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

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

THE DHS DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Rules

Constitutional Provisions

I. INTRODUCTION

Nearly five years after the Glen Mills Schools closed, Plaintiffs seek certification of a single Rule 23(b)(3) damages class—not against the school leaders who perpetuated "a pervasive culture of intimidation and coercion," Mot. at 3, but against the public officials who led Pennsylvania's Department of Human Services (DHS), which issued the Emergency Removal Order that evacuated residents from Glen Mills in March 2019. Plaintiffs assert an Eighth Amendment claim against three DHS executives in their individual capacities—former DHS Secretary Theodore Dallas, former DHS Secretary Teresa D. Miller, and former DHS Deputy Sectary for DHS's Office of Children, Youth and Families ("OCYF") Cathy Utz (collectively, "the DHS Defendants")—on behalf of a proposed class of 1,661 residents who were placed at Glen Mills over a period of more than three years.

While Plaintiffs' Motion for Class Certification blames the DHS Defendants for not identifying the pattern of abuse at Glen Mills earlier, Plaintiffs are unable, even after more than three years of discovery, to identify any specific policy or procedure implemented by the DHS Defendants that caused the varied injuries they allege were sustained by the putative class members. *See* Mot. at 25. Instead of such facts, Plaintiffs' theory rests on allegations of missed opportunities, oversights, and instances where different policies and procedures might (or might not) have led to an earlier shutdown of Glen Mills. Mot. at 5–8. They contend that the DHS Defendants' inaction led to a diverse array of harms sustained by some putative class members, and include in their proposed class some former Glen Mills residents who did not suffer any injury at all.

All of these deficiencies, and all of these inconsistencies, weigh against class certification. The U.S. Supreme Court and Circuit Courts have held that claims based on generalized allegations of inaction, like those Plaintiffs allege here—as opposed to specific, unconstitutional policies or

procedures—are not appropriate for class treatment. When there is no common question rooted in an affirmative policy, individual lawsuits are the appropriate vehicles for the relief Plaintiffs seek. To be clear, that is not a hypothetical alternative to the ill-fitting class action the Plaintiffs propose here; indeed, there are currently more than 800 tort actions brought by former residents—*i.e.*,, nearly half of the members of Plaintiffs' proposed class—against Glen Mills pending in the Court of Common of Pleas in Philadelphia. Moreover, Plaintiffs' own experts concede that as many as *two-thirds* of proposed class members did not suffer from abuse or a denial of medical care. Certification should be denied because Plaintiffs cannot meet any of the six requirements for certification of a class pursuant to Rule 23, and because the class definition is overbroad. Plaintiffs have failed to satisfy Rule 23(a)'s four factors because they cannot demonstrate:

(1) numerosity, because they have not established that joinder is impracticable;

(2) commonality, because they have identified no allegedly unconstitutional policy or practice, and where the class suffered a wide variety of injuries;

(3) typicality, because the Named Plaintiffs have no standing to bring a claim against one of the DHS Defendants, Secretary Dallas; or

(4) adequacy, because the Named Plaintiffs, all of whom allege they suffered abuse at Glen Mills, have a conflict of interest with class members who suffered no such alleged injury.

Compounding these problems, plaintiffs seeking to recover damages must fulfill two additional factors pursuant to Rule 23(b)(3). Plaintiffs cannot demonstrate:

(1) predominance, because the DHS Defendants are entitled to qualified immunity; or

(2) superiority, because as many as half of the proposed class members have already filed separate damages claims for injuries they suffered at Glen Mills.

These deficiencies are fatal to Plaintiffs' Motion and demonstrate that the claims against the DHS Defendants are ill-suited for class treatment. There is no operative issue that would allow the Court to render judgment applicable to the class as a whole. Because Plaintiffs have failed to come close to meeting their burden of establishing that a class is appropriate here, Plaintiffs' Motion should be denied.

II. FACTUAL BACKGROUND

The Glen Mills Schools ("Glen Mills") was a youth residential facility located in Delaware County, Pennsylvania, which closed in March 2019. Compl. ¶ 1, ECF No. 1; *id*. Ex. A (Emergency Removal Order). Glen Mills consisted of up to fourteen separate entities (each a different residential hall), each individually licensed to operate by DHS. Residents of Glen Mills were primarily youth who were adjudicated delinquent and committed to Glen Mills by state or local juvenile justice systems across the country. Compl. ¶ 1.

Plaintiffs, who are former Glen Mills residents, bring one Section 1983 claim against the DHS Defendants named in their individual capacities, alleging that they violated Plaintiffs' Eighth Amendment rights by being deliberately indifferent to abuse and denial of medical treatment at Glen Mills. Despite alleging a wide variety of unique harms and mistreatment suffered by each Plaintiff at different times and at the hands of different Glen Mills staffers and residents, Plaintiffs seek to prosecute their claims on behalf of a single Rule 23(b)(3) class of 1,661 former Glen Mills residents.

A. The Pennsylvania Department of Human Services

The DHS Defendants are former leaders of the Pennsylvania Department of Human Services,[1] the Commonwealth's largest cabinet-level agency. DHS's "seven program offices

[1] DHS was formerly called the Department of Public Welfare ("DPW").

administer services that provide care and support to Pennsylvania's most vulnerable individuals and families." DHS, *About DHS*, *available at* https://www.dhs.pa.gov/about/DHS-Information/Pages/Learn-About-DHS.aspx. DHS is led by the Pennsylvania DHS Secretary, a position appointed by the Governor of Pennsylvania. Defendant Theodore Dallas served as DHS Secretary from January 2015 to August 2017. Compl. ¶ 33. Defendant Teresa Miller served as DHS Secretary from August 2017 to April 2021. Compl. ¶ 32; Deposition Transcript of Teresa D. Miller, dated Aug. 2, 2022, at 89:20-25 (relevant excerpts attached hereto as Ex 1).

One of DHS's functions is licensing facilities that provide a variety of services across the Commonwealth. Deposition Transcript of Theodore Dallas, dated Oct. 18, 2022 at 17:4-16 (relevant excerpts attached hereto as Ex. 2). These facilities include medical facilities, assisted living facilities, nursing homes, personal care homes, children and youth facilities, and day care centers. *Id.* at 17:4-16. Youth residential facilities, which include Glen Mills, are licensed pursuant to 55 Pa. Code Chapter 3800 ("the 3800 Regulations"). 55 Pa. C.S. § 3800.2.

The 3800 Regulations provide hundreds of rules that youth residential facilities must follow, as well as rules governing DHS's oversight of the facilities. *See* 55 Pa. C.S. § 3800. Under the 3800 Regulations, DHS cannot provide one single license to a large facility like Glen Mills. Rather, DHS must separately license each "physical structure" at the school. 55 Pa. C.S. § 3800.4(b). Glen Mills had more than one dozen separately licensed facilities on its campus. Deposition Transcript of Colleen Cahill, dated Jan 18, 2022, at 354:2-12 (relevant excerpts attached hereto as Ex. 3).

Prior to July 1, 2017, youth residential facility licensing was administered by DHS's Bureau of Human Services Licensing ("BHSL"). Deposition Transcript of Roseanne Perry, dated Dec. 8, 2022, at 38:12–39:16 (relevant excerpts attached hereto as Ex. 4); Deposition Transcript

of Alexander Prattis, Jr., dated Mar. 28, 2022, at 113:17–114:8 (relevant excerpts attached hereto as Ex. 5). Beginning on July 1, 2017, youth residential facility licensing was reassigned to DHS's Office of Children, Youth and Families ("OCYF").[2] Dallas Tr. at 17:17–18:10; Prattis Tr. at 113:17–114:8. Defendant Cathy Utz served as OCYF Deputy Secretary, the office's highest-ranking position, from 2015 to May 2019. Deposition Transcript of Cathy Utz, dated Aug. 11, 2022, at 42:1-5; 104:3-14 (relevant excerpts attached hereto as Ex. 6).

B. The DHS Office of Children, Youth and Families

OCYF has three core functions with respect to youth residential facility licensing: (1) conducting annual licensing inspections of each licensed facility, 55 Pa. C.S. § 3800.4(a); (2) investigating allegations of child abuse and neglect ("child abuse investigations"); and (3) investigating allegations of non-compliance with the 3800 Regulations ("complaint investigations"). Perry Tr. at 38:12–39:16; Utz Tr. at 333:19–334:7. Allegations falling within the statutory definition of child abuse are investigated as child abuse investigations, and must be called into Pennsylvania's ChildLine system. Prattis Tr. at 272:14-16. Complaint investigations are used to investigate all allegations not meeting the statutory definition of child abuse, which applies to issues ranging from the use of physical restraints on children, § 3800.211, to safety issues such as the maximum water temperature in a bathroom, § 3800.88, and whether windows have screens, § 3800.92.[3]

OCYF's inspections and investigations are specific to each licensed facility. For example, because Glen Mills had fourteen licensed facilities in 2018, OCYF was required to conduct fourteen separate annual inspections at Glen Mills. *See* § 3800.4(a); Prattis Tr. at 223:16–224:8.

[2] OCYF had previously administered youth residential facility licensing up until 2012.

[3] Abuse and neglect of children is also a violation of the 3800 Regulations.

If OCYF staff determine that a licensed facility is out of compliance with the 3800 Regulations, Pennsylvania law requires that they notify that facility of the areas of non-compliance and provide an opportunity for the facility to submit a "written plan to correct each noncompliance item and . . . establish an acceptable period of time to correct these items." 55 Pa. C.S. § 20.52, § 3800.11.

In limited circumstances, Pennsylvania law authorizes OCYF to take more drastic action against licensed facilities. For example, OCYF "may deny, refuse to renew, or revoke" a license if it determines that the facility has failed to comply with the 3800 Regulations, including by "mistreat[ing] or abus[ing]" residents, engaging in "[g]ross incompetence, negligence or misconduct in operating the facility," or failing to submit or comply with a plan of correction. 55 Pa. C.S. § 20.71(a). In addition, Pennsylvania law requires that OCYF order the emergency removal of a facility's residents if it "finds evidence of gross incompetence, negligence, misconduct in operating the facility or agency, or mistreatment or abuse of clients, likely to constitute an immediate and serious danger to the life or health of the clients." 55 Pa. C.S. § 20.37.

OCYF cannot issue an emergency removal order or take any licensing action against a facility without "substantial evidence" supporting its decision. 23 Pa. C.S. § 6341(c.2.)(5); *Colonial Manor Personal Care Boarding Home v. Dep't of Public Welfare*, 551 A.2d 347 (Pa. Cmwlth. Ct. 1988). In the event a licensed facility disagrees with OCYF's licensing action, the facility can file an administrative appeal. 55 Pa. C.S. § 3800.12; 1 Pa. C.S. Part II. OCYF then bears the burden of supporting its decision by substantial evidence which "outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion." 23 Pa. C.S. § 6303(a). Notably, the evidence necessary to support an emergency removal or licensing action must be specific to the licensed facility against which action is being taken. *See* 55 Pa. C.S. §§ 20.37 and 20.71.

All child abuse investigations, complaint investigations, and annual inspections are conducted by staff and contractors working in OCYF's four regional offices. Utz Tr. at 35:23–37:2; 46:14-20. OCYF regional office staff and contractors receive extensive training regarding the 3800 Regulations and conducting child abuse investigations. Prattis Tr. at 110:14–112:24. They are the individuals who go to facilities to interview children and staff, review facility paperwork, and make findings as to whether there has been a violation of the 3800 Regulations or the Child Protective Services Law. Prattis Tr. at 83:7-12. The DHS Secretary and the OCYF Deputy Secretary are not involved in the "day to day" oversight of youth residential facilities like Glen Mills. Utz Tr. at 72:19–73:9, 127:22–129:4.

C. The Named Plaintiffs

Plaintiffs Derrick, Thomas, and Walter are former Glen Mills residents ("the Named Plaintiffs"). Derrick was a Glen Mills resident from March 2018 to March 2019, Compl. ¶ 84, Thomas resided there from May 2018 to March 2019, Compl. ¶ 154, and Walter resided there from March 2018 until March 2019. Compl. ¶¶ 126, 153.

Each of the Named Plaintiffs alleges he was abused and denied medical treatment at Glen Mills. Compl. ¶¶ 108, 116, 131, 172–74. The alleged abuse and the alleged denials of medical treatment occurred at different times and arose from the conduct of different Glen Mills' staff and residents. *See* Compl. ¶ 149 ("On November 13, 2018, Walter woke up to find his roommate on top of him with his hands around his throat."); Compl. ¶ 173 ("In October 2018, Thomas was getting a snack during Townhouse. Thomas bumped into a staff member, Chris (Chris Doe 2), who then responded by hitting him in the eye."); Compl. ¶ 110 ("One night, Derrick was punched in the middle of the night while asleep in Fillmore. He then realized there were more than a dozen other boys in the room . . . beating up his roommate . . . ."). [redacted]

[redacted]

[redacted] *See* Ex. 7 at 8–9; Deposition Transcript of "Michelle," dated Oct. 28, 2022, at 247:13-16 (relevant excerpts attached hereto as Ex. 8).

i. Derrick

In September 2017, Derrick was adjudicated delinquent and placed on probation for a year. On March 27, 2018, he was placed at Glen Mills for violating his parole.

Derrick alleges that he was subject to abuse by Glen Mills staff and residents, and that staff threatened him to dissuade him from reporting the abuse. Compl. ¶¶ 108, 118–19. [redacted] Deposition Transcript of "Derrick," dated July 18, 2022, at 111:8–113:10 (relevant excerpts attached hereto as Ex. 9). According to the Complaint, staff told him that he would be forced to remain at Glen Mills for longer if he spoke out and reported abuse. Compl. ¶ 118. His parents also allege they were also threatened by Glen Mills staff when they inquired about Derrick's condition. *Id*. [redacted] Derrick Tr. at 184:19–185:16.

When he arrived at Glen Mills, Derrick was initially placed in Jefferson Fillmore Hall. Compl. ¶ 109. He alleges that while housed there, he was punched by a staff member on three separate occasions. *Id*. He further alleges that he and a roommate were assaulted by a group of other residents. *Id*. ¶ 110. He was later transferred to Jackson Hall, a separate facility at Glen Mills, where he alleges he was head-butted by a staff member, Andre Walker. *Id*. ¶ 112. He further alleges that he was restrained by four staff members in the cafeteria. *Id*. ¶ 113. Finally, Derrick alleges that he was physically restrained by a staff member while he was fighting with another resident. *Id*. ¶ 114 (alleging staff member "slammed him into a desk" and "dragged [him] across the floor").

[redacted]. Compl. ¶ 116; Derrick Tr. 373:23-24. The only specific injury he claims from abuse at Glen Mills is back pain following the restraint during his fight. Compl. ¶ 114. He also alleges that he experienced emotional changes due to his experience at Glen Mills. *Id*. ¶ 120. [redacted] *See* Ex. 10 at 6–7.

ii. Thomas

Thomas attended Glen Mills from May 2018 to March 2019 after he was adjudicated delinquent. Compl. ¶ 154.

His principal allegation of abuse relates to an altercation he had with a staff member while housed in Van Buren Hall. He alleges that he was hit in the face by a staff member. *Id*. ¶ 173. [redacted] Ex. 11. [redacted]. *See* Ex. 12. [redacted]. Ex. 13. [redacted] *See* Deposition Transcript of "Thomas," dated Aug. 15, 2022, at 252:10-24 (relevant excerpts attached hereto as Ex. 14) ([redacted].

Thomas alleges that after attending Glen Mills, he has been fearful and watchful of others. Compl. ¶ 182. [redacted] Thomas Tr. at 171:24–172:5. [redacted] *Id.* at 166:14–168:8; 173:17–174:19. [redacted]. *Id.* at 173:7-8; 167:1-2. [redacted] *See* Ex. 15 at 17–19.

iii. Walter

In March of 2018, Walter was sent to Glen Mills [redacted]. Compl. ¶ 126; Deposition Transcript of "Walter," dated Nov. 21, 2022, at 22:13-16 (relevant excerpts attached hereto as Ex. 16).

Walter alleges that while at Glen Mills, he was housed in Jefferson Hall, where he was assaulted by staff and other residents. Compl. ¶¶ 131, 134. He alleges that two months after being placed at Glen Mills, he was slapped and his head slammed into a refrigerator by a staff member. *Id*. ¶ 131. He also alleges that this staff member choked him. *Id*. ¶ 132. Later, he attempted to run away, but was chased and ultimately restrained by another Glen Mills staff member. *Id*. ¶ 133. During this incident, he was allegedly dragged through brush, causing a long laceration and scar on his back. *Id*. ¶¶ 133–34. [redacted]. Expert Report of P. Justin Roe, MD, FAAEM, FACEP, dated April 26, 2023 (attached hereto as Ex. 17). He also alleges he was assaulted by his roommate, a fellow Glen Mills resident. Compl. ¶ 149.

[redacted]. Walter Tr. 299:9–300:13. [redacted]

[redacted]. Walter Tr. 272:14-24. [redacted]. Walter Tr. 272:14–273:4. [redacted]. Walter Tr. 173:16–175:12. [redacted] Ex. 18 at 18, [redacted] *See* Ex. 19 ([redacted]). [redacted].

D. The Proposed Class

The Plaintiffs assert a single cause of action against the DHS Defendants. Mot. at 24. Count Two of the Complaint alleges "the PA-DHS Defendants violated Plaintiffs' Eighth . . . Amendment Rights to be Free from Excessive and Unreasonable Use of Force, to be Protected from Harm, and to Adequate Medical Treatment." Compl. ¶¶ 378–85. The Plaintiffs seek certification of a single Rule 23(b)(3) damages class against the DHS Defendants, which "comprises all youth at GMS within the Class Period." Mot. at 24. This "Abuse Class" is defined as:

> Youth who were adjudicated delinquent and were placed at GMS by a court or state or local agency, and resided at GMS: (a) at any time between April 11, 2017 and April 11, 2019; (b) at any time who turned 18 years old between April 11, 2017 and April 11, 2019; or (c) at any time and had not yet turned 18 years old by April 11, 2019.

Mot. at 24.

Plaintiffs allege a wide variety of ways in which class members' Eighth Amendment rights were purportedly violated. [redacted] *See* Compl. ¶ 139; Ex. 7 at 11–15. [redacted]

[redacted]. Ex. 7 at 11–15. Plaintiffs further allege that students were injured by the denial of medical care, Compl. ¶ 45, but they have not specifically alleged any instances where an alleged denial of care led to harm.

Plaintiffs' purported expert[4], Timothy Decker, testified that he reviewed incident reports related to all residents at Glen Mills. Deposition Transcript of Timothy Decker, dated July 11, 2023 at 183:13-16 (relevant excerpts attached hereto as Ex. 20). Instead of providing a comprehensive set of alleged injuries corresponding to those incidents, his report provides examples of incidents at three of Glen Mills' fourteen residence halls, which he contends reflect the variety of harms alleged by punitive class members. *See generally* Expert Report of Timothy Decker, dated March 30, 2023, at 27–32 (attached hereto as Ex. 21). [redacted]. *Id.* [redacted]. Decker Rep. at 11. [redacted]. *Id*. During his deposition, Mr. Decker was asked about the variety of alleged injuries, and testified that the incidents he reviewed were "all different harms and injuries." Decker Tr. at 55:12–56:8; 184:17–186:6 ("[A] lot of these situations were different. . . . Each of those situations would warrant a different, more nuanced response.").

All 1,661 potential class members were, during their respective residencies at Glen Mills, housed at one or more of fourteen separately licensed residence halls. Each facility housed a different type of resident. [redacted] Deposition Transcript of Sean Cosgrove, dated Jan 24, 2023 at 277:19-21 (relevant excerpts

[4] The DHS Defendants anticipate filing *Daubert* motions as to Plaintiffs' proposed experts at the appropriate time

attached hereto as Ex. 22). [redacted]. Cosgrove Tr. at 278:3-10. [redacted]. Cosgrove Tr. at 279:9. [redacted]. *See* Cosgrove Tr. 119:1-5. [redacted] *See* Cosgrove Tr. at 140:5–141:2.

Plaintiffs' proposed class comprises individuals housed at Glen Mills during the administrations of both Defendant Dallas and Miller, and both before and after the 3800 facilities were overseen by OCYF, which was led by Utz.

III. LEGAL STANDARD

To obtain class certification under Rule 23, Plaintiffs bear the burden of establishing "that all four requisites of Rule 23(a) and at least one part of Rule 23(b) are met." *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994). "Class certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 are met," and "not just supported by some evidence." *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305, 309, 321 (3d Cir. 2008). Together, the criteria of Rule 23(a) and (b) ensure "that a proposed class has sufficient unity so that absent class members can fairly be bound by decisions of class representatives." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997).

Echoing the Supreme Court, the Third Circuit has repeatedly "emphasize[d] that '[a]ctual, not presumed conformance' with Rule 23 requirements is essential." *Gonzalez v. Owens Corning*, 885 F.3d 186, 192 (3d Cir. 2018); *see also In re Hydrogen Peroxide*, 552 F.3d at 326; *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 167 (3d Cir. 2001)). When deciding whether to certify a class, the Court "must make whatever factual and legal inquiries are necessary

and must consider all relevant evidence and arguments presented by the parties." *Hydrogen Peroxide,* 552 F.3d at 307; *see also Newton*, 259 F.3d at 166. "Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence." *Hydrogen Peroxide*, 552 F.3d at 320.

Rule 23 contains two sets of requirements for class certification, all of which Plaintiffs must meet to prevail on their Motion. *Baby Neal*, 43 F.3d at 55. First, the party seeking certification must show that all four prerequisites set out in Rule 23(a) have been satisfied. "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). Rule 23(a) requires that the Court find: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy"). Fed. R. Civ. P. 23(a).

In addition, the party seeking certification must also show that the proposed class action fits into one of the three categories of class actions listed in Rule 23(b), which carry their own requirements. With regard to the DHS Defendants, the Plaintiffs seek certification of a single Rule 23(b)(3) damages class. "Under Rule 23(b)(3), the District Court must find that 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." *In re Citizens Bank, N.A.*, 15 F.4th 607, 612 (3d Cir. 2021).

IV. ARGUMENT

Plaintiffs have failed to satisfy ***any*** of the six factors required for certification of a Rule 23(b)(3) damages class against the DHS Defendants.

- As a preliminary matter, Plaintiffs' proposed class definition is overbroad because Plaintiffs have supplied no evidence that most, or even a significant percentage, of the 1,661 putative class members suffered either abuse or a denial of medical treatment at Glen Mills.
- Second, Plaintiffs make little effort to show that the requirements of Rule 23(a)—numerosity, commonality, typicality, or adequacy—are satisfied, much less with the "convincing proof" the Supreme Court requires for commonality.
- Third, Plaintiffs have not and cannot meet the requirements of Rule 23(b)(3)—predominance and superiority—to recover damages from the DHS Defendants.

A. Plaintiffs' Proposed Class Is Overbroad Because There Is No Evidence that a Significant Percentage of the Class Suffered Any Injury

Plaintiffs' proposed 1,661-member "Abuse Class" against the DHS Defendants—which consists of all residents who attended Glen Mills from April 2017 to 2019, as well as certain residents who attended earlier and meet age qualifications, Mot. at 24—is overbroad because, as Plaintiffs' experts concede, at least two-thirds of the proposed class members suffered no abuse or denial of medical care at the school.

A prerequisite to establishing a class is that "[t]he class must be sufficiently identifiable without being overly broad." *Kemblesville HHMO Ctr., LLC v. Landhope Realty Co*., No. 08-2405, 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*. at *14 (citing *Oshana v. Coca-Cola Bottling Co*., 225 F.R.D. 575, 580 (N.D. Ill. 2005) (noting that class identification insures that those individuals actually harmed by defendant's wrongful conduct will be the recipients of the awarded relief)). "Factors to consider include: (1) whether there is 'a particular group that was

harmed during a particular time frame, in a particular location, in a particular way;' and (2) whether class membership has been defined 'in some objective manner.'" *Id.* at *14–15 (*quoting Rowe v. E.I. Dupont De Nemours & Co.*, 262 F.R.D. 451, 455 (D.N.J. 2009)).

In *Kemblesville*, the plaintiffs sought to certify a class of homeowners residing within 2,500 feet of a gas station that had leaked harmful chemicals. 2011 U.S. Dist. LEXIS 83324 at *16. The court found that the proposed class was "simply far too broad" because the plaintiffs failed to produce "some evidence" establishing a "reasonable relationship between the relevant [chemical] release and the proposed class area." *Id.* at *17–18, 21. Instead, the plaintiffs had shown that only 17 of the 2,500 properties tested positive for the harmful chemicals, and "[t]he locations of those properties are nowhere near the 2,500 foot radius, or even logically reasonably related to that boundary." *Id.* at *18.

Similarly, in *Glover v. Udren*, the plaintiff sought certification of a class consisting of all homeowners who had secured their first mortgage loan through Wells Fargo in Pennsylvania. No. 08-990, 2013 U.S. Dist. LEXIS 170246, at *26 (W.D. Pa. July 18, 2013). The named plaintiff alleged that her injuries were sustained by "flawed practices applied universally" by Wells Fargo regarding overcharges, improper handling of escrow payments, and attorneys' fees. *Id*. at *8. In support of her motion for class certification, the plaintiff relied on an affidavit from a former employee asserting that the class comprised of at least 60,000 individuals. *Id*. at 25–26. The court declined to certify the class, finding that it was "overly broad in that it includes people who have not been, and will not be harmed by Wells Fargo." *Id*. at 26 (cleaned up).

As in *Kemblesville* and *Glover*, Plaintiffs have failed to introduce any evidence establishing a "reasonable relationship" between a class member's residence at Glen Mills and the infliction of abuse or denial of medical treatment. Plaintiffs have asserted that there were twenty-one

documented incidents of abuse at Glen Mills, Compl. ¶ 210, but even assuming that number is under-inclusive, the evidence suggests that the vast majority of the "Abuse Class" did not suffer any abuse while at Glen Mills. In addition, [redacted] *See* Ex. 7 at 26–27. [redacted] *See, e.g.*, Ex. 23 [redacted]; Ex. 24 [redacted]; Ex. 25 [redacted]

Significantly, the reports and testimony of Plaintiffs' own experts conclusively establish the extent of the proposed class's overbreadth. For example, [redacted] Report of Robert T. Kinscherff, Ph.D, dated Mar. 29, 2023 at 4, 16 (attached hereto as Ex. 26). [redacted] Report of Joseph Calvin

Gagnon, Ph.D., dated July 20, 2023 at 14 (attached hereto as Ex. 27). [redacted] *Id*. at 16. [redacted] *Id*. [redacted] *Id*. Thus, Plaintiffs' own experts' analyses demonstrate the significant overbreadth of the proposed DHS "Abuse Class."

B. The Plaintiffs' Have Failed to Meet their Burden to Establish All of the Rule 23(a) Factors

i. Plaintiffs Make No Effort to Demonstrate Numerosity

Plaintiffs' cursory nod toward satisfying the first Rule 23(a) factor, numerosity, falls short of this Court's standards. Plaintiffs must prove two elements to establish numerosity: (1) that the class is sufficiently numerous; and (2) that joinder is impracticable. *T.R. v. Sch. Dist. of Phila.*, No. 15-4782, 2019 U.S. Dist. LEXIS 66002, at *38 (E.D. Pa. Apr. 18, 2019). Plaintiffs' one-paragraph addressing this requirement, repeated in other sections of the brief, offers no evidence, or even argument, that joinder is impracticable. *See* Mot. at 24.

Plaintiffs have the burden to establish numerosity. *Hayes v. Wal-Mart Stores, Inc*., 725 F.3d 349, 358 (3d Cir. 2013). The Court must make a factual determination based upon the preponderance of evidence, and not mere speculation, regarding the manageability of the class. *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."). The Third Circuit has outlined "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)). In *T.R.,* for example, the court found that the plaintiffs' impracticability of joinder arguments, made "without reference to any proof," were insufficient because they 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.

Plaintiffs' entire impracticability of joinder argument is contained in one generalized, conclusory sentence that essentially just regurgitates the standard: "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* Mot. at 51, 54, 57, 61, and 63 (referring back to the same sentence on Page 24). Just as in *T.R.*, 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 id.* at 24.[5]

The perfunctory arguments that Plaintiffs do offer fail to establish numerosity. First, the "sheer size" of a class does not, by itself, demonstrate that joinder is impracticable. *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 to support why litigating as joined

[5] Plaintiffs here are represented by the same counsel as the plaintiffs in *T.R.*, which is notable given their failure to submit proof, or even argument, of impracticability of joinder in both cases.

parties would "constitute a significant tax on judicial resources." *See* Mot. at 24. While a class of 1,661 may be sufficiently "numerous," simply relying on a number is not enough, particularly because, as Plaintiffs' Motion concedes, individual mass tort cases—brought by almost half of the putative class members—are already pending against Glen Mills in the Court of Common Pleas of Philadelphia County. *Id*. at 36.

(1) Plaintiffs' Failure to Identify a Discrete Policy or Practice of the DHS Defendants, Paired with the Wide Variety of Alleged Injuries, Precludes a Finding of Commonality

Plaintiffs' efforts to satisfy the second Rule 23(a) factor, commonality, are deficient for two separate and independent reasons outlined by the U.S. Supreme Court in *Wal-Mart*, 564 U.S. at 349–50. First, Plaintiffs cannot establish commonality because they have failed, despite more than three years of discovery, to identify and challenge a discrete policy or general practice employed by the DHS Defendants. Second, the putative class members' wide variety of alleged injuries means that there can be no common injury or contention amongst class members' experiences, as Rule 23(a) requires.

To establish commonality, plaintiffs must show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). However, as the Supreme Court observed in *Wal-Mart*, the Rule's "language is easy to misread, since [a]ny competently crafted class complaint literally raises common questions," and "[r]eciting these questions is not sufficient to obtain class certification." 564 U.S. at 349 (citations omitted). Rather, "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Id*. at 349–50 (internal citations omitted) ("What matters to class certification . . . [is] the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."). In addition to sharing the same injuries, Plaintiffs' allegations must be based upon a

"common contention" that is more specific than simply an area of law, such as the Eighth Amendment, and must be "capable of class resolution." *Id.* This showing requires "significant proof" of either an identifiable policy or a general practice or procedure that caused the class members' injuries. *Id.* at 352–53, 359 (denying class certification on commonality grounds because there was "no convincing proof of a companywide discriminatory pay and promotion policy").

While *Wal-Mart* addressed employment policies, the Tenth Circuit has considered the very issue in this case: a state human services department's policies and procedures. *J.B. v. Valdez*, 186 F.3d 1280, 1282–84 (10th Cir. 1999). In *J.B.*, child plaintiffs in the custody of the state of New Mexico alleged that "systemic" failures by officials in the New Mexico Human Services Department and Department of Health deprived them of the "care and treatment they deserve." *Id.* at 1283. The plaintiffs alleged that they had a "common claim" that "systemic failures in the defendants' child welfare delivery system deny all members of the class access to legally-mandated services which plaintiffs need because of their disabilities." *Id.* at 1289. The court found that the plaintiffs could not establish commonality because they "merely attempt[ed] to broadly conflate a variety of claims to establish commonality via an allegation of 'systematic failures.'" *Id.* ("We refuse to read an allegation of systematic failures as a moniker for meeting the class action requirements.").

Here, too, the conclusory allegations in Plaintiffs' Motion demonstrate that they are impermissibly seeking to "conflate a variety of claims" to establish commonality by alleging "systemic failures." *Id.*; *see also* Mot. at 25 (alleging that the DHS Defendants "failed in their duty and violated the Constitutional rights of each putative class member by maintaining policies, practices, and patterns of consciously disregarding claims of abuse at GMS."). In the fact section

of their motion, Plaintiffs cobble together a list of actions and omissions of unspecified "DHS staff" purportedly "under the command and control of DHS Defendants." *See* Mot. at 5–8; *see also* Compl. ¶ 384 (describing the DHS Defendants' "failing to take sufficient action to ensure Plaintiffs' and other youths' safety"). Plaintiffs do not identify which of the individual DHS Defendants created or maintained the supposed policies or practices they challenge. Significantly, despite more than three years of discovery, Plaintiffs have failed to identify either a specific DHS policy or a general practice that satisfies Rule 23(a)'s commonality inquiry with the "convincing proof" the Supreme Court requires. *See Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 29 (1st Cir. 2019) (finding that commonality was not established because the plaintiffs did not identify a "a uniformly applied, official policy of the [defendant], or an unofficial yet well-defined practice, that drives the alleged violation").

Moreover, even if Plaintiffs had rooted their claims in a discrete DHS policy or practice (and they have not), the wide variety of class members' alleged harms precludes a finding of commonality. *See Wal-Mart*, 564 U.S. at 349–50 (explaining plaintiffs must show that they "suffered the same injury"). Two Third Circuit decisions demonstrate that even when plaintiffs *can* point to an identifiable policy, certification should be rejected on commonality grounds when the putative class members' injuries diverge widely, as they do here.

In *Mielo v. Steak 'N Shake Operations, Inc.*, 897 F.3d 467, 473 (3d Cir. 2018), a putative class of disabled individuals who alleged that they were unable to navigate Steak 'N Shake parking lots sought certification of a class of disabled individuals who had experienced similar discrimination. The Third Circuit declined to certify the class because each class member's claim depended on individual circumstances. *Id.* at 490 ("One 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."). While individually, each case presented a "serious claim," the Court found that "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*.

Ferreras v. American Airlines, Inc., 946 F.3d 178 (3d Cir. 2019), is likewise instructive. There, a putative class of American Airlines employees alleged that the airline had not compensated them for all hours worked, and identified two common questions related to American's timekeeping policies and practices. *Id.* at 185–86. The Third Circuit rejected the proposed class on commonality grounds, finding that deficient timekeeping policies and practices would not tell the court anything about whether "each individual employee worked overtime and is thus entitled to additional compensation." *Id.* Following *Wal-Mart*, the Court focused on the individualized nature of the evidence required, noting that "[p]laintiffs will have to offer individualized proof to show that they were actually working during the various time periods at issue, the main point of dispute in this case." *Id*. at 186.

Plaintiffs' allegations of a common injury are likewise deficient. Plaintiffs conclusorily allege, without a record citation, that the "harmful impact of DHS's policies and practices is discernable from evidence common to the class." Mot. at 25. As in *Ferraras*, Plaintiffs have offered no "individualized proof" to address fundamental issues in this litigation: (1) whether each class member was actually injured; and (2) whether a DHS Defendant's policy or practice caused the class member's injury. And as in *Mielo*, the putative class members are Glen Mills residents of a range of ages and geographic backgrounds who spent different amounts of time (from just a

few days to over a year) at an institution that consisted of more than a dozen separately-licensed facilities. *See, e.g.*, Cosgrove Tr. 140:5–141:2 (describing how each facility had different "norms" that governed staff and resident behavior within the facility, and these norms changed over time); *id.* at 277:19-21, 278:3-10, 279:7-9 (describing how Johnson Hall II was a community-based detention center that was unlike other residential facilities at Glen Mills because it housed only individuals placed there by Philadelphia DHS, its residents did not interact with other Glen Mills residents, and its staff members did not work in other halls); *id.* at 119:3-5 (describing how Jackson Hall housed only younger residents). This constellation of different resident experiences at Glen Mills defies the common injury Rule 23(a) requires.

Plaintiffs' own experts demonstrate that the putative class members share no common injury tied to a DHS policy. [redacted] *See* Decker Tr. 54:22–56:12. [redacted]

Decker Tr. 184:4–186:14.

Although Plaintiffs have included all 1,661 former Glen Mills residents who meet the broad bounds of their proposed class, Plaintiffs' experts found it significant that some residents were at Glen Mills for just a few days, reducing their exposure to potential injuries. [redacted]

[redacted] Deposition Transcript of Clive R. Belfield, dated July 14, 2023 at 174:16–176:1 (relevant excerpts attached hereto as Ex. 28). [redacted] Gagnon Rep. at 14. [redacted] *Id*. at 16. When the putative class members' "collective claims are so widely divergent," *Mielo*, 897 F.3d at 490, commonality can never be satisfied.

ii. Plaintiffs Cannot Establish Typicality Because the Named Plaintiffs Are Not Representative of the Class and Lack Standing to Bring Claims Against Each of the DHS Defendants

Plaintiffs make little effort to satisfy the third element of Rule 23(a), typicality, averring generally that "all three named Plaintiffs were subject to the same unconstitutional policies and practices of the DHS Defendants as all other GMS students." Mot. at 25. Rule 23(a)'s typicality inquiry "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 v. BMW of N. Am., LLC*, 687 F.3d 583, 598 (3d Cir. 2012) (cleaned up).

The three Named Plaintiffs fail the typicality test in two separate respects. First, none of them has standing to bring a claim against DHS Defendant Dallas, who left his post in the middle of 2017, almost a year before any of them arrived at Glen Mills. Second, the Named Plaintiffs' alleged injuries differ from those of their fellow class members, some of whom suffered no injury at all.

(2) None of the Named Plaintiffs Has Standing to Bring a Claim Against DHS Defendant Dallas

None of the Named Plaintiffs attended Glen Mills during the time Secretary Dallas led DHS from January 2015 to August 2017. A named plaintiff "cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands he suffered no injury." *Thompson v. Bd. of Educ.*, 709 F.2d 1200, 1204 (6th Cir. 1983) (citing *LaMar v. H & B Novelty & Loan Company*, 489 F.2d 461, 462 (9th Cir. 1973)). "This is true even though the plaintiff may have suffered an identical injury at the hands of a party other than the defendant." *LaMar*, 489 F.2d at 466. A plaintiff's "[s]tanding cannot be predicated on an injury which the plaintiff has not suffered, nor can it be acquired through the back door of a class action." *Laspina v. SEIU Pa. State Council*, No. 3:18-2018, 2019 U.S. Dist. LEXIS 147506, at *15–16 (M.D. Pa. Aug. 29, 2019) (cleaned up); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3d Cir. 1970) ("[A] predicate to appellee's right to represent a class is his eligibility to sue in his own right. What he may not achieve himself, he may not accomplish as a representative of a class.").

As set forth in Plaintiffs' Motion, the proposed class includes all residents who attended Glen Mills from April 2017 to April 2019, and some residents who attended Glen Mills before April 2017 who meet certain age qualifications. Mot. at 24. The proposed class, therefore, nominally encompasses the tenures of Defendants Dallas, Miller and Utz. However, Plaintiffs Derrick and Walter did not arrive at Glen Mills until March 2018, and Plaintiff Thomas did not enroll until May 2018, well after Secretary Dallas's July 2017 medical leave and August 2017 resignation. *See* Compl. ¶¶ 84, 126, 154; Dallas Tr. 31:12-20, 33:3-8. None of the Named Plaintiffs resided at Glen Mills while Secretary Dallas was at the helm of DHS, and they have not otherwise introduced evidence connecting their purported injuries to a specific policy or practice

of Dallas. Moreover, Plaintiffs have introduced no evidence that Secretary Dallas knew anything about Glen Mills or its residents—other than of the school's existence—until years after his resignation when he read several articles in the *Philadelphia Inquirer* about the school. *See* Dallas Tr. 166:15–167:4, 349:24–350:12. Secretary Dallas's uncontroverted testimony shows that he had no knowledge of even a single abuse allegation during his tenure as DHS Secretary. *Id.* at 367:3-14.

In these circumstances, none of the Named Plaintiffs has standing to bring claims against Secretary Dallas based upon what Plaintiffs contend, without any record citations, were "unconstitutional policies and practices" in 2017. Mot. at 25; *see Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) ("At the core of the standing doctrine is the requirement that a plaintiff 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'") (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984), *Valley Forge Christian College v. Americans United for Separation of Church & State*, Inc., 454 U.S. 464, 472 (1982)). At a minimum, the Named Plaintiffs should be precluded from pursuing a claim on behalf of the class against Secretary Dallas.

(3) ***The Alleged Injuries of the Class Representatives Differ from Those of the Proposed Class Members and Are Subject to Unique Defenses***

Typicality cannot be established when the Named Plaintiffs' own claims, like the rest of the class members, are subject to unique defenses, and when the evidence demonstrates that some class members have suffered no injury or harm at all. An analysis of the significant differences in the Named Plaintiffs' own alleged injuries at Glen Mills underscores that putative class members' claims should be analyzed individually, as they will be in the pending mass tort cases against Glen Mills in the Court of Common Pleas. *See* Mot. at 29.

Banda v. Corzine, No. 07-4508, 2007 U.S. Dist. LEXIS 80932 (D.N.J. Nov. 1, 2007), is instructive. There, a putative class of prisoners brought claims related to injuries from an incident when they were held outside in 90-degree heat by an officer with a gun, without sufficient water or access to bathrooms. *Id.* at *3–7. Members of the proposed class suffered a variety of injuries, including a heart attack, a seizure, and clinical death before being revived. *Id.* at *8–11. The court found that typicality could not be established for two reasons: (1) some unknown percentage of class members "experienced no medical condition of any kind" during the incident; and (2) to the extent an injury was suffered, "dramatic difference[s]" existed "between the alleged ailments . . . as well as the entities treating these conditions." There was, therefore, "some degree of likelihood [that] a unique defense will play a significant role at trial." *Id.* at *58 (quoting *Beck v. Maximus, Inc.*, 457 F.3d 291, 300 (3d Cir. 2006)).

Here, the Named Plaintiffs' own claims are subject to "unique defense[s]." *Id.* For example, [redacted] *See* Ex. 19 at 6–7 ([redacted]). [redacted] *See* Roe Rep. at 4–5.

Moreover, as in *Banda*, Plaintiffs' proposed class includes individuals who suffered no injury at Glen Mills. And among those who could claim to have been abused or denied medical care, the cause and extent of the injury may vary dramatically by class member. [redacted] *See* Kinscherff Rep. at 4;

Gagnon Rep. at 16. Without an actual injury, proposed class members have no standing to pursue an Eighth Amendment claim. *See Coleman v. Tice,* No. 15-244 Erie, 2018 U.S. Dist. LEXIS 175319, at *19 (W.D. Pa. Oct. 10, 2018) (citing *Brown v. Ellis*, 175 F.3d 1019 (7th Cir. 1999) (table) (holding that "[f]ailure to protect from actual physical injury, not failure to protect from the fear of injury, is what violates the Eighth Amendment"); *Mearin v. Swartz*, 951 F. Supp. 2d 776, 786 (W.D. Pa. 2013) (citing *Babcock v. White*, 102 F.3d 267, 272 (7th Cir. 1996) ("[H]owever legitimate [plaintiff's] fears may have been . . . it is the reasonably preventable assault itself, rather than any fear of assault, that gives rise to a compensable claim under the Eighth Amendment."). Because these defenses and others are "dramatic differences" that "will play a significant role at trial," Plaintiffs' Motion should be denied on typicality grounds. *Banda*, 2007 U.S. Dist. LEXIS 80932 at *58.

iii. Plaintiffs Are Not Adequate Class Representatives Because Their Claims Are in Conflict with the Claims of Absent Class Members

Addressing the final Rule 23(a) factor, adequacy, the Named Plaintiffs are not adequate class representatives because they have a fundamental conflict with absent class members who suffered no physical injury at Glen Mills. *See* Fed. R. Civ. P. 23(a)(4) (requiring that "the representative parties will fairly and adequately protect the interests of the class"). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 431 (3d Cir. 2016) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)). The Named Plaintiffs' conflict with uninjured class members is "fundamental" and defeats a finding of adequacy because it concerns "specific issues in controversy." *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 184 (3d Cir. 2012).

The Supreme Court's analysis in *Amchem.*, which involved a proposed class of individuals exposed to products with asbestos, is controlling. 521 U.S. at 626. The Court expressed concern about intra-class conflict because the named plaintiffs had already suffered asbestos-related injuries, but some members of the class had only been exposed to products with asbestos, and so "in significant respects, the interests of those within the single class are not aligned." *Id.* The Court concluded that the conflict between the class members with acute injuries and those who had merely been exposed to harmful conditions without developing injuries rendered the named plaintiffs inadequate class representatives, because they would be interested in maximizing "generous immediate payments" to pay for injuries already sustained. *Id.* The latter group, however, would have less interest in maximizing immediate payment, and instead would seek to ensure a financial "fund for the future." *Id.*

A nearly identical conflict exists here. The Named Plaintiffs, and likely others in the proposed class, will contend at trial that they suffered actual physical injuries at Glen Mills that entitle them to large damage awards. Class members who suffered no physical injury at Glen Mills and who cannot recover large damage awards, like the second group in *Amchem*, may be interested in establishing an alternative form of relief. In any event, under *Amchem* the Named Plaintiffs have a "fundamental" conflict and cannot advance the claims of class members who suffered no physical injury.

C. Plaintiffs Cannot Satisfy the Requirements of Rule 23(b)(3)

Since Plaintiffs seek to recover damages from the DHS Defendants "on a class-wide basis," Motion at 26, they "must satisfy the additional requirements of predominance and superiority" pursuant to Rule 23(b)(3). *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 482 (3d Cir. 2015). Because individual questions predominate and a class action is inferior to other methods of adjudicating this controversy, Plaintiffs' Motion should be denied on both grounds.

i. Individual Factual Issues Predominate

(1) *Baby Neal Precludes Certification of Plaintiffs' Proposed Class*

The Third Circuit explicitly warned 30 years ago, in a case with strikingly similar facts, that individual issues are likely to predominate in a Rule 23(b)(3) damages case like this one.

In *Baby Neal*, "a putative class of children in the legal care and custody of Philadelphia's Department of Human Services" sought to certify a Rule 23(b)(2) class seeking declaratory and injunctive relief rather than damages. 43 F.3d at 52. The plaintiffs' allegations, which largely mirror the allegations against DHS here, asserted "a host of policies and procedures" of Philadelphia DHS "that are inefficient and deficient." *Id.* at 53. The district court denied class certification under the commonality and typicality prongs "because each of the plaintiffs' claims arose out of individual (and tragic) circumstances and hence they could not claim a single common injury." *Id.* at 52. The Third Circuit reversed, finding that class treatment was appropriate—despite "the differences among the plaintiffs"—because "the plaintiffs in this case seek only injunctive and declaratory relief, *not individual damages*." *Id.* at 63–64 (emphasis added). The Third Circuit cautioned, however, "that the individual differences in the children's circumstances might indeed militate against certification if the action sought certification under 23(b)(3) because a court would need to evaluate those differences in the event that the plaintiffs prevailed and were entitled to monetary damages." *Id.* at 63.

Here, Plaintiffs have essentially brought a *Baby Neal* case against DHS, alleging generally that DHS employed deficient policies and procedures. But instead of seeking prospective injunctive and declaratory relief under Rule 23(b)(2), as in *Baby Neal*, Plaintiffs seek damages under Rule 23(b)(3). Mot. at 1. This is precisely the situation the Third Circuit warned about in *Baby Neal*, in which a putative class of plaintiffs alleging a wide-variety of injuries based on

individual circumstances nonetheless seeks collective treatment of their damages claims. In accordance with the Third Circuit's reasoning in *Baby Neal*, this Court should deny Plaintiffs' Motion. *See also McClendon v. Sch. Dist.*, No. 04-1250, 2005 U.S. Dist. LEXIS 3497, at *12 (E.D. Pa. Mar. 7, 2005) (distinguishing *Baby Neal* and striking class allegations because "the plaintiffs ask for compensatory relief," and "[c]ertification of a class would compromise the individual plaintiffs' freedom to resolve their individual cases"); *In re Flint Water Cases*, 558 F. Supp. 3d 459, 500 n.23 and 511 (E.D. Mich. 2021) (discussing *Baby Neal* and concluding that predominance could not be established because "[t]here will be a great deal of individualized inquiry required at nearly every stage of legal analysis in this case").

(2) *The DHS Defendants Are Entitled to Qualified Immunity*

The DHS Defendants have asserted, and continue to assert, that they are entitled to qualified immunity in this matter. *See* MTD Opinion, dated Dec. 19, 2019, ECF No. 59 (reserving ruling on qualified immunity). Government officials sued in their individual capacity, as the DHS Defendants were here, are entitled to qualified immunity, which "gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'" *City & Cnty. Of San Francisco v. Sheehan*, 575 U.S. 600, 611 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)). The Third Circuit has held that plaintiffs in a Rule 23(b)(3) damages class action must overcome a defendant's qualified immunity at the class certification stage. *Rouse v. Plantier*, 182 F.3d 192, 199 (3d Cir. 1999) ("[T]he scope of the qualified immunity afforded each individual defendant should not be any different than it would be if that defendant were instead faced with separate damages actions filed on behalf of each member of the plaintiff class."). Individual issues will necessarily predominate in any trial in this matter because, pursuant to binding Third Circuit

precedent, every class member will have to overcome each DHS Defendant's right to qualified immunity.[6]

"Rule 23(b)(3) requires that 'questions of law or fact common to class members predominate over any questions affecting only individual members.'" *In re Suboxone 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).

With three DHS Defendants named in their individual capacities and 1,661 class members, nearly 5,000 individual factual determinations will be required when the Court weighs the DHS Defendants' entitlement to qualified immunity. A defendant is entitled to qualified immunity if he or she "can show that a reasonable person in [his or her] position at the relevant time could have believed, in light of clearly established law that [his or her] conduct comported with established legal standards." *Beers-Capitol v. Whetzel*, 256 F.3d 120, 142 n.15 (3d Cir. 2001). In the context of an Eighth Amendment claim, the proper test is whether the defendant was "deliberately indifferent" to plaintiffs. *See id.* at 131–32; *see also E.A.F.F. v. Gonzalez*, 600 F. App'x 205, 210

[6] The DHS Defendants anticipate filing a summary judgment motion asserting that they are entitled to qualified immunity with respect to the claims of the three Named Plaintiffs at the Court's direction. Given the Third Circuit's ruling in *Rouse*, however, the DHS Defendants respectfully submit it is appropriate for the Court to consider Plaintiffs' Motion seeking class certification first, before weighing qualified immunity with respect to the remaining three Named Plaintiffs and their parents. Should the Court disagree, the DHS Defendants will be prepared to file their motion whenever the Court determines is appropriate.

(5th Cir. 2015) ("this court must consider whether the defendants were deliberately indifferent to such abuse"). Deliberate indifference is judged under "a subjective standard of liability consistent with recklessness as that term is defined in criminal law." *Nicini v. Morra*, 212 F.3d 798, 811 (3d Cir. 2000). Mere negligence or even gross negligence does not constitute deliberate indifference. *Wilson v. Seiter*, 501 U.S. 294, 305 (1991).

A state official "cannot be found liable . . . unless [he] knows of and disregards an excessive risk to [the plaintiff's] health and safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Nicini*, 212 F.3d at 811. Deliberate indifference claims cannot be based on "[g]eneralized allegations that a supervisor defendant is 'in charge of' or 'responsible for' an office or facility" because they "are insufficient to allege personal involvement in an underlying constitutional violation." *Maldonado v. Steberger*, No. 22-cv-5189, 2023 U.S. Dist. LEXIS 5089, at *5 (E.D. Pa. Jan. 10, 2023). It is similarly insufficient to show that "defendants were in charge of agencies that allowed [a plaintiff's injury] to happen." *Saisi v. Murray*, 822 F. App'x 47, 48 (3d Cir. 2020). An Eighth Amendment claim cannot be sustained based on allegations the plaintiff's "injury would not have occurred had the [defendant] 'done more.'" *Talley v. Ionata*, No. 19-cv-1723, 2020 U.S. Dist. LEXIS 27793, at *15 (E.D. Pa. Feb. 19, 2020) (quoting *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 216 (3d Cir. 2001)). Likewise, officials cannot act with deliberate indifference "if they are helpless to correct the protested conditions." *Dixon v. Godinez*, 114 F.3d 640, 645 (7th Cir. 1997) (citing *Del Raine v. Williford*, 32 F.3d 1024, 1038 (7th Cir. 1994)).

The first step in a deliberate indifference analysis is determining whether the defendant "knows" of "an excessive risk to [the plaintiff's] health and safety." *Nicini*, 212 F.3d at 811. This

requires a subjective analysis of what knowledge each of the defendants possessed, regarding the circumstances surrounding the harms alleged by each of the individual plaintiffs. The defendant's "knowledge must be actual, not constructive." *Chavarriaga v. N.J. Dep't of Corr.*, 806 F.3d 210, 222 (3d Cir. 2015). Plaintiffs cannot rely upon allegations that the defendant knew or should have known about conditions at Glen Mills generally. "[T]he mere presence of circumstances from which a reasonable person *could* infer 'an excessive risk to . . . health or safety' is insufficient" to sustain an Eighth Amendment claim. *Counterman v. Warren Cty. Corr. Facility* 176 F. App'x 234, 238 (3d Cir. 2006). "[R]ather, the official must actually make the inference and disregard it." *Id*.

The second inquiry in a deliberate indifference analysis is whether the defendant "disregard[ed] [the] risk by failing to take reasonable measures to abate it." *Porter v. Pa. Dep't of Corr.,* 974 F.3d 431, 444 (3d Cir. 2020). In evaluating whether the defendant took "reasonable measures to abate" the risk, the Third Circuit applies a two-step analysis: (1) whether the defendants took "affirmative steps" to address the risk of harm; and (2) whether there was evidence that the "affirmative steps" amounted to "[i]neffectual action under the circumstances." *Wharton v. Danberg*, 854 F.3d 234, 241, 244 (3d Cir. 2017). Where "affirmative steps" to address the risk of harm are shown, "a finding of deliberate indifference [is] difficult." *Id.* at 244. Again, the circumstances of the alleged harms differ substantially among members of the class, and therefore so does the analysis necessary to consider whether each of the defendants took reasonable steps to abate the particular harms alleged by each plaintiff.

Rouse, also an Eighth Amendment damages case, provides a template for this Court's qualified immunity inquiry at class certification. 182 F.3d at 199. In that case, a putative class of prisoners suffering from diabetes alleged "deliberate indifference to [their] serious medical needs"

and defendants, officials at the prison, asserted qualified immunity. *Id.* at 194. The Third Circuit reversed an order certifying a class because the district court had failed to consider how qualified immunity would impact each class member's claims. The court explained:

> if an individual damages actions by plaintiff P1 against defendant D1 would not survive a motion for summary judgment based on qualified immunity, either because D1's alleged conduct did not constitute an Eighth Amendment violation as to P1 or because the illegality of D1's conduct was not clearly established at the time in question, then in the class action context D1 should likewise be free from the burden of going to trial on the claims of P1 and all other similarly situated members of the plaintiff class.

Id. at 199.

To overcome the DHS Defendants' claim to qualified immunity here, individual factual findings need to be made as to (1) whether each DHS Defendant had actual knowledge of the risk of each class member's specific injury, (2) when that knowledge was acquired, (3) what action, if any, was taken after acquiring that knowledge, and (4) whether that action was "ineffectual . . . under the circumstances." *Wharton*, 854 F.3d at 241; *Rouse*, 182 F.3d at 199. Moreover, even if a class member could show that a DHS Defendant had actual knowledge of the risk of his specific harm, the inquiry as to deliberate indifference would effectively reset as soon as the defendant took any "affirmative steps" to address the risk, even if those steps were ultimately ineffective. *See id.* Given the wide variety of class members' alleged injuries, the fact that class members resided at Glen Mills at different time periods spanning multiple years, and the fact that the DHS Defendants' respective tenures do not cover the entire class period, individual issues predominate over class questions in this litigation.

(3) *The Seventh Circuit Case Law in Plaintiffs' Motion Highlights that They Have Not Challenged any 'Uniform' DHS Policy or Practice Affecting the Class*

Plaintiffs' predominance argument is largely contained in one self-serving sentence: "there are *no* individual questions with respect to the putative class members." Mot. at 26 (emphasis in

original). Indeed, they offer no substantive analysis or evidence to establish predominance, instead relying upon an easily distinguishable case from the Seventh Circuit, *Ross v. Gossett*, 33 F.4th 433 (7th Cir 2022). *See* Mot. at 26–28.

In *Ross*, a putative class of prisoners alleged that they sustained injuries during a series of simultaneous "shakedowns" administered by the defendants at several different Illinois prisons. *Ross*, 33 F.4th at 435. There was undisputed evidence that "the shakedown plan was imposed in the same manner at each institution, that safeguards were in place to ensure that everyone was aware of the plan, and that supervisors were present to ensure uniform execution of it." *Id.* at 440. In affirming the class certification order, the Seventh Circuit explained that claims of uniform behavior, "such as those involving a uniform form or standardized agreement, are the type of claims that are amenable to class-wide proof and therefore capable of satisfying the predominance inquiry." *Id*.

The court emphasized the difference between a "uniform behavior" or policy, which might allow for a finding of commonality and predominance, with allegations of inaction or a lack of uniform policy, which the court found insufficient for certifying a damages class. *See id.* at 438. To illustrate this difference, the court contrasted the fact pattern in *Ross* with *Wal-Mart*, 564 U.S. at 338. In *Ross*, there was evidence that the defendants had created an explicit and detailed policy directing the shakedowns that led to the plaintiffs' injuries. *Id*. at 438–39. In *Wal-Mart*, however, there was no such policy or practice; to the contrary, plaintiffs specifically complained that there was no Wal-Mart policy, which they claimed permitted managers' bias against women. The court explained that the company's inaction was "the opposite of a uniform employment practice that would provide the commonality needed for a class action," and therefore prevented the court from finding commonality or predominance. *Id*. at 438.

Likewise, *Wal-Mart*, and not *Ross,* controls here.[7] Although Plaintiffs allege that their "claims . . . focus on the DHS Defendants' policies and practices as a whole," Motion at 28, their true complaint is that the Defendants did not institute the policies Plaintiffs believe were needed—a type of theory that the *Wal-Mart* Court held could not satisfy Rule 23(a)'s commonality requirement, let alone prove that common questions predominate over individual ones. *Compare* Mot. at 6 ("DHS Defendants failed to put in place policies to adequately hire and train competent investigators, develop policies for interviewing abuse victims despite evidence that youth at GMS were often too intimidated to complaint about abuse, or to establish policies to effectively evaluate, assess and remedy the cumulative impact of these complaints") *with Wal-Mart*, 564 U.S. at 359 (finding there was not "even a . . . common question" because "respondents provide[d] no convincing proof of a companywide discriminatory pay and promotion policy"). Because this Court cannot uniformly address whether the alleged inaction and lack of policies of the DHS Defendants resulted in a violation of each class member's Eighth Amendment rights, Plaintiffs' Motion should be rejected on predominance grounds.

[7] The other cases cited on pages 27 and 28 of Plaintiffs' Motion provide no better support for satisfying predominance. As with *Ross*, the holding in *Wilson v. Cty. of Gloucester*, 256 F.R.D. 479, 488–89 (D.N.J. 2009) addressed an affirmative county policy which had been applied to each of the putative class members uniformly. The court did not address whether an alleged lack of oversight by the defendants could satisfy predominance. *Id.*; *see also Bizzarro v. Ocean Cty.*, No. 07-5665, 2009 WL 1617887, at *15 (D.N.J. June 9, 2009) (certifying class of pretrial detainees who were subjected to uniform county policy regarding strip searches). The remaining cases cited by in Plaintiffs' Motion are inapplicable here. *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 490 (3d Cir. 2015) addressed the necessary evidentiary showing for certifying a class of RICO plaintiffs who were allegedly defrauded by the defendants' telemarketing scheme. While the *Reyes* court recognized that the specifics of each plaintiff's telemarketing pitch might vary, its holding was based on the alleged existence of a fraudulent scheme common to all plaintiffs. *Id.* This is distinguishable from the fact pattern here, where there is no alleged common scheme–instead, Plaintiffs simply allege the DHS Defendants failed to address a variety of problems at Glen Mills. Lastly, the holding in *P.V. v. Sch. Dist. of Phila.*, 289 F.R.D. 227, 236 (E.D. Pa. 2013) addressed certification of a Rule 23(b)(2) injunction class as opposed to Rule 23(b)(3) damages class.

ii. Class Certification Is Not Superior Because Class Members' Interests Are Not Aligned

The 800 separate mass tort cases pending against Glen Mills in the Court of Common Pleas in Philadelphia starkly illustrate that Plaintiffs will never be able to show that a class action is "superior" "to 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). Although Plaintiffs argue that those cases are "irrelevant" because the DHS Defendants are not parties, their mere existence shows that other kinds of litigation are not just feasible, but appear to be preferable to at least half of the class, which has elected to sue Glen Mills—and not the DHS Defendants—in a separate venue. *See* 5 Moore's Federal Practice - Civil § 23.46(2)(b)(i) ("Frequently, the presence of large individual damage claims has been viewed as supporting an interest of the class members in separate litigation.").

The four *Processed Egg* factors weigh strongly against a finding of superiority here. *See* 312 F.R.D. at 164 ("Rule 23(b)(3) sets out four factors for the Court to consider: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action.").

Addressing the first and second factors, class members have expressed an interest in controlling the prosecution of separate Court of Common Pleas actions; indeed, hundreds of the 1,661 potential class members in this action have filed their own mass tort cases. *See The Glen Mills School Litigation*, Dkt. No. 900 (Phila. C.C.P.). Contrary to Plaintiffs' argument that claims are likely to be "relatively small" and that class members "would have little interest in prosecuting the case without the class-action mechanism," Mot. at 28–29, the fact that so many individual class

members are pursuing claims against Glen Mills demonstrates that the potential recoveries are substantial enough to motivate individual plaintiffs to action. This is strong evidence against the court finding a class action is superior. *See Bentkowski v. Marfuerza Compania Maritima*, S. A., 70 F.R.D. 401, 405 n.10 (E.D. Pa. 1976) ("Those cases which find that individual lawsuits are superior are usually beset with a number of pending lawsuits at the time the class is sought to be certified."); *see also* 5 Moore's Federal Practice - Civil § 23.46 ("the presence of large individual damage claims has been viewed as supporting an interest of the class members in separate litigation"). With respect to the third factor and this forum, while Glen Mills is indeed in the Eastern District of Pennsylvania, the Philadelphia County court where the mass tort cases are pending is equally convenient for class members residing in the jurisdiction.

Finally, the record evidence shows that a class action would be difficult to manage. The class consists of hundreds of residents, who allegedly sustained a variety of injuries, all of which require subjective analysis of each individual Defendant's knowledge and actions. *See Johnston v. HBO Film Mgmt.*, 265 F.3d 178, 194 (3d Cir. 2001) (holding that establishing proof of elements and defenses applicable to individual plaintiffs would present severe manageability problems for the court). In these circumstances, a class action would require hundreds of mini-trials to determine whether, and to what extent, each class member was injured.

V. CONCLUSION

For all the reasons set forth above, the DHS Defendants respectfully ask the Court to deny Plaintiffs' Motion and grant them such other and further relief as the Court deems just and proper.

Dated: October 31, 2023

Respectfully submitted,

/s/ Henry E. Hockeimer, Jr.

Henry E. Hockeimer, Jr.
Paul Lantieri III
Kaitlin M. Gurney
Joseph J. Bailey
Kathryn J. Boyle
John W. Scott
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Tel.: 215.665.8500
Fax: 215.864.8999

Attorneys for the PA-DHS Defendants

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