEA claim for depriving certain Plaintiffs' parents of their right to meaningful participation in the special education process (Count 8); (vi) a claim under Section 504 of the Rehabilitation Act for discriminating against certain Plaintiffs based on their alleged disabilities (Count 9); and (vii) a claim under the Americans with Disabilities Act for discriminating against certain Plaintiffs based on their disabilities (Count 10). Compl. ¶¶ 386–408, 414–65. They purported to bring those claims on behalf of a general class of students who had been placed at

GMS, Compl. ¶ 39, and five putative subclasses. *See id.*; *see also id.* ¶¶ 39–44. And they alleged that certification of the subclasses for purposes of injunctive relief in the form of compensatory education would be appropriate under Rule 23(b)(2). *See* Compl. ¶¶ 52, 399, 408.

Now, after years of discovery, Plaintiffs have dramatically changed their tack. In their Motion, they seek certification pursuant to 23(b)(3) and (c)(4) of five issue classes, each of which includes multiple sub-issues, for a total of ***fourteen*** different issues. The PDE Defendants address those issues—and why they are not suitable for class treatment—further below.

Despite having had the benefit of more than four years of discovery, Plaintiffs do not identify in their Motion a single PDE policy or practice that violates any of the laws upon which their claims are premised. Instead, they rely in their Motion on conclusory and amorphous allegations about PDE's "lack of oversight," "fail[ure] to conduct effective monitoring," failure to "identify any concerns," and "fail[ure] to implement policies and practices." *See* Motion at 15–16, 50-54, 56, 58–60, 64. As discussed below, there is no precedent for certifying a class for education claims like those here that are not connected to a specific policy or practice of the defendant.

## III. THE STRINGENT STANDARDS GOVERNING CLASS CERTIFICATION

"In deciding whether to certify a class under Federal Rule of Civil Procedure 23, a district court must make 'findings' and factual determinations." *Wharton v. Danberg*, 854 F.3d 234, 241 (3d Cir. 2017) (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008)); *Beck v. Maximus, Inc.*, 457 F.3d 291, 297 (3d Cir. 2006) ("Depending on the circumstances, class certification questions are sometimes enmeshed in the factual and legal issues comprising the plaintiff's cause of action, and courts may delve beyond the pleadings to determine whether the requirements for class certification are satisfied." (internal quotation marks omitted)). "The burden of proof rests with the movant to 'affirmatively demonstrate' certifiability by a

preponderance of the evidence." *Wharton*, 854 F.3d at 241 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

The class certification analysis "begins with a determination of whether the plaintiff has satisfied the prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy of the class representative." *Shelton v. Bledsoe*, 775 F.3d 554, 559 (3d Cir. 2015). "[A] court should address each Rule 23(a) factor in a certification decision." *Beck*, 457 F.3d at 296 n.2; *Mielo v. Steak 'N Shake Ops., Inc.*, 897 F.3d 467, 482 n.16 (3d Cir. 2018) (stating that "the requirements of Rule 23 must always be satisfied regardless of the type of class seeking certification"). Thus, Rule 23 "does not set forth a mere pleading standard"; rather, class certification is only appropriate if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores, Inc.*, 564 U.S. at 350–51. The "rigorous analysis of the evidence and arguments" may necessitate "a preliminary inquiry into the merits of the plaintiffs' claims to ensure they can be properly resolved as a class action." *Rodriguez v. Nat'l City Bk.*, 726 F.3d 372, 380 (3d Cir. 2013) (internal quotation marks omitted). "When courts harbor doubt as to whether a plaintiff has carried her burden under Rule 23, the class should not be certified." *Mielo*, 897 F.3d at 483 (citing *Hydrogen Peroxide*, 552 F.3d at 321).

"Once beyond Rule 23(a)'s four prerequisites, plaintiffs then must seek to certify a class of one of three 'types,' each with additional requirements." *Russell*, 15 F.4th at 266. Rule 23(b)(3), the provision at issue here, "states that a class may be maintained where 'questions of law or fact common to class members predominate over any questions affecting only individual members,' and a class action would be 'superior to other available methods for fairly and efficiently adjudicating the controversy.'" *Id.* (quoting Fed. R. Civ. P. 23(b)(3)). In addition, "[a]

plaintiff seeking certification of a Rule 23(b)(3) class must prove by a preponderance of the evidence that the class is ascertainable." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015).

Finally, when seeking certification of issue classes under Rule 23(c)(4), Plaintiffs "must show that those issues 'satisfy[] Rule 23(a)'s prerequisites' and that those issues are 'maintainable under Rule 23(b)(1), (2), or (3).'" *Russell*, 15 F.4th at 267 (alteration in original). The plaintiff also bears the burden of showing that the nine factors identified in *Gates*, 655 F.3d at 274, weigh in favor of certification. *Russell*, 15 F.4th at 268–69. Plaintiffs here cannot meet any of these stringent standards.

## IV. ARGUMENT

The Court should deny Plaintiffs' motion because: (i) for six independent, overarching reasons applicable to all five of the proposed issue classes, Plaintiffs cannot satisfy the elements of Rule 23; and (2) each of the proposed issue classes individually fails to satisfy the requirements of Rules 23(a) and (b).

### A. Plaintiffs Fail To Satisfy the Requirements of Rule 23 for Six Overarching Reasons Applicable to All Five of the Proposed Issue Classes

#### 1. Plaintiffs Cannot Establish Predominance Because Each of their Claims Requires a "Highly Individualized" Analysis

The law in the Third Circuit is clear: a plaintiff cannot prove liability or damages for a claim based on the denial of a FAPE without a "highly individualized" analysis of each plaintiff's personal circumstances. Plaintiffs therefore cannot establish that "'questions of law or fact common to class members predominate over any questions affecting only individual members.'" *In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig.*, 967 F.3d 264, 269 (3d Cir. 2020) (quoting Fed. R. Civ. P. 23(b)(3)).

"To assess predominance, a court . . . must examine each element of a legal claim through the prism of Rule 23(b)(3) by determining whether each element is capable of proof at trial through

evidence that is common to the class rather than individual to its members." *Id.* at 269–70 (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 600 (3d Cir. 2012)) (cleaned up). "[T]his standard is far more demanding than the commonality requirement of Rule 23(a), and requires more than a common claim." *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 483 (3d Cir. 2015) (cleaned up).

The predominance "inquiry, more so than other aspects of the certification determination, requires a close examination of the underlying claims to determine whether common legal elements pervade the class." *Lester v. Percudani*, 217 F.R.D. 345, 351 (M.D. Pa. 2003); *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 185 (3d Cir. 2019) ("Courts must give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member." (internal quotation marks omitted)). "Because 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." *Hydrogen Peroxide*, 552 F.3d at 311 (cleaned up). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Id.*

Here, although Plaintiffs assert seven different claims against the PDE Defendants, the required analysis is straightforward because each of the claims turns on the same issue: whether an individual plaintiff was denied a FAPE. *See Bowers v. NCAA*, 475 F.3d 524, 553 n.32 (3d Cir. 2007) (to prove an ADA claim, plaintiff must show, *inter alia*, that he was "denied the benefits of the services, programs, or activities of a public entity"); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 189 (3d Cir. 2009) (same for Section 504); *Blunt*, 262 F.R.D. at 489 (each

plaintiff bringing ADA, Section 504, and IDEA claims must show that he "was deprived of an appropriate education").

*Blunt* is on point and highly instructive here. In that case, the plaintiffs asserted class allegations similar to those raised here. 262 F.R.D. at 489–90. A putative class of disabled African American students brought claims under Section 1983, the IDEA, ADA, and Section 504 against PDE and their school district. *Id.* at 484. They alleged that district and PDE policies and procedures denied them a FAPE. *Id.* at 484–85. The court denied class certification, finding that it could not determine whether an individual was denied a FAPE without a "highly individualized" analysis "dependent upon that particular student's needs, capabilities, and the IEP in place for that child." *Id.* at 489. "These individual determinations, which must be made to determine whether a particular student falls within the class definition and whether such student has a cause of action, weigh against certifying this class." *Id.* at 489–90 (concluding that "[g]eneral injunctive relief under Rule 23(b)(2) would not be appropriate"). Here, as in *Blunt*, "***[t]he individualized analysis of each student's educational history and needs precludes a finding that a class could be efficiently managed by this court***." *Id.* at 490 (emphasis added).

Other courts have reached the same conclusion in analogous cases. *See M.A. ex rel. E.S. v. Newark Pub. Sch.*, No. 01-cv-3389, 2009 U.S. Dist. LEXIS 114660, at *48 (D.N.J. Dec. 7, 2009) ("Entitlement to the remedy [of compensatory education] would not flow directly from Defendants' failure to [comply with the IDEA,] but rather from the deprivation of an appropriate education to a student who is or was in fact disabled under the IDEA."); *id.* (before determining whether a student is entitled to compensatory education, there must be "a student-by-student evaluation of whether that student could be classified with a disability under the IDEA, would be eligible for special services, and failed to receive an appropriate education as a result of

Defendants' failure to implement procedures"); *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 499 (7th Cir. 2012) (reversing certification because the plaintiffs' IDEA claims would require "thousands of individual determinations of class membership, liability, and appropriate remedies"); *T.R. v. Sch. Dist. of Phila. L.R.*, 4 F.4th 179, 191 (3d Cir. 2021) ("Addressing the educational needs of children with disabilities requires individualized assessments and considerations of countless concerns.").

Plaintiffs cannot avoid the same result by proposing issues classes instead of the traditional Rule 23(b)(2) classes proposed in their Complaint. Regardless of the remedy or type of class treatment sought, each of Plaintiffs' claims requires an individualized analysis as to whether each proposed class member received a FAPE. This is underscored by Plaintiffs' own framing of the issues proposed for certification. For example, for their Education Issues Class, Plaintiffs propose class treatment of the issue "whether students subject to GMS's education program were harmed." Motion at 50. The "harm" in this case is necessarily denial of a FAPE, which cannot be determined without a "highly individualized" analysis. *Blunt*, 262 F.R.D. at 489–90. *See also, e.g.*, Motion at 53 ("whether PDE breached any duty it owed to students with qualifying disabilities"); 57 ("whether students with disabilities are entitled to relief from PDE for its failure to provide oversight and ensure the provision of a FAPE"; 61 ("whether students with suspected disabilities are entitled to relief from PDE"); 63 ("whether parents of students with disabilities are entitled to relief from PDE"). None of these issues can be determined without a highly individualized analysis.

The remaining issues proposed for class treatment similarly require individual determinations.[2] For example, within the Special Education Issues Class, they seek certification of the issue "whether PDE met its obligations under the IDEA." Mot. at 56–67. Even if the Court ignored the fact that the USDOE has repeatedly found that PDE met its obligations under the IDEA—an administrative agency finding that is owed deference—an individual determination would still be required as to what IDEA obligation PDE purportedly failed to meet and how, if at all, that failure impacted each class member. *See D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010) (explaining that "though it is important that a school district comply with the IDEA's procedural requirements, rather than being a goal in itself, such compliance primarily is significant because of the requirements' impact on students' and parents' substantive rights").

Indeed, Plaintiffs' purported education expert, Joseph Gagnon, recognized that liability and damages determinations in this case cannot be made without individualized analyses. He opines, for example, [redacted] Ex. 60, Gagnon Report at 64; *see also id.* at 38 [redacted] Ex. 61, Gagnon Tr. I at 190:6-8, and [redacted]. *Id.* at 186:4-5.

Thus, individual—not class—issues predominate. Accordingly, the Court should follow the Third Circuit's controlling precedents and this Court's own decision in *Blunt*, and find that this action is not appropriate for class certification. *See Hydrogen Peroxide*, 552 F.3d at 311 ("If proof

[2] Plaintiffs also propose issues regarding duties PDE allegedly owed to certain groups, such as "students with qualifying disabilities." *See* Mot. at 50, 53, 56. These supposed issues are not tied to the elements of any of Plaintiffs' claims, and therefore they are inappropriate for class treatment.

of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.").

### 2. Plaintiffs Do Not Make Any Arguments as to Why Their Proposed Issues Satisfy the Requirements of Rules 23(a), (b), and (c)(4)

The Third Circuit's recent decision in *Russell*, 15 F.4th at 266, made clear that the proponent of a Rule 23(c)(4) issues class must—for each proposed issue—satisfy all requirements of Rules 23(a) and (b), and show that the class is "appropriate" for class treatment. Plaintiffs do not even attempt to comply with this standard.

In *Russell*, a putative class of individuals injured by a doctor brought negligent infliction of emotional distress claims against an entity that had provided the doctor with certain medical certifications. *Id.* at 264. The district court certified Rule 23(c)(4) issues classes on the questions of duty and breach. *Id.* at 264–65. On appeal, the Third Circuit reversed the certification order, finding that the district court had failed to determine whether each issue satisfied all of Rule 23's requirements for certification. *Id.* at 271. The Court explained that a motion for certification of issues classes requires three determinations:

> 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? The first two steps will be informed by general class-action doctrine. The third step will be informed by *Gates*.

*Id.* at 270 (cleaned up); *Lloyd v. Covanta Plymouth Renewable Energy, LLC*, 585 F. Supp. 3d 646, 660 (E.D. Pa. 2022) (Bartle, J.) ("It is black-letter law that issue-only classes, permitted under Rule 23(c)(4), may be certified only if the class would otherwise satisfy the Rule 23(a) and (b) requirements.").

Accordingly, under *Russell*, Plaintiffs are required to show how each of their fourteen class issues satisfies Rules 23(a) and (b), and why the *Gates* factors weigh in favor of certification.

They have failed to do so. For example, they argue that the Court should certify each of their four Education Issues Class sub-issues because "resolution of common questions relating to liability will materially advance this litigation." *See* Mot. at 53. This is not an argument; it is merely a recitation of one of the nine *Gates* factors. *See Gates*, 655 F.3d at 273 (the class certification proponent "should also explain how class resolution of the issue(s) will fairly and efficiently advance the resolution of class members' claims"). Similarly, when addressing the predominance element for the Disability Discrimination Issues Class, Plaintiffs merely recite the elements of a disability claim and state that they "predominate over individual issues," but Plaintiffs identify no common evidence that could be used as proof. Mot. at 55–56. *See also, e.g.*, Mot. at 52 (mentioning, without argument, only two of the four proposed Education Issues Class sub-issues when addressing predominance); *id.* at 55–56 (listing the three Disability Discrimination Issues Class sub-issues, but providing no argument as to why common issues predominate over individual issues).

Because Plaintiffs have failed to show how each of their fourteen class issues satisfies Rules 23(a) and (b), and why the *Gates* factors weigh in favor of certification of each issue, the Court should deny the Motion. *See, e.g.*, *Lloyd*, 585 F. Supp. 3d at 660 ("As [the plaintiff] has not met [the *Russell*] requirements, the court may not certify an issue class.").

**3. <u>The *Gates* Factors Weigh against Certification Because the Proposed Issue Classes Would Be Cumbersome and Highly Inefficient</u>**

In *Russell*, the Third Circuit instructs the Court to consider whether the nine *Gates* factors weigh in favor of certifying each proposed issue. *Russell*, 15 F.4th at 268. The nine factors are:

(1) the type of claim(s) and issue(s) in question;

(2) the overall complexity of the case;

(3) the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives;

> (4) 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;
>
> (5) the impact partial certification will have on the constitutional and statutory rights of both the class members and the defendant(s);
>
> (6) the potential preclusive effect or lack thereof that resolution of the proposed issue class will have;
>
> (7) the repercussions certification of an issue(s) class will have on the effectiveness and fairness of resolution of remaining issues;
>
> (8) 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
>
> (9) 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 (citing *Gates*, 655 F.3d at 273). The *Gates* factors weigh overwhelmingly against certifying any of the fourteen issues Plaintiffs propose for certification here.

***Factor 1.*** The types of claims and issues in question weigh against certification because all of the education claims inherently require individualized analyses, including: what education the class member was entitled to, whether she was disabled, whether she was entitled to special education services, what special education services were needed, whether she was deprived of a FAPE, what caused the FAPE deprivation, whether a PDE policy or practice caused the deprivation, what educational deficit currently exists, and what compensatory education, if any, is required. *See Blunt*, 262 F.R.D. at 489–90; *M.A. ex rel. E.S.*, 2009 U.S. Dist. LEXIS 114660, at *48; *Jamie S.*, 668 F.3d at 499; *T.R.*, 4 F.4th at 191. None of these questions can be answered on a class-wide basis given the breadth and variability of each Plaintiff's allegations. *See* Section II.G (describing disparate allegations and circumstances of the Named Plaintiffs).

***Factor 2.*** The proposed issues are also complex, requiring highly individualized determinations for every sub-issue. Moreover, Plaintiffs have not submitted a plan for managing trial of the fourteen complex sub-issues. Unsurprisingly, they cite no precedent for certification of issue classes that even remotely approach the complexity of their proposed issues.

***Factor 3.*** No efficiencies will be gained by certifying the proposed issues classes because each class member would *still* be required to file an individual lawsuit in which they had to prove both liability and damages on their education claims. In their Motion, Plaintiffs argue that resolution of their proposed issues "will streamline litigation by determining liability." Mot. at 4. That is not so. Rather than resolving liability, certification of the proposed issues would allow putative class members to prove, at most, procedural violations of the IDEA. Proof of a procedural violation, however, does not establish liability or an entitlement to damages. *See D.S.*, 602 F.3d at 565 ("A procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits."); *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009) (quoting *Erickson v. Albuquerque Pub. Schs.*, 199 F.3d 1116, 1122–23 (10th Cir. 1999) ("[C]ompensatory education is not an appropriate remedy for a procedural violation of the IDEA.")). Accordingly, in the unlikely event Plaintiffs proved at trial that a yet-unspecified policy or practice of PDE amounted to a procedural violation of the IDEA, all of the more than 1,600 class members would still have to file separate lawsuits in which they had to prove, at a minimum: (1) that the unlawful policy or practice was applicable to them; (2) it caused them an education deprivation; and (3) they have a current education deficit that must be remedied by the provision of compensatory education. *See D.S.*, 602 F.3d at 565; *P.P. ex rel. Michael P.*, 585 F.3d at 738. Therefore, no efficiencies would be gained from certification. *See,*

*e.g.*, *Plastic Surgery Assocs., S.C. v. Cynosure, Inc.*, 407 F. Supp. 3d 59, 73 (D. Mass. 2019) (finding this *Gates* factor was not satisfied because "approximately 300-400 individualized trials would be necessary after the resolution of the[] proposed classwide issues").

***Factor 4.*** As discussed in Section IV.A.1, *supra*, the issues proposed for class certification are dependent on individual determinations regarding liability and damages. Therefore, the same evidence relevant to this litigation would need to be considered again whenever an individual class member files a lawsuit to prove liability and damages.

***Factor 5.*** Certification of Plaintiffs' proposed issues classes would unfairly prejudice PDE because Plaintiffs' "lack of oversight" claim is so amorphous that it would be unclear what, if any, claims of absent class members would be precluded in future litigation in the event PDE prevails at summary judgment or trial.

***Factor 6.*** Resolution of Plaintiffs' proposed issues would have no preclusive effect on individual class member claims because each plaintiff would still need to prove every element of their education claims because all they can prove here is a procedural IDEA violation. *See, e.g.*, *D.S.*, 602 F.3d at 565 ("A procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits."); *P.P. ex rel. Michael P.*, 585 F.3d at 738.

***Factors 7-8.*** These factors are neutral because resolution of the proposed issues would have little or no impact on the claims of individual class members because each class member would still need individually to prove liability and damages on each of their claims.

***Factor 9.*** As addressed above, individual evidence is required for all of the proposed class issues, and there is a certain risk that subsequent triers of fact would need to reexamine evidence and findings from resolution of the allegedly common issues.

Accordingly, the *Gates* factors weigh overwhelmingly against certification.

**4. Plaintiffs Cannot Establish Superiority Because Separate Lawsuits Would Still Be Required To Prove Liability and Damages**

"The 'superiority' requirement asks whether a case is better brought as a class action or in an alternative form of litigation, such as individual lawsuits." *In re Processed Egg Prods. Antitrust Litig.*, 312 F.R.D. 124, 163–64 (E.D. Pa. 2015). Plaintiffs cannot establish superiority here for the same reason that the *Gates* factors weigh against class certification: all of the proposed class members' claims require extensive individual fact finding to prove liability and damages. And because individual issues pervade every element of the claims, each class member has an interest in directing their claims. Certifying Plaintiffs' proposed issues for class consideration would therefore be highly inefficient and difficult to manage.

None of Plaintiffs' superiority arguments compel a different conclusion. For example, Plaintiffs conclusorily claim that "[p]roceeding on a class-wide basis will be far more efficient and economical for all parties than for hundreds of class members to undertake individual trials." Mot. at 43; *id.* at 53, 60, 62, 65 (referencing arguments on page 43). But that is exactly what would be required for any class member to prove liability and damages. And the cases Plaintiffs cite are no more persuasive. For example, *C.P. v. N.J. Dep't of Educ.*, No. 19-cv-12807, 2022 U.S. Dist. LEXIS 148892, at *32 (D.N.J. Aug. 19, 2022), involved a discrete NJ PDE policy regarding the lawfulness of a 45-day "child find" rule—not amorphous allegations regarding a lack of agency oversight. *See id.* Similarly, Plaintiffs cite *Barel v. Bank of America*, 255 F.R.D. 393, 400 (E.D. Pa. 2009), for the proposition that "[a] class action is superior here because it provides a forum for class members unlikely to bring separate claims," Motion at 49—but that again ignores the fact that if the Court certifies Plaintiffs' proposed issue classes, each class member will still need to file a separate lawsuit.

Therefore, Plaintiffs cannot establish superiority for any of their proposed issue classes.

**5. Plaintiffs Cannot Establish Numerosity Because They Have Presented No Evidence that Joinder is Impracticable**

The numerosity prong of Rule 23(a) requires showing that the class is sufficiently numerous and that joinder is impracticable. Plaintiffs fail to demonstrate impracticability of joinder.

"Whether joinder of all of the class members would be impracticable depends on the circumstances surrounding the case and not merely on the number of class members." *T.R. v. Sch. Dist. of Phila.*, No. 15-cv-4782, 2019 U.S. Dist. LEXIS 66002, at *38 (E.D. Pa. Apr. 18, 2019). "The Third Circuit has enumerated a non-exhaustive list of factors to consider, including: judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, the financial resources of class members, the geographic dispersion of class members, the ability to identify future claimants, and whether the claims are for injunctive relief or for damages." *Id.* (citing *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 253 (3d Cir. 2016)).

Plaintiffs' joinder argument—which they do not alter for any of the proposed classes against any of the defendants—consists in its entirety of one sentence: "The sheer size of the proposed classes, as indicated below, would make it extremely difficult for class members to litigate as joined parties and, even if they could, would constitute a significant tax on judicial resources." Mot. at 24; *see also id.* at 51, 54, 57, 61, and 63. That is not sufficient.

In *T.R.*, the court found that the plaintiffs' impracticability of joinder arguments, which were made "without reference to any proof," were insufficient because the plaintiffs had "not provided any analysis of the combined considerations on the factors of judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, an accurate measure of financial

resources, or geographic dispersion, several of which appear to weigh against certification." 2019 U.S. Dist. LEXIS 66002, at *39.

Similarly here, Plaintiffs make no reference to any proof and fail to discuss "the claimants' ability and motivation to litigate as joined plaintiffs, an accurate measure of financial resources, or geographic dispersion." *See* Mot. at 24. The cursory arguments Plaintiffs do make fail as well. *First*, the "sheer size" of a class is not, in and of itself, an argument in favor of impracticability of joinder. *See T.R.*, 2019 U.S. Dist. LEXIS 66002, at *38 ("Whether joinder of all of the class members would be impracticable depends on the circumstances surrounding the case and not merely on the number of class members."). *Second*, Plaintiffs provide no evidence of how litigating as joined parties would "constitute a significant tax on judicial resources." *See* Mot. at 24. Indeed, they cannot do so because the proposed issue classes would resolve neither liability nor damages questions for any of the putative class members; rather they are, in effect, a proposal to require that more than 1,600 individual lawsuits be filed to resolve the putative class members' claims—an unquestionably significant tax on judicial resources.

Accordingly, Plaintiffs have not established impracticability of joinder.

**6. Plaintiffs Cannot Establish Typicality or Adequacy Because the CCIU Settlement Mooted Their Claims and Put the Interests of the Named Plaintiffs in Conflict with Those of Absent Class Members**

Plaintiffs are not typical of their classes or adequate class representatives because: (1) their participation in the CCIU settlement renders their claims against PDE moot; and (2) their voluntary dismissal of claims against CCIU puts them in conflict with absent class members.

Rule 23(a) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Its primary purpose is to determine whether the named plaintiffs have the ability and the incentive to vigorously represent the claims of the class." *Duncan v. Governor of Virgin Islands*, 48 F.4th 195, 209 (3d Cir. 2022) (cleaned up). "A proposed

class representative is neither typical nor adequate if the representative is subject to a unique defense that is likely to become a major focus of the litigation." *Beck*, 457 F.3d at 300.

*a. The Named Plaintiffs Are Subject to the Unique Defense that Their Claims against the PDE Defendants Are Moot*

"A case becomes moot . . . when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (cleaned up). Thus, mootness occurs when "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (cleaned up); *see also Salter v. Phila. Hous. Auth.*, No. 99-cv-1681, 1999 U.S. Dist. LEXIS 16960, at *8 (E.D. Pa. Nov. 2, 1999) ("A plaintiff's claims become moot when, subsequent to the filing of a suit, complete relief is afforded in full satisfaction of plaintiff's claims.").

In *F.V. v. Cherry Hill Twp. Bd. of Educ.*, No. 1:21-cv-18096, 2023 U.S. Dist. LEXIS 52625, at *26 (D.N.J. Mar. 28, 2023), the parents of a student sued their school district, alleging deficient special education services. *Id.* at *5–6. During the pendency of the litigation, the defendant "not only committed itself to providing [their child] with all of the relief [p]laintiffs demanded, but it also demonstrated that it had been long honoring that commitment." *Id.* at *24. Because the plaintiffs sought no other relief, their claims were moot. *Id.*

Here, the only relief Plaintiffs seek from PDE is compensatory education. *See* Mot. at 52, 59, 62, 65 (limiting relief to the "equitable remedy" of "compensatory education"). They have, however, already been "automatically" qualified to receive compensatory education and compensatory damages from CCIU pursuant to their participation in the CCIU settlement. *See* Settlement Agreement §§ II.C.2., III.B.3. Accordingly, Plaintiffs' claims are moot as to the PDE

Defendants, and this Court no longer has subject matter jurisdiction over their claims.[3] *See Kajmowicz v. Whitaker*, 42 F.4th 138, 152 n.11 (3d Cir. 2022) ("[O]nce it becomes impossible for a court to grant any effectual relief whatever to the prevailing party, then we no longer have jurisdiction and must dismiss the case as moot.") (cleaned up)).

Given that Plaintiffs are subject to this defense, they are not typical of the class or adequate class representatives. *See Beck*, 457 F.3d at 300 ("A proposed class representative is neither typical nor adequate if the representative is subject to a unique defense that is likely to become a major focus of the litigation."); *Zenith Labs. Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir. 1976) (proposed class representative was not adequate because the defendant "could assert defenses against it which would not be applicable to the class as a whole").

*b. Plaintiffs' Voluntary Dismissal of CCIU Puts Them in Conflict with Absent Class Members*

"Courts have found a conflict of interest when the named representative does not assert certain claims that may be available and advantageous to the absent putative class members." *Mielo v. Bob Evans Farms, Inc.*, No. 14-cv-1036, 2015 U.S. Dist. LEXIS 36905, at *27 (W.D. Pa. Mar. 23, 2015); *see also, e.g.*, *Pearl v. Allied Corp.*, 102 F.R.D. 921, 923–24 (E.D. Pa. 1984) (denying motion for class certification because class representatives "abandoned" claims of class members).

Plaintiffs' voluntary dismissal of CCIU created a conflict between them and absent class members for two reasons: (i) under federal and Pennsylvania law, the absent class members can

[3] The limited class action exception to the mootness doctrine is inapplicable here because Plaintiffs' claims became moot before they filed their motion for class certification. *See Salter*, 1999 U.S. Dist. LEXIS 16960, at *9 ("In cases where no motion [for class certification] was pending when the individual claims were mooted, dismissal for lack of subject matter jurisdiction is proper.").

only recover compensatory education from CCIU—not PDE; and (ii) when CCIU was dismissed from the case on February 17, 2023, the statute of limitations immediately began running on absent class members' claims against CCIU—many of which are now time-barred.

Under Plaintiffs' Settlement Agreement with CCIU, the named Plaintiffs each "automatically" received complete relief from CCIU as to their compensatory education claims, and they agreed to dismiss CCIU from the case. *See* Settlement Agreement §§ II.C.2., III.B.3., IX-X; *see also* ECF No. 161 (dismissing Plaintiffs' claims against CCIU with prejudice). Plaintiffs nonetheless continue seeking duplicative compensatory education from PDE.

No authority supports Plaintiffs' position that they are entitled to compensatory education from ***both*** the LEA (CCIU) and the SEA (PDE). PDE is not "responsible for remedying past failures by the [LEA]." *Charlene R. v. Solomon Charter Sch.*, 63 F. Supp. 3d 510, 514 (E.D. Pa. 2014); *accord, e.g.*, *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1492 (9th Cir. 1986) (holding that a state "is not obliged to intervene in an individual case whenever the local agency falls short of its responsibilities"), *aff'd by split decision, Honig v. Doe*, 484 U.S. 305, 329 (1988). Rather, PDE would only be responsible for securing remedial services for Plaintiffs in the event CCIU cannot do so. *See Charlene R.*, 63 F. Supp. 3d at 516. In *Lejeune v. Khepera Charter School*, for example, a charter school settled claims by three students by promising to make payments and provide compensatory services to remedy the school's IDEA failures. 327 F. Supp. 3d 785, 790–92 (E.D. Pa. 2018). When the school failed to comply with the settlement agreements, the students sued PDE to make up the relief. *See id.* at 792. The court held that by the plain language of the IDEA,

a state education agency is not responsible for providing a FAPE when an LEA is able, but merely "unwilling," to do so.[4] *Id.* at 800.

Plaintiffs' resolution of their education claims against the responsible LEA extinguishes PDE's potential liability for the same alleged harms. *See, e.g.*, *Olivia B. v. Sankofa Acad. Charter Sch.*, No. 14-cv-867, 2014 U.S. Dist. LEXIS 105257, at *30–32 (E.D. Pa. Aug. 1, 2014) (PDE is not responsible for securing services included in settlement agreement between an LEA and a student in which the student resolved her IDEA claims against the LEA); *I.D. v. N.H. Dep't of Educ.*, 878 F. Supp. 318, 319–23 (D.N.H. 1994) (holding that FAPE-based claims against an SEA were moot in light of the plaintiffs' negotiation of a settlement with the LEA, which demonstrated that the plaintiffs effectively secured necessary accommodations).

Moreover, given that Plaintiffs must pursue compensatory education first from CCIU before suing PDE, Plaintiffs' voluntary dismissal of their CCIU claims puts them in conflict with absent class members. *See Mielo*, 2015 U.S. Dist. LEXIS 36905, at *31 (finding that the named plaintiff's "abandonment of certain claims" made him an inadequate class representative). The conflict is underscored here because Plaintiffs' education claims are all subject to a two-year statute of limitations, *see Kach v. Hose*, 589 F.3d 626, 634 (3d Cir. 2009), which began to run again for absent class members as soon as CCIU was dismissed from this lawsuit on February 17, 2023. *See China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1804 (2018) (describing class action tolling). Over [redacted] absent class members' CCIU claims have since become time-barred—preventing them from recovering from CCIU—and more are becoming time barred with each passing day. *See, e.g.*, Exhibit 37 to Plaintiffs' Motion (showing dates of birth and discharge dates

[4] The court in *Lejeune* ultimately granted judgment for the plaintiffs, but only after finding that the school was financially unable to comply with its settlement obligations. *Id.* at 800. Here, CCIU's ability to comply with the settlement is not an issue.

for all putative class members, over [redacted] of whose claims against CCIU are now time-barred given that 256 days have elapsed between the February 17, 2023 dismissal with prejudice of CCIU (ECF No. 161) and the October 31, 2023 filing of this opposition brief). Plaintiffs are therefore not adequate class representatives.

### B. Each Proposed Class Fails To Satisfy Rule 23's Rigorous Requirements

Even if Plaintiffs could overcome all of these overarching problems with their Motion, the Court should deny certification because each of Plaintiffs' proposed issue classes in respect of the PDE Defendants is flawed for the additional reasons discussed below.

#### 1. The Education Issues Class

Plaintiffs propose an "Education Issues Class" comprised of "all school-eligible youth at GMS within the Class Period who remained at GMS." Mot. at 50. For members of that proposed class, they propose certification of four sub-issues:

> (1) Whether PDE had a duty to provide oversight or monitoring of the education program at GMS; (2) whether the GMS education program failed to meet the requirements of Pennsylvania and federal law; (3) whether PDE discriminated against students at GMS on the basis of their placement at a PRRI by failing to ensure their education; and (4) whether students subject to GMS's education program were harmed.

*Id.* This class cannot be certified because Plaintiffs have failed to satisfy the commonality and typicality requirements.

***Commonality.*** In their commonality argument, Plaintiffs do not identify any common questions that must be answered. *See* Motion at 51–52. Rather, they state that "PDE's failure to oversee the education provided by GMS deprived all students of education, including the opportunity to receive live instruction from a qualified teacher in state-required courses and necessary special education services." *Id.* at 51. That is not a common question.

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 900 (3d Cir. 2022). In *Mielo v. Steak 'N Shake Operations, Inc.*, a putative ADA class action, the Third Circuit found that commonality was not satisfied because "[o]ne person, for example, might allege that Steak 'n Shake violated the ADA by failing to correct a steep slope in a parking facility, while other class members might allege that Steak 'n Shake violated the ADA by failing to replace inaccessible door hardware, by failing to widen bathroom doors, or by failing to replace inaccessible water fountains." 897 F.3d at 490. "While each of these Steak 'N Shake patrons presents a serious claim, the collective claims are so widely divergent that they would be better pursued on either an individual basis or by a sufficiently numerous class of similarly-aggrieved patrons." *Id.*

Here, Plaintiffs' purported statement of commonality makes it clear that there are widely divergent claims just as in *Mielo*. For example, some class members would base their claims on the lack of a "qualified teacher in state-required courses," Mot. at 51, while others would contend that they did not receive "necessary special education services." *Id.* Even if any such claim were valid, the range of claims across the proposed class would be widely divergent in terms of necessary proof, and resolution of such claims would not apply classwide given that the vast majority of class members were not disabled and therefore not entitled to "necessary special education services." *Compare* Mot. at 50 (the Education Issues Class contains 1,661 putative members) *with* Mot. at 57 (the Special Education Issues Class contains 524 putative members).

The only case cited by Plaintiffs on this point, *V.W. v. Conway*, 236 F. Supp. 3d 554, 575 (N.D.N.Y. 2017), is easily distinguished. In *V.W.*, commonality was found with respect to IDEA claims against the defendant school district based on the discrete policies of "only sporadically delivering 'cell packets' in lieu of direct instruction and, relatedly, [failing] to conduct

manifestation determinations prior to imposing discipline of a certain duration." *See* Mot. at 52 (citing *V.W.*, 236 F. Supp. 3d 554 at 575). No such discrete PDE policies are described in Plaintiffs' Motion, and unlike the *V.W.* class, which consisted only of special education students, the Education Issues Class includes both general and special education students whose claims are not capable of classwide resolution. *See Allen*, 37 F.4th at 900 ("That common contention, moreover, must be of such a nature that it is capable of classwide resolution.").

***Typicality.*** Plaintiffs make no arguments as to why the claims of Derrick or Thomas are typical of those of absent class members. *See* Mot. at 41–42, 52. Plaintiffs state that Walter [redacted] Mot. at 41; *id.* at 52. This unique experience of Walter's does not make him "typical" of the class.

Typicality "derives its independent legal significance from its ability to screen out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are present." *Marcus*, 687 F.3d at 598 (cleaned up). "To determine whether a plaintiff is markedly different from the class as a whole, we consider the attributes of the plaintiff, the class as a whole, and the similarity between the plaintiff and the class." *Id.*

Among the three named Plaintiff GMS students, [redacted] *See* Section II.G, *supra*. Among the class as a whole, however, almost 70% (1,137 out of 1,661) of its putative members are not disabled and therefore not entitled to the IDEA's protections. *See* Mot. at 57 (stating that only 524 former GMS residents are entitled to special education—out of the proposed 1,661 member class). Thus, the named Plaintiffs' special education claims are not typical

or representative of the claims of nearly 70% of the Education Issues Class members. *See Blunt*, 262 F.R.D. at 488 (denying motion to certify class of disabled and non-disabled African American students because the plaintiffs, all of whom were disabled, brought claims largely "under federal statutes designed specifically to remedy discrimination against individuals, including students, with disabilities").

**2. The Disability Discrimination Issues Class**

Plaintiffs define their proposed Disability Discrimination Issues class as including "all youth at GMS after April 11, 2017, who had qualifying disabilities as defined under Section 504 and the ADA, specifically 42 U.S.C. § 12102, either before or during their placement at GMS." Mot. at 53. They further propose three sub-issues for certification:

> (1) Whether PDE's common policies and practices of failing to provide any supervision of GMS's program discriminated against class members on the basis of their disabilities; (2) whether PDE owed a duty to students with qualifying disabilities; and (3) whether PDE breached any duty it owed to students with qualifying disabilities.

*Id.* This class cannot be certified because the class definition is overbroad and Plaintiffs cannot establish numerosity, ascertainability, commonality, or typicality.

***Overbreadth.*** The Disability Discrimination Issues Class would impermissibly include individuals with disabilities unrelated to the education claims that this class seeks to advance. A proposed class "must be sufficiently identifiable without being overly broad." *Kemblesville HHMO Ctr., LLC v. Landhope Realty Co.*, No. 08-cv-2405, 2011 U.S. Dist. LEXIS 83324, at *13 (E.D. Pa. July 27, 2011). "Overbroad class descriptions violate the definiteness requirement because they include individuals who are without standing to maintain the action on their own behalf." *Id.* (cleaned up). This proposed class necessarily includes individuals with disabilities that do not impair their ability to learn. Under 42 U.S.C. § 12102, "disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities of such

individual." Nothing in Section 12102, or in Plaintiffs' proposed class definition, limits the proposed class to individuals limited in the major life activity of learning or receiving a FAPE. *See id.*; *see also* Mot. at 53 (defining Disability Discrimination Issues Class).

***Numerosity.*** Plaintiffs also have not established numerosity. They assert in their Motion that there are 529 members of the Disability Discrimination Issues Class based on (i) a spreadsheet (GMSCA0381084), (ii) [redacted] (GMSCA0436763), and (iii) Plaintiffs' purported expert's report. Mot. at 53–54. But none of those documents actually shows how many individuals are in this proposed class.

The spreadsheet does not show that even a single individual had a qualifying disability under Section 504 and the ADA "either before or during their placement at GMS." Indeed, although the spreadsheet has a column titled "primary disability," it does not specify when or how that disability determination was made, or how the term disability is defined. *See* Mot. at Ex. 37 (GMSCA0381084 ("Primary Disability" column)). Some individuals are described simply as having [redacted]—neither of which category necessarily qualifies someone as disabled under Section 504 or the ADA. *See id.*; *see also* 42 U.S.C. § 12102.

The June 2017 letter is similarly unhelpful because it [redacted] *See* Mot. at Ex. 54 (GMSCA0436763).

And the report of Plaintiffs' purported expert also provides no basis for identifying disabled students beyond speculation that [redacted] Ex. 60, Gagnon Rept. at 41; *see also id.* [redacted]

[redacted]

In sum, none of the evidence cited by Plaintiffs establishes numerosity for the Disability Discrimination Issues Class.

***Ascertainability.*** Plaintiffs also fail to show that the Disability Discrimination Issues Class is ascertainable. "The ascertainability inquiry is two-fold, requiring a plaintiff to 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*, 784 F.3d at 163 (quoting *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)). "Where determining a membership in a class or subclass would require 'a mini-hearing on the merits of each class member's case,' a class action is inherently inappropriate for addressing the claims at issue." *Contawe v. Crescent Heights of Am., Inc.*, No. 04-2304, 2004 U.S. Dist. LEXIS 25746, at *21 (E.D. Pa. Dec. 21, 2004) (quoting *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 446 (E.D. Pa. 2000); *see also Kline v. Sec. Guards, Inc.*, 196 F.R.D. 261, 266–67 (E.D. Pa. 2000)). "[P]utative classes are not ascertainable where either a defendant's records do not contain the information needed to ascertain the class or the records do not exist at all." *Kelly v. Realpage Inc.*, 47 F.4th 202, 223–24 (3d Cir. 2022).

Again, the spreadsheet on which Plaintiffs rely does not show that any individuals had a qualifying Section 504 or ADA disability "either before or during their placement at GMS." Nor does the June 2017 letter or the Gagnon report provide this information. Accordingly, the only reliable way to ascertain whether an individual was disabled under Section 504 or the ADA before or during their GMS placement would be to conduct an individualized analysis of each and every former GMS resident that claims to have been disabled before or during their GMS placement.

*See Jamie S.*, 668 F. 3d at 496 ("identifying disabled students who might be eligible for special-education services is a complex, highly individualized task, and cannot be reduced to the application of a set of simple, objective criteria"). This is exactly the type of "individualized fact-finding or mini trial[]" that is prohibited under Third Circuit precedent. *Byrd*, 784 F.3d at 163 (class must be ascertainable without "individualized fact-finding or mini trials"); *Marcus*, 687 F.3d at 593 ("If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate.").

***Commonality.*** Plaintiffs cannot satisfy the commonality requirement for the same reason the class is overbroad: membership in the proposed class is entirely disconnected from Plaintiffs' education claims. For example, Plaintiffs summarily assert that PDE's purported policy and practice of "failing to monitor or oversee GMS or ensure the provision of a free appropriate public education to residents applied equally to all student in the Disability Discrimination Issues Class." Mot. at 54. This is impossible because the class is not limited to individuals with a disability impacting their ability to learn. Plaintiffs thus cannot establish commonality. *See, Mielo*, 897 F.3d at 480 (declining to find commonality because of the "widely divergent" claims a group of disabled individuals could bring under the ADA).

***Typicality.*** Plaintiffs also cannot satisfy the typicality requirement because their claims, which are based on the denial of FAPE, are not typical of a class that includes individuals with disabilities unrelated to education. Plaintiffs therefore cannot show that their challenge of unspecified PDE policies and procedures is "equally important to the named Plaintiffs as to the unnamed Plaintiffs." *CG v. Commonwealth Dep't of Educ.*, No. 06-cv-1523, 2009 U.S. Dist. LEXIS 90028, at *19 (M.D. Pa. Sep. 29, 2009).

### 3. The Special Education Issues Class

Plaintiffs define the Special Education Issues Class as including "all school-eligible youth at GMS after April 11, 2017, who had been identified as 'child[ren] with a disability' pursuant to the IDEA, either before or during their placement at GMS." Mot. at 56. Plaintiffs propose three sub-issues for certification:

> Whether PDE had a duty to ensure that GMS had a system to provide individualized special education services to students with disabilities; (2) whether PDE met its obligations under the IDEA; and (3) whether students with disabilities are entitled to relief from PDE for its failure to provide oversight and ensure the provision of a FAPE as required.

*Id.* at 56–57. The Special Education Issues Class cannot be certified because Plaintiffs have not established commonality or typicality.

***Commonality.*** Plaintiffs fail to present any common issues as to PDE. They begin their commonality argument by listing purported deficiencies in the GMS special education program, before concluding that "PDE's failure to properly oversee GMS's deficient special education policies and practices also equally affected every student" with a qualifying IDEA disability. Motion at 57–58. That conclusory statement is not sufficient to establish commonality.

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Allen*, 37 F.4th at 900. "That common contention . . . must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

There can be no such requisite common injury here because Plaintiffs do not allege a common way in which the IDEA was violated. *See* Mot. at 57. Rather, they identify six ways in which the IDEA could have been violated by GMS across the putative class members. *See id.* Moreover, even if Plaintiffs could prove that the IDEA was violated in all of these ways for certain class members, they cannot do so on a classwide basis given the individual nature of the proof

required for IDEA violations. *See Jamie S.*, 668 F.3d at 499 (reversing class certification decision because the plaintiffs' IDEA claims would require "thousands of individual determinations of class membership, liability, and appropriate remedies"); *T.R*, 4 F.4th at 191 ("Addressing the educational needs of children with disabilities requires individualized assessments and considerations of countless concerns.").

The cases Plaintiffs rely upon are inapposite because they involved discrete education policies, not merely broad and amorphous allegations of "lack of oversight." In addition, the putative classes in those cases sought only Rule 23(b)(2) injunctive relief, not individual Rule 23(b)(3) relief like Plaintiffs seek here. *See* Mot. at 58 (citing *DL v. Dist. of Columbia*, 860 F.3d 713, 717 (D.C. Cir. 2017) (Rule 23(b)(2) class alleging the school district's "child find" policy was deficient under the IDEA); *CG*, 2009 U.S. Dist. LEXIS 90028, at *2 (Rule 23(b)(2) class alleging Pennsylvania's special education funding formula violated federal law); and *Nat'l Law Ctr. on Homelessness & Poverty v. N.Y.*, 224 F.R.D. 314, 325 (E.D.N.Y. 2004) (Rule 23(b)(2) class alleging a failure to provide homeless children with access to education)).

***Typicality.*** Plaintiffs also cannot establish typicality because the proposed class representatives—Derrick and Walter—[redacted] *Compare* Mot. at 57 (alleging that "IDEA violations applied equally to every student" and that GMS failed to provide every student with IEP meetings and individualized IEPs) *with* Section II.G, *supra* [redacted]. In these circumstances, there is no typicality. *See Marcus*, 687 F.3d at 598 (no typicality where the "legal or factual position of the representatives is markedly different from that of other members of the class").

**4. The Suspected Special Education Issues Class**

Plaintiffs define the Suspected Special Education Issues Class as including "all school-eligible youth at GMS after April 11, 2017, who demonstrated documented behavioral, developmental, or academic indicia of being 'child[ren] with a disability' such that the youth was entitled to a disability evaluation pursuant to IDEA, and who did not receive one during their placement at GMS [*sic*]." Mot. at 61. Plaintiffs propose two sub-issues for certification:

> (1) Whether PDE's policies and practices failed to ensure that GMS identified, evaluated, or served students with suspected disabilities; and (2) whether students with suspected disabilities are entitled to relief from PDE for this failure.

*Id.* This class cannot be certified because: (i) it is a classic "fail-safe" class; (ii) there is no evidence to support numerosity; (iii) the proposed definition is ambiguous and cannot be ascertained; and (iv) Thomas, [redacted] is neither common nor typical of the class, nor an adequate class representative.

***Fail-Safe Class.*** This proposed class is an impermissible fail-safe class because mere membership in the class would establish an IDEA violation. For example, an individual who establishes that he was entitled to receive a disability evaluation, but did not receive one, would simultaneously establish class membership and a procedural IDEA violation. Conversely, if an individual cannot show entitlement to a disability evaluation, he cannot establish class membership or an IDEA violation. This is the classic fail-safe class. *See Zarichny v. Complete Payment Recovery Servs.*, 80 F. Supp. 3d 610, 623 (E.D. Pa. 2015) (a "fail-safe" class is "defined so that whether a person qualifies as a member depends on whether the person has a valid claim").

***Numerosity.*** Plaintiffs cannot establish numerosity because they point to no reliable evidence showing who is in this class. The only evidence they cite is the report of their purported expert, who opines that [redacted] Ex. 60,

Gagnon Rept. at 41. He provides no description of how he arrived at these figures. *See id.* He then extrapolates his findings to assert that [redacted] *id.* at 41, and concludes that his findings are reliable because they are [redacted] *See id.* at 41–42. Moreover, Plaintiffs do not explain the discrepancy between the class size asserted by their expert [redacted] and the size identified by Plaintiffs in their Motion (257). *See* Mot. at 61. This is precisely the type of impermissible speculation prohibited by the Third Circuit. *See Mielo*, 897 F.3d at 484 (numerosity must be shown "without resorting to mere speculation"); *Hayes*, 725 F.3d at 357–58 ("where a putative class is some subset of a larger pool, the trial court may not infer numerosity from the number in the larger pool alone").

Plaintiffs cannot establish numerosity for the additional reason that they have not shown that the "expert" they rely upon can satisfy the *Daubert* standard. For example, Dr. Gagnon—[redacted] Gagnon Tr. I at 14:3-4—[redacted] *id.* at 17:22-24, 18:1-10. [redacted] *Id.* at 26:17-23. [redacted] *See id.* at 99:9-21. Accordingly, the Court should not consider his opinions. *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) ("[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*.").[5]

[5] If necessary, the PDE Defendants will file *Daubert* motions at the appropriate time.

***Ascertainability.*** In addition, the class is not ascertainable. Plaintiffs' expert concedes as much when he states in his report [redacted] Ex. 60, Gagnon Rept. at 38. Indeed, he personally conducted individualized evaluations to identify potential class members. *See id.* at 41; *see also* Ex. 61, Gagnon Tr. I at 52:20 [redacted]; *Contawe*, 2004 U.S. Dist. LEXIS 25746, at *21 ("Where determining a membership in a class or subclass would require 'a mini-hearing on the merits of each class member's case,' a class action is inherently inappropriate for addressing the claims at issue."). The proposed class definition also provides no "objective criteria" for determining membership. For example, Plaintiffs state that membership is based on "demonstrated documented behavioral, developmental, or academic indicia," but they provide no definition or objective basis for evaluating such "indicia." *See* Mot. at 61. In these circumstances, the class is not ascertainable. *See Byrd*, 784 F.3d at 163 (requiring "objective criteria" to evaluate class membership); *Jamie S.*, 668 F.3d at 496 ("Every step of the child-find inquiry and IEP process under the IDEA is child specific and requires the application of trained and particularized professional educational judgment. In short, a class of unidentified but potentially IDEA-eligible disabled students is inherently too indefinite to be certified.").

***Commonality, Typicality, and Adequacy.*** Thomas cannot establish the commonality, typicality, or adequacy requirements because [redacted]. The evidence shows that he [redacted]. *See, e.g.*, Ex. 52, GMSCA0000494 ([redacted]);

Ex. 51, GMS-HIGHJ0051826 ([redacted]).

Because class membership is based on a failure to conduct an IDEA evaluation—and [redacted]—he has not "suffered the same injury" as absent class members as is necessary to show commonality. *See Allen*, 37 F.4th at 900. Nor can he show that he is typical of the class or an adequate class representative. *See Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 156 (1982) ("a class representative must be part of the class and possess the same interest and suffer the same injury as the class members" (cleaned up)).

**5. The Special Education Parents Issues Class**

Plaintiffs define the Special Education Parents Issues Class as including "all parents of school-eligible youth at GMS after April 11, 2017, who had been identified as 'child[ren] with a disability' pursuant to IDEA, either before or during their placement at GMS." Mot. at 63. Plaintiffs propose two issues for certification:

> (1) Whether PDE's policies and practices failed to ensure a system that allowed for meaningful parental participation in special educational decision making for students with disabilities at GMS; and (2) whether parents of students with disabilities are entitled to relief from PDE for this failure.

Mot. at 63. Tina and Janeva, parents of Derrick and Walter, are proposed as class representatives. *Id.* This class cannot be certified because: (i) there is no evidence of numerosity; (ii) the class is not ascertainable; and (iii) Tina and Janeva cannot establish commonality, typicality, or adequacy.

***Numerosity.*** Plaintiffs' evidence of numerosity is impermissibly speculative. Plaintiffs argue that, based on unspecified "GMS-produced student lists," they can assume "one 'parent' . . . is counted for each student with an IEP." Mot. at 63. They provide no evidentiary support for that assumption. *See id.* This is precisely the type of impermissible speculation that the Third Circuit prohibits. *See Mielo*, 897 F.3d at 484 ("a court must be presented with evidence that would

enable the court to [find numerosity] without resorting to mere speculation"); *see also T.R.*, 2019 U.S. Dist. LEXIS 66002, at *38 (finding that numerosity was not shown because the plaintiffs did not offer proof "specific to the parties or the problem covered by the class definition").

***Ascertainability.*** The proposed class is also not ascertainable because there is no evidence upon which members of the proposed class can be identified. This is particularly problematic here because: (i) the parents of former GMS residents are located all over the country, *see* Compl. ¶¶ 1, 53; and (ii) many of the former GMS residents are [redacted]. *See* Mot. at Ex. 37 (showing birth dates of former GMS residents). Given the lack of evidence to identify class members, and the inherent difficulties in identifying the geographically dispersed parents of [redacted] individuals, the proposed class is not ascertainable. *See Byrd*, 784 F.3d at 164 (a party cannot "merely propose a method of ascertaining a class without any evidentiary support that the method will be successful"); *Kelly*, 47 F.4th at 223–24 ("[P]utative classes are not ascertainable where either a defendant's records do not contain the information needed to ascertain the class or the records do not exist at all.").

***Commonality.*** Plaintiffs argue that there is a common question whether PDE's policies and practices failed to ensure a system that allowed for "meaningful parental participation" in special educational decision making for students with disabilities at GMS. Mot. at 63. A recent decision from this District shows why this issue cannot satisfy the commonality prong.

In *T.R.*, the parents of ESL students in the School District of Philadelphia brought claims arguing that a district policy denied them "meaningful participation" in the "education of their special needs students." 2019 U.S. Dist. LEXIS 66002, at *46. The court found that "meaningful participation" under the IDEA "is not subject to common enforcement" because it "requires a fact-intensive inquiry into the individual circumstances" of each class member. *Id.* at *47, *49. The

court explained how meaningful participation would be different for each of the named plaintiffs. *See id.* at *51–52 (one parent brought two interpreters to the IEP meeting, but did not need the IEP translated, while another parent chose to have her child's art teacher act an interpreter).

Similarly here, questions of meaningful participation in special education decisions must be determined on an individual basis, thus precluding a finding of commonality. For example, the evidence shows that [redacted]. Plaintiffs provide no common description of what [redacted] would have constituted "meaningful participation" for the named parent Plaintiffs, let alone for absent class members. Indeed, it is unlikely that meaningful participation could have been the same for every parent given that many of them lived far from GMS.

***Typicality and Adequacy.*** The typicality and adequacy prongs cannot be satisfied here because the evidence shows Tina and Janeva were given [redacted]. *See* Section II.G, *supra* ([redacted]).

Under these circumstances, Tina and Janeva cannot represent a class of individuals alleged to have been "systematically excluded" from special education decision. *See, e.g., Banda v. Corzine*, No. 07-cv-4508, 2007 U.S. Dist. LEXIS 80932, at *57–58 (D.N.J. Nov. 1, 2007) (typicality not satisfied because the plaintiffs were subject to unique defenses).

### C. The Court Should Hold an Evidentiary Hearing

Defendants request that the Court hold an evidentiary hearing on Plaintiffs' Motion. An evidentiary hearing is warranted because discovery is complete and the Court must make evidentiary findings before ruling on certain elements of Rule 23. *See* 5 Moore's Fed. Prac. – Civil § 23.82 ("Most commonly. . . the court will conduct a hearing and allow the parties to present evidence on any factual issues that must be resolved so that the court can determine whether the prerequisites for class certification under Rule 23 have been met."); *Monroe v. City of Charlottesville*, 579 F.3d 380, 384 (4th Cir. 2009) ("When deciding a motion for class certification, a district court does not accept the plaintiff's allegations in the complaint as true; rather, an evidentiary hearing is typically held on the certification issue.").

## V. CONCLUSION

The disparate claims of the putative class members are ill-suited for class certification, and the Plaintiffs' proposed approach to certification for their claims against the PDE Defendants is therefore riddled with legal and evidentiary flaws. For these and all the reasons set forth above, the Court should deny Plaintiffs' Motion and grant the PDE Defendants such other and further relief as the Court deems just and proper.

Dated: October 31, 2023

Respectfully submitted,

*/s/ Henry E. Hockeimer Jr.*

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 31, 2023, I caused a true and correct copy of the foregoing Opposition to Plaintiffs' Motion for Class Certification to be served upon all counsel of record through the Court's CM/ECF system.

*/s/ Joseph J. Bailey*
Joseph J. Bailey