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

DERRICK, by and with his parent and next friend TINA, et al., Plaintiffs, v. GLEN MILLS SCHOOLS, et al., Defendants.	Case No. 2:19-cv-01541-HB **ORAL ARGUMENT REQUESTED**

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL IN RESPONSE TO DEFENDANT PDE'S OPPOSITION

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I. INTRODUCTION

Plaintiffs seek certification of an Education Issues Class composed of over 1600 former residents of Glen Mills Schools ("GMS") and four issues classes relating to Plaintiffs' disability claims.[1] Plaintiffs challenge Defendant Pennsylvania Department of Education's ("PDE") systemic failures to ensure that all class members had access to a legally compliant quality secondary education and that students with disabilities had access to a special education system capable of conferring a free appropriate public education ("FAPE") for any student and a system to protect students from discrimination based on their disabilities.

Evidence adduced through discovery shows that PDE's common policies, practices, failures, and inaction impacted former residents on a class-wide basis. PDE does not dispute that it had little involvement in overseeing the general education provided to students at GMS but contends it had no duty or authority to act. Ex. A, PDE 30(b)(6), Clancy Dep. 86:11-22, 105:20-25; 228:10-14. For students with disabilities, PDE acknowledges that as a state education agency ("SEA") it has "general supervision" responsibilities not only to allocate funding, but to monitor local education agencies ("LEA") like Chester County Intermediate Unit ("CCIU") and to ensure provision of a FAPE to GMS students. (PDE Opp'n 6, ECF No. 197). *See* 20 U.S.C. § 1412(a)(11); 34 C.F.R. § 300.149 (2023).[2] However, PDE contends that whatever it did must have been

[1] These issues classes are: Disability Discrimination Issues Class, Special Education Issues Class, Suspected Special Education Issues Class, and Special Education Parent Issues Class. Plaintiffs seek certification of these issues classes based on "separate and discrete legal claims" pursuant to particular federal constitutional, statutory, and regulatory obligations of the Defendants. *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997); *see also D.L. v. District of Columbia*, 302 F.R.D. 1, 10 (D.D.C. 2013), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017).

[2] Although the SEA's role under the Individuals with Disabilities Education Act ("IDEA") is primarily supervisory, § 1412(a)(11)(A) charges SEA with primary responsibility to provide a FAPE to each student:

> The State educational agency is responsible for ensuring that –
> (i) the requirements of this subchapter are met;
> (ii) all educational programs for children with disabilities in the State, including all such programs administered by the State agency or local agency –

sufficient. (PDE Opp'n 5-8).

PDE's unique role and the systemic nature of GMS's and PDE's conduct, make issues class certification a superior way to proceed. There can be no question that a determination of PDE's liability involves common questions of fact and law relating to PDE's lack of oversight and supervision that applies to all class members with equal force. Because Plaintiffs challenge the education program provided to all students and allege a wholesale absence of any special education system capable of conferring a FAPE, individual facts do not predominate.

Rather, the record makes clear that common policies, practices, inaction, and failures by PDE deprived all GMS students of their legal right to a quality secondary education and deprived students with disabilities of their right to a system of special education. As in other cases involving a systemic failure applicable to all class members, adjudication of PDE's liability through a class-wide proceeding will generate common answers that will resolve multiple claims against PDE and others, significantly advancing this litigation.[3]

PDE contends that any attempt to resolve the claims asserted against it must necessarily involve hundreds of individual trials regarding the same common facts to determine both PDE's

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(I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

(II) meet the educational standards of the State educational agency[.]

20 U.S.C. § 1412(a)(11)(A). In addition, the legislative history indicates that § 1412(a)(11)(A) was included in the statute to "assure a single line of responsibility with regard to the education of handicapped children." S. Rep. No. 94-168, at 24 (1975) (citing § 1412(6), the previous location of this legislative language prior to amendment in 1997).

[3] Plaintiffs' Complaint alleges that PDE's inaction deprived: (1) school-eligible class members of their right to a quality, legally compliant secondary education in violation of their rights to due process and equal protection (Compl. (ECF No. 1) Counts III, IV, and V); (2) students with disabilities of their right to equal access to services and programs and to be free from discrimination based on disability in violation of their rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, (Compl. Counts IX and X), and (3) students with disabilities eligible for special education of their right to a special education system that identified students suspected to be eligible, was capable of ensuring a FAPE for students with disabilities, and ensured meaningful parent participation (Compl. Counts VI, VII, and VIII).

liability and damages. Such an approach is impractical, judicially inefficient, and likely to lead to inconsistent determinations regarding liability. As reflected in cases addressing a state agency's systemic inaction, PDE's liability is not predicated on individual student-specific circumstances, as is sometimes the case in litigation brought against an LEA, but is rather based on PDE's conduct common to all class members and "central to the validity of each one of the claims," which can be resolved "in one stroke," thereby justifying class treatment. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Certification of issues classes relating to claims against PDE is particularly appropriate here, under Rule 23(b)(3) and (c)(4), because predominance is satisfied: PDE's liability is based on common evidence of its conduct and facts regarding the education and special education made available to all students; thus, individual circumstances do not "overwhelm" questions common to the class. *Comcast Corp v. Behrend*, 569 U.S. 27, 34 (2013). Moreover, questions regarding damages can more easily be subject to individualized determinations at a later stage.[4] Indeed, Rule 23(c)(4) exists for such situations. *See* Advisory Committee Notes to 1966 Amendment of Rule 23(c)(4).

II. LEGAL ANALYSIS

PDE challenges class certification at every turn, contending that Plaintiffs cannot establish any of the requirements of Rule 23(a) or Rule 23(b), or the *Gates* factors. PDE's response relies heavily on Rule 23(b)(2) cases involving IDEA[5] claims against school districts where a special education system was clearly in place and a determination of liability was predicated on individual

[4] "It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013).

[5] Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* & 34 C.F.R. § 300.149.

facts. *See e.g., Blunt v. Lower Merion Sch. Dist.*, 262 F.R.D. 481 (E.D. Pa. 2009); *M.A. ex rel. E.S. v. Newark Pub. Sch.*, 2009 WL 4799291 (D.N.J. Dec. 7, 2009). PDE's analysis ignores the unique context of this case, its clear obligations as an SEA, and the overwhelming evidence of common facts, issues, and evidence.

III. PLAINTIFFS' PROPOSED CLASSES SATISFY RULE 23(a)

A. Plaintiffs' Proposed Classes are Sufficiently Numerous

PDE asserts that numerosity is not satisfied because Plaintiffs have failed to demonstrate that joinder is impracticable with respect to over 1600 former GMS students whose whereabouts are currently unknown and who likely lack the financial means to adjudicate their claims. Importantly, PDE does not question that putative class members of the Education Issues Class are directly identifiable and number over 1600, or that each issues class numbers well over 40.

As this Court has repeatedly held, joinder of a *known* number of class members far exceeding 40 is commonly sufficient to establish numerosity under Rule 23(a)(1). *See e.g., Scanlan v. Am. Airlines Grp., Inc.*, 567 F. Supp. 3d 521, 529 (E.D. Pa. 2021), *amended*, 2022 WL 1028038 (E.D. Pa. Apr. 6, 2022). This is so because courts generally presume under these circumstances that joinder would be impracticable, and judicial economy favors class adjudication. *See id.* (proposed classes of 950 and 500 pilots sufficient to establish numerosity); *Blunt*, 262 F.R.D. at 489; *see also Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir .2001). "[T]he more claimants there are, the more likely a class action is to yield substantial economies in litigation." *Butler*, 727 F.3d at 801 (citation omitted).

In contrast, evidence of impracticability need only be presented when plaintiffs seek to certify a class whose members are unknown or in "the gray area between 20 and 40." *Lloyd v. Covanta Plymouth Renewable Energy, LLC*, 585 F. Supp. 3d 646, 655 (E.D. Pa. 2022) (quoting 1 William B. Rubenstein, *Newberg on Class Actions* § 3:12 (5th ed. 2012) ("*Newberg*")); *In re*

Modafinil Antitrust Litig., 837 F.3d 238, 250 (3d Cir. 2016). Notably, the cases relied on by PDE largely involved unknown class members. *See e.g.*, *Allen v. Ollie's Bargain Outlet, Inc*., 37 F.4th 890, 900 (3d Cir. 2022) (numerosity burden not met where there was no concrete evidence, *e.g.*, surveys, videos, or complaints by patrons with disabilities, to identify number of class members who suffered ADA injuries).

Here, PDE recognizes that class members are directly known or identifiable. (PDE Opp'n 34-37). In any event, the evidence favors a finding of numerosity. First, record evidence indicates that putative class members lack the financial resources to bring individual claims. (Pls. Br., Ex. 49, Belfield Rpt. 14-19; Ex. 31, Gagnon Rpt. 9-12). In addition, many were subjected to trauma and intimidation and may fear retaliation. (Pls. Br., Ex. 39, Osher Rep. 10-11; Ex. 31, Gagnon Rep. 9-12, 26-28); *see Wallace v. Powell*, 2013 WL 2042369, at *19 (M.D. Pa. May 14, 2013) (former juveniles challenging denial of constitutional rights in court proceeding deemed unlikely to seek redress individually). Second, class members' ability and motivation to litigate as joined plaintiffs is low, as many are incarcerated. (Pls. Br., Ex. 49, Belfield Rep. 8 (8.7% of former students were incarcerated, which is greater than 20 times the general population)). Third, litigating issues of liability based on common facts applicable to all members of each class will best serve the interests of judicial economy. *See e.g.*, *In re Niaspan Antitrust Litig.*, 397 F. Supp. 3d 668, 678 (E.D. Pa. 2019) (joinder impractical for 48 direct purchasers in pharmaceutical case as individuals would be represented by dozens of attorneys leading to a multitude of summary judgment briefs espousing different arguments and additional complications at trial.).

B. Plaintiffs' Proposed Issues Classes Satisfy Commonality

As this Court explained in *Dukich v. IKEA US Retail LLC*, 343 F.R.D. 296, 306 (E.D. Pa. 2022), *appeal dismissed*, 2023 WL 4421396 (3d Cir. Apr. 17, 2023), to establish commonality "[t]he bar is not high." *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig*., 795 F.3d 380,

393 (3d Cir. 2015). A single common question is sufficient. *See Dukes*, 564 U.S. at 359. Commonality does not require "identical claims or facts among class member[s]." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 597 (3d Cir. 2012) (citation omitted). Rather, as long as all putative class members were "subjected to the same harmful conduct by defendant, Rule 23(a) will endure many legal and factual differences among the putative class members." *In re Cmty. Bank*, 795 F.3d at 397; *see Scanlan*, 567 F. Supp. 3d at 529.[6]

In *Dukes*, the Supreme Court clarified that it is not common *questions* that matter so much as the "capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." 564 U.S. at 350 (internal citation omitted). *D.L.*, 302 F.R.D. at 12. Demonstrating commonality requires proof that all class members' claims depend upon a "common contention" that is "capable of class-wide resolution," such as a companywide policy of discriminatory pay. *Dukes*, 564 U.S. at 350. Since *Dukes*, courts have similarly held that this "same injury" requirement is satisfied when all class members were subject to the same injurious conduct by the defendant. *See, e.g.*, *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) (finding commonality where inmates alleged that department of corrections engaged in policies and practices of statewide and systemic application exposing all inmates to a substantial risk of harm due to conditions of confinement and provision of healthcare); *see, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976), *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 383 (3d Cir. 2013); *Soseeah v. Sentry Ins.*, 2016 WL 7435792, at *4 (D.N.M. Sept. 6, 2016). Here, certification of issues classes to adjudicate PDE's liability—

[6] While PDE argues that Rule 23(c)(4) issues classes must satisfy strict commonality standards and are rarely certified (PDE Opp'n 15-17), courts recognize the efficiency of certifying discreet issues where, as here, plaintiffs have been subject to common policies and conduct. *See e.g., In re FieldTurf Artificial Turf Mktg. & Sales Pracs. Litig.*, 2023 WL 4551435, at *9 (D.N.J. July 13, 2023); *Lisa v. Saxon Mortg. Servs., Inc.*, 2016 WL 5930846, at *14 (E.D. Pa. Oct. 11, 2016) (quoting *In re Cmty. Bank*, 795 F.3d at 397; *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 486 (3d Cir. 2015)) ("The bar for establishing commonality is 'not high' and is 'easily met.'"); *Quiles v. Wal-Mart Stores, Inc.*, 2020 WL 1969940, at *3 (D.N.J. Apr. 24, 2020).

along with GMS and DHS—will result in common answers applicable to all class members based on common facts and legal issues relating to PDE's liability and common failure to oversee, supervise, monitor, and intervene. This is admittedly an unusual, egregious situation where the absence of core elements of a special education system give rise to systemic violations of the IDEA, Section 504, and the ADA. Under the circumstances, a class-wide liability determination is not only possible but advisable. *See e.g.*, *C.P. v. New Jersey Dep't of Educ.*, 2022 WL 3572815, at *2 (D.N.J. Aug. 19, 2022); *D.L.*, 302 F.R.D. at 12-13 (commonality satisfied where class of preschoolers with disabilities sought certification of issues classes alleging uniform practices of failing to identify and evaluate students).

1. *This Case is Distinguishable from This Court's and Similar Rulings.*

PDE contends that class certification is precluded by *Blunt*, a case in which this Court declined to certify a proposed Rule 23(b)(2) class of students with disabilities claiming violations by their LEA and seeking a remedy of class-wide compensatory education services. This Court ruled that the proposed class necessarily implicated disparate factual circumstances, requiring a "highly individualized inquiry" into each student's unique needs, when and whether the school district met a student's needs, and the proper amount of compensatory education to redress individual deficiencies. *Blunt*, 262 F.R.D. at 490.

PDE's reliance on *Blunt* is misguided. Here, in contrast, Plaintiffs seek certification of liability issues classes against PDE as an SEA under Rule 23(c)(4). Unlike an LEA, PDE has supervisory duties common to all class members that are not predicated on individual factual circumstances. Plaintiffs allege in part that PDE failed to ensure that all class members had access to a legally compliant special education system capable of providing a FAPE to all students with disabilities and protecting them against discrimination. Such liability issues may be determined class-wide, based on an evaluation of PDE's oversight common to all class members. Moreover,

unlike in *Blunt*, Plaintiffs in this case do not seek class-wide treatment of damages that would be based on individual facts. Instead, Plaintiffs only seek to resolve PDE's liability, based on facts and issues common to all class members. If liability is established, separate proceedings may be undertaken to determine the scope of damages based on a common criterion such as the length of time that class members were deprived of their educational rights.

Moreover, unlike *Blunt*, this case concerns an SEA's failure to supervise and intervene. PDE treated all students similarly. Issues regarding the nature of GMS's education program and PDE's conduct as violative of the IDEA do not require review of individualized harm at this stage. Rather, courts have recognized that harm to one child may be imputed to other children subject to the same global policy or failure to act. For example, in *Cordero v. Pennsylvania Department of Education*, the court emphasized that the state must assure that the IDEA's requirements are being fulfilled and that "the dereliction of this supervisory duty constitutes a violation of the Act in and of itself." 795 F. Supp. 1352, 1362 (M.D. Pa. 1992). "The violation of even one child's rights under the Act is sufficient to visit liability on the state. This is a proposition that has been reiterated time and again." *Id.* at 1363.[7] Here, as in *Cordero*, there is evidence of "numerous and continuing instances of children being denied their guarantee of a [FAPE]," and therefore a court is well within its power to analyze that situation and determine whether "Defendants' special education system as well as its supervision and leadership under the act are inadequate and to order injunctive relief to fix the problems." *Cordero*, 795 F. Supp. at 1363.

[7] *See e.g.*, *Honig v. Doe*, 484 U.S. 305 (1988); *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 696-97 (3d Cir. 1981); *Lester H. v. Gilhool*, 1989 WL 136303 (E.D. Pa. Nov. 9, 1989), *aff'd*, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 499 U.S. 923 (1991).

2. *Commonality Exists Regarding the Education Issues Class.*

Plaintiffs' proposed Education Issues Class alleges that PDE is liable for its admitted failure to oversee or monitor in any way the provision of general education to students at GMS. Plaintiffs contend that all students were deprived of their state statutory right to a secondary education without any due process and in violation of their equal right to obtain a secondary education as a non-resident student residing at GMS. With respect to this equal protection claim, Plaintiffs allege that PDE completely failed to monitor GMS's general education program and treated students at GMS differently than other non-resident students because GMS was a private residential rehabilitative institution ("PRRI") and PDE believed that GMS alone was "[redacted]."[8] (Ex. A, PDE 30(b)(6), Clancy Dep. 86:7-22, 103:15-104:8; 231:9-25). In contrast, adjudicated youth in other residential facilities are recognized as "[redacted]," (*id.* at 75:7-14), and trial evidence will show that these programs receive additional state oversight. (Ex. C, Riccio Dep. 64:7-70:12).

Resolving the four proposed issues for the Education Issues Class relating to Counts III and IV, (*see* Pls. Br. 50), requires consideration of the many common facts, legal issues, and evidence applicable to all class members, including:

(i) whether PDE had a duty to provide oversight or monitoring of the general education program at GMS;

(ii) whether the GMS education program failed to meet the requirements of Pennsylvania and federal law through common deficiencies applicable to all, including, but not limited to:

[8] PDE's wholesale deference to GMS was particularly concerning given that GMS believed "[redacted]." Ex. 40, GMS 30(b)(6), Pikes Dep. at 355:1-10; *see also* Ex. B, Nov. 11, 2017 Email from Denise Banks to Rema Pikes, GMSCA0269580 ("[redacted]").

- a lack of access to an accessible state-mandated secondary curriculum (*See* Pls. Br., Ex. 28, GMSEDU0115596-684 ("2019 Education Playbook") 11; Ex. 31, Gagnon Rpt. 28-31;

- a lack of qualified, trained educators (*See, e.g.*, Pls. Br., Ex. 28, Education Playbook 3; Ex. 29, Chobany Dep. 83:4-20; Ex. 5, Cosgrove Dep. 89:1-3); and

- insufficient instructional hours (*See* Pls. Br., Ex. 28, 2019 Education Playbook at 11; Ex. 32, McNeal Dep. 61:3-22);

(iii) whether PDE discriminated against students at GMS by depriving them of a quality secondary education without a compelling state interest, including by maintaining:

- policies of failing to inspect, oversee, and monitor the general education program at GMS (*See* Ex. A, PDE 30(b)(6), Clancy Dep. 86:11-22, 105:20-25, 228:10-14);

- policies and practices of failing to inspect, oversee, and monitor CCIU as the LEA of GMS (*See* Pls. Br., Ex. 42, PDE 30(b)(6), Clancy Dep. 221:13-225:8, 230:6-9, 245:12-249:2);

- policies and practices approving GMS consent to minors taking the GED exam, (*See* DHS's Opposition to Plaintiffs Motion for Class Certification (ECF No. 198), Ex. 2, PDE Resp. & Objs. to Pls.' First RFAs, Nos. 10 & 11); 22 Pa. Code § 4.72; and

(iv) whether students subjected to GMS's education program were harmed.

Contrary to PDE's repeated assertions, the facts at issue here—unlike the cases relied on by PDE—are not widely divergent. Rather, the record discloses that all students were deprived of a legally compliant secondary education and that all students were deprived of access to a state-mandated secondary curriculum and in-person instruction provided by trained or qualified educators, and that their learning was undermined by a culture of abuse and intimidation. (*See,* Pls. Br., Ex. 39, Osher Pt. 8-9, 13-16). Common facts apply to all class members.

3. *Commonality Exists for Special Education and Disability Issues Classes.*

PDE contends that its supervisory obligations are extremely limited and CCIU as the LEA was responsible for monitoring and ensuring a FAPE for students with disabilities at GMS. (PDE Opp'n 3-6). But it is well established that PDE had a significant responsibility to ensure putative

class members with disabilities (comprising over 40% of the Education Issues Class) had access to a FAPE. (*See* Pls. Br., Ex. 31, Gagnon Rpt. 15); *see, e.g.*, *Cordero*, 795 F. Supp. at 1362 ("It is the state's obligation to ensure that the systems it put in place are running properly and that if they are not, to correct them."); *Muth v. C. Bucks Sch. Dist.*, 839 F.2d 113, 129 (3d Cir. 1988), *rev'd on other grounds*, 491 U.S. 223 (1989) ("[T]he state agency is required to provide that education by contract or otherwise."); *Kruelle v. New Castle Cty. Sch. Dist*., 642 F.2d 687, 696-97 (3d Cir. 1981); *Battle v. Pennsylvania*, 629 F.2d 269, 278 (3d Cir. 1980); *L.L. By & Through B.L. v. Tenn. Dep't of Educ*., 2019 WL 653079, at *4-5 (M.D. Tenn. Feb. 15, 2019) (rejecting argument that a child is limited to suing his LEA and not the SEA).

Moreover, PDE can be held independently liable for CCIU's systemic violations, meaning its liability remains unaffected even after CCIU's dismissal. *See Pachl v. Seagren*, 453 F.3d 1064, 1070 (8th Cir. 2006) ("[O]ur court has suggested that 'systemic violation' of the State's responsibilities under the IDEA might give rise to state liability."); *St. Tammany Par. Sch. Bd. v. State of La.*, 142 F.3d 776, 784 (5th Cir. 1998) ("[B]oth the language and the structure of IDEA suggest that either or both [the SEA and LEA] may be held liable for the failure to provide a [FAPE], as the district court deems appropriate after considering all relevant factors."); *Gadsby ex rel. Gadsby v. Grasmick*, 109 F.3d 940, 953 (4th Cir. 1997) ("[T]he SEA is ultimately responsible for the provision of a [FAPE] to all of its students and may be held liable for the state's failure to assure compliance with IDEA.").[9] In addition, independent of an LEA, an SEA can be held liable

[9] *See J.M. v. Dickson Cty. Sch. Dist.*, 2017 WL 11671746 at *5 (M.D. Tenn. Dec. 14, 2017) ("Th[e]se systemic, state-level failures are relevant not only to [the child's] past deprivations but whether he can expect, with any confidence, to receive a FAPE going forward. The defendants are therefore appropriate parties to the case . . . ."); *Morgan Hill Concerned Parents Ass'n v. Ca. Dep't of Educ.*, 258 F. Supp. 3d 1114, 1125 (E.D. Cal. 2017) (noting that the IDEA's "choice of words suggests Congress . . . anticipated private suits in response to statewide, systemic failures in the education of students with disabilities"); *Kalliope R. ex rel. Irene D. v. N.Y. State Dep't of Educ.*, 827 F. Supp. 2d 130, 141 n.3 (E.D.N.Y. 2010)

for compensatory education as a remedy for its failures under the IDEA. *See e.g.*, *Gadsby*, 109 F.3d at 955.[10]

Special Education Issues Class. Common questions of law and fact exist with respect to the Special Education Issues Class, which challenges PDE's failure to fulfill its supervisory obligations to ensure that GMS students with disabilities had access to a system capable of providing a FAPE. This issues class focuses on:

(i) whether PDE had a duty to ensure that GMS had a system to provide individualized special education services to students with disabilities;

(ii) whether PDE met its obligations under the IDEA, including by, but not limited to:

- Identifying, investigating, and addressing multiple documented system-wide deficiencies in GMS's special education system, including:
  - The global failure of CCIU as the LEA to participate in IEP meetings as required by the IDEA, preventing all parents from working with the LEA to address any students' needs (Pls. Br., Ex. 43, CCIU 30(b)(6), Ewing Dep. 92:22-93:1; Ex. 44, CCIU Response to Pls.' Interrogatory No. 11; Ex. 31, Gagnon Rpt. 42-43);
  - the global failure to modify or differentiate the online PLATO program to provide specially designed instruction (*See* Pls. Br., Ex. 32, McNeal Dep. 49:4-50:24; Ex. 31, Gagnon Rpt. 31-32);
  - the global failure to provide individualized determinations of services (Pls. Br., Ex. 40, GMS Special Ed. 30(b)(6), Pikes Dep. 263:17-264:4; Ex. 31, Gagnon Rpt. 45);

(noting that the SEA "is a proper defendant in this action, which challenges a [state] policy that allegedly interferes with the IEP development process for disabled students in a systemic manner"); *Fetto v. Sergi*, 181 F. Supp. 2d 53, 72 (D. Conn. 2001) ("The [SEA] is a proper party to actions involving claims of systemic violations of the IDEA . . . ."); *Corey H. v. Bd. of Educ. of City of Chicago*, 995 F. Supp. 900, 913 (N.D. Ill. 1998) ("[C]ourts have found that the [SEA] is responsible for a local school district's systematic failure to comply with an IDEA mandate.").

[10] PDE also suggests that the fact that the U.S. Department of Education monitors PDE and issues an annual certificate of IDEA compliance is dispositive and negates any finding of liability. (PDE Opp'n 8). This is simply incorrect. As other courts have properly observed, the IDEA authorizes parents to assert claims for IDEA violations and requires courts to review and consider whether an SEA failed to fulfill its duties in violation of the law. There is no authority for the notion that a federal agency's monitoring precludes or limits a court's clear independent authority in any way. *See e.g.*, *Corey H.*, 995 F. Supp.at 915-17 (rejecting SEA's argument that the court could not "second-guess" federal approval of SEA's monitoring policies).

- relying on untrained GMS counselor-teachers to provide specially designed instruction (*See* Pls. Br., Ex. 5, Cosgrove Dep. 89:1-3; Ex. 40, GMS Special Ed. 30(b)(6), Pikes Dep. 117:4-119:2; Ex. 33, Powell Dep. 188:15-190:17);
- the global failure to provide individualized behavior plans (Pls. Br., Ex. 45, MacLuckie Dep. 207:9-22; Ex. 40, GMS Special Ed. 30(b)(6), Pikes Dep. 273:12-19); and
- the failure to provide related services (*See* Pls. Br., Ex. 40, GMS Special Ed. 30(b)(6), Pikes Dep. 261:3-7; Ex. 31, Gagnon Rpt. 49-51);

- Conducting only one GMS site visit every six years and reviewing only 10 sample IEPs (*See* Pls. Br., Ex. 42, PDE 30(b)(6), Clancy Dep. 42:15-18, 46:11-14, 264:9-23, 267:13-269:4);
- Failing to review, intervene, investigate, and issue corrective actions in response to GMS data regarding classroom physical restraints (*See* Ex. A, PDE 30(b)(6), Clancy Dep. 223:11-224:20);[11] and

(iii) whether students with disabilities are entitled to relief from PDE for its failure to provide oversight.

Suspected Special Education Issues Class. Similarly, common issues of fact and law exist with respect to issues for the Suspected Special Education Issues Class, including:

(i) whether PDE's policies and practices failed to ensure that GMS identified, evaluated, or served students with suspected disabilities by

- Failing to monitor how often GMS identified and evaluated any student suspected to be eligible for special education services (Pls. Br., Ex. 40, GMS Special Ed. 30(b)(6), Pikes Dep. 252:4-254:2, 355:24-356:10);
- Failing to monitor whether GMS had any system in place to identify and evaluate students with disabilities (Pls. Br. Ex. 40, GMS Special Ed. 30(b)(6), Pikes Dep. 252:4-254:2, 274:18-21, 340:22-343:20, 355:24-356:10; Ex. 31, Gagnon Rpt. 38-42); and
- Failing to monitor whether staff were trained on how to identify students suspected to be eligible for an evaluation (Pls. Br. Ex. 33, Powell Dep. 139:24-141:18); and

[11] PDE admits that it "collects and monitors data on classroom physical restraints" and "may" investigate and issue corrective actions in response to "serious instances" relating to restraints. (PDE Opp'n 2). However, PDE contends that it fulfilled any responsibilities merely by having a restraint reporting system in place, in which GMS reported to PDE, even if no further action was ever taken. (*See Id.*).

(ii) whether students with suspected disabilities are entitled to relief from PDE.

Special Education Parents Issues Class. Plaintiffs seek certification of the following two issues, which also include common issues of law and fact:

(i) whether PDE's policies and practices failed to ensure a system that allowed for meaningful parental participation in the special education decision making process for students with disabilities at GMS, including, but not limited to:

- failing to monitor meaningful parent participation at GMS (*See* Pls. Br. Ex. 42, PDE 30(b)(6), Clancy Dep. at 42:15-18, 46:11-14, 264:9-23, 267:13-269:4);
- failing to monitor how frequently GMS made special education decisions without any parent input (*See*, *e.g.*, Pls. Br. Ex. 40, GMS Special Ed. 30(b)(6), Pikes Dep. at 217:8-219:3, 238:20-239:19);
- failing to issue any corrective actions relating to GMS' failure to conduct evaluations, Ex D, Corrective Action Report, GMS0604132-GMS0604163; and

(ii) whether parents of students with disabilities are entitled to relief from PDE.

Unlike the cases relied on by PDE, the evidence adduced through discovery revealed the wholesale absence of a legally compliant special education system. Each of the proposed special education-related issues classes focus on PDE's common conduct and failure to oversee the program at GMS based on common facts and evidence applicable to all class members.

Disability Discrimination Issues Class. The ADA and Section 504 claims asserted against PDE as the SEA are viable. *See, e.g.*, *C.G. v. Pa. Dep't of Educ.*, 734 F.3d 229, 235 (3d Cir. 2013).[12] Plaintiffs seek certification of issues for the Disability Discrimination Issues Class, defined by the common issues, facts, and evidence:

[12] A plaintiff can prove a violation under the Rehabilitation Act where a student is disabled as defined by the Act; (2) "otherwise qualified" to participate in school activities; (3) the school receives federal financial assistance; and (4) the student was excluded from participation in, denied the benefits of, or subject to discrimination at school. *Andrew M. v. Delaware Cty. Off. of Mental Health & Mental Retardation*, 490 F.3d 337, 350 (3d Cir. 2007) (citation omitted).

(i) whether PDE's common policies and practices of failing to provide any supervision of GMS's program discriminated against class members based on disability, including, but not limited to:

- failing to monitor GMS to ensure that it had any system in place to identify or accommodate students with qualifying disabilities pursuant to Section 504 Plans (Ex. A, PDE 30(b)(6), Clancy Dep. 165:16-188:24);
- failing to track the performance of students with disabilities (Ex. A, PDE 30(b)(6), Clancy Dep. 165:16-188:24; Pls. Br., Ex. 43, CCIU 30(b)(6) Ewing Dep. 133:14-134:6);
- failing to monitor behavioral systems implemented for all students to ensure they did not discriminate against students with qualifying disabilities (Ex. A, PDE 30(b)(6), Clancy Dep. 221:13-225:8);
- failing to review GMS's education polices to ensure that students with qualifying disabilities were able to access education free from disability-based discrimination (Pls. Br. 11-14);
- failing to review GMS's policies and practices to ensure they were modified for students with qualifying disabilities (Ex D, Corrective Action Report, GMS0604132-GMS0604163); and
- failing to issue corrective actions relating to disability discrimination;

(ii) whether PDE owed a duty to students with qualifying disabilities; and

(iii) whether PDE breached any duty it owed to students with qualifying disabilities.

Because the Disability Discrimination Issues Class, like other issues classes, is based on PDE's common course of conduct and inaction applicable to all class members, commonality is satisfied. *See V.W. by & through Williams v. Conway*, 236 F. Supp. 3d 554, 575 (N.D.N.Y. 2017) (certification granted based on common conduct 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"). The specifics of each putative member's disability are irrelevant, as Plaintiffs must only "demonstrate that the systemic challenge is equally important to the named Plaintiffs as to the unnamed Plaintiffs." *C.G.*, 2009 WL 3182599, at *6.

Unlike those PDE relies on, this is not a case where individualized facts are determinative and "so widely divergent" as to warrant adjudication on an individualized basis. *Cf. Mielo v. Steak 'n Shake Ops., Inc*., 897 F.3d 467, 490 (3d Cir. 2018) (reversing certification of nationwide class alleging inaccessibility of parking lots in over 400 different locations). In this case, as in *C.P.*, Plaintiffs' common questions of liability predominate as any difference in the class members' individual circumstances have practically no effect on a determination of PDE's liability because the alleged "acts and omissions" of PDE are not specific to any particular Plaintiff. 2022 WL 3572815, at *2, at *6 (quoting *Raymond v. Rowland*, 220 F.R.D. 173, 180 (D. Conn. 2004)). Here, claims regarding liability are capable of proof through common evidence and individual damages can be measured later through a common methodology. *Wallace*, 2013 WL 2042369, at *17.

C. Plaintiffs Satisfy Typicality and Adequacy

Named Plaintiffs satisfy typicality and adequacy under Rule 23(a) because their claims are "typical of the claims or defenses of the class" and they "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(3)-(4). Named Plaintiffs' settlement with CCIU has not altered their claims against PDE, which are "the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory." *In re Schering Plough Co. ERISA Litig.*, 589 F.3d 585, 599 (3d Cir. 2009). In addition, Named Plaintiffs are not "subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation," and their "interests and incentives . . . [are] sufficiently aligned with those of the class." *Id.* The Third Circuit "has embraced a liberal approach to establishing typicality: '[i]f a plaintiff's claim arises from the same event, practice or course of conduct that gives rises to the claims of the class members, factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class.'" *Lloyd*, 585 F. Supp. 3d at 646 (citing *Marcus*, 687 F.3d at 598).

Courts have set a "low threshold" for typicality. *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 271 n.4 (3d Cir. 2021); *see also In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 428 (3d Cir. 2016). While, here, the factual circumstances underlying Named Plaintiffs' claims against PDE are markedly similar to the class, "'[e]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories' or where the claim arises from the same practice or course of conduct." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998) (citation omitted); *see also C.G.*, 2009 WL 3182599, at *6-7 (holding that typicality requirement was satisfied in case challenging PDE's funding of special education and finding that "to the extent only some or not all students are denied" the education due to them "under the various statutes," that "is a commentary on the merits of the claim, rather than on whether the claims Plaintiffs assert are typical of those experienced by the entire class"). In addition, PDE has not met its "burden of establishing that the representative plaintiffs will not adequately represent the class," as Named Plaintiffs have been vigorously pursuing their claims against PDE and there is no evidence that they "have interests antagonistic to those of the class." *Kerrigan v. Phila. Bd. of Election*, 248 F.R.D. 470, 477 (E.D. Pa. 2008) (citation omitted).

1. *Named Plaintiffs' PDE Claims Are Not Affected by the CCIU Settlement.*

Named Plaintiffs vigorously represented the class in asserting and pursuing viable claims against PDE that have not been rendered moot by the settlement with CCIU. *See, e.g., Corey H. v. Bd. of Educ. of City of Chicago*, 995 F. Supp. 900, 905, 9s12 (N.D. Ill. 1998) (distinguishing between the obligations of the SEA and LEA in special education programming decisions when plaintiffs had settled with the LEA). Independent of CCIU as the LEA, PDE as the SEA has a duty to "administer all of the laws of this Commonwealth with regard to the establishment, maintenance, and conduct of the public schools," 71 Pa. Stat. and Cons. Stat. Ann. § 352(a) (West

1963), and to "oversee[] all public school districts, IUs, charter schools, cyber charter schools, career and technology centers (CTC), and vocational technical schools, among other components of Pennsylvania's system of public education." *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 294 A.3d 537, 548 (Pa. Commw. Ct. 2023). As discussed above, courts have consistently found that the SEA has an overarching responsibility to ensure students' statutory rights are protected, regardless of the actions of local school districts. *See Cordero*, 795 F. Supp. at 1362 ("the fact that local agencies are not performing up to par . . . becomes irrelevant . . . [i]t is the state's obligation to ensure that the systems it put in place are running properly and that if they are not, to correct them"); *see also Gadsby*, 109 F.3d at 955 (4th Cir. 1997) (holding that the "language and the structure of IDEA" indicate that either the LEA or SEA, or both, may be held liable for equitable remedies, including reimbursement, for the failure to provide a student a FAPE).

Because PDE has its own obligation to Named Plaintiffs under Counts III-X, Named Plaintiffs' release and waiver of CCIU's obligations under the settlement do not extinguish these claims against PDE or impact Plaintiffs' ability to represent the class. *See Corey H.*, 995 F. Supp. at 903; *see also Cordero*, 795 F. Supp. at 1362. In fact, Named Plaintiffs have vigorously pursued these claims since this Court's order voluntarily dismissing CCIU on February 17, 2023—for example, by submitting expert opinions regarding PDE's failure to fulfill its obligation to provide a FAPE to the class and participating in multiple expert depositions.

Moreover, the CCIU settlement did not alter the similarities between the legal theories and factual circumstances of Named Plaintiffs' claims and those of the class. As described in greater detail below, PDE failed to ensure a system existed to provide Named Plaintiffs with a FAPE free from discrimination, just as it did for all putative class members.

2. *Named Plaintiffs Are Not in Conflict with the Issues Class Members.*

The CCIU settlement does not create a conflict between Named Plaintiffs' claims and those of absent class members, for two key reasons: (i) Named Plaintiffs have not abandoned any claims against PDE via the voluntary dismissal of CCIU; and (ii) under the terms of the CCIU settlement, both Named Plaintiffs and the other putative class members will only receive partial relief for the educational deprivation and discrimination experienced at GMS. (*See* ECF No. 149-1 ("CCIU Settlement") 7, 9-10, 16, 14, 20 ("The Parties further acknowledge and agree that the awards provided to individual students pursuant to this Agreement in the form of compensatory education services and education damages are wholly insufficient to compensate Former Students, including Named Plaintiffs, for the injuries and harm they sustained and the deprivation of education Former Students experienced while residing at Glen Mills Schools and accordingly additional relief, compensation and remediation is needed but shall be sought from parties other than CCIU")).

First, all class members are eligible to submit claims for compensatory education under the CCIU settlement on account of their enrollment in GMS during the relevant time period. (CCIU Settlement, 2). The Named Plaintiffs' "automatic eligibility" is solely due to information already in CCIU's possession regarding their enrollment dates and prior sworn statements on exposure to abuse and not to some factor that, PDE suggests, renders them dissimilar to the absent class members. (CCIU Settlement, 7-8; PDE Opp'n 14). The CCIU settlement provides a total of $1,350,000 in compensatory education and $1,350,000 in damages for the nearly 1600 eligible class members. (CCIU Settlement, 6, 13). All of the student class members are eligible claimants under the terms of the settlement. (*Compare* CCIU Settlement, 2 (definition of Former Student), *with* Pls. Br. 50, 53, 56, 61). Although there is a process for allocating awards under the settlement, (CCIU Settlement, 9-10, 16), those awards will all be reduced *pro rata* depending on the number of claimants. (CCIU Settlement 9-10, 16). Named Plaintiffs receive the same treatment.

For example, if all of the class members submit claims, based on the *pro rata* reductions, individual awards would be less than $1000 in damages and 20 hours of compensatory education, including for Named Plaintiffs. This is far less than the relief required to compensate Named Plaintiffs and the class members for PDE's violations. (CCIU Settlement, at 20; Pls. Br., Ex. 31, Gagnon Rpt. 64-65, Ex. 49, Belfield Rep. 19-20); *see G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 626 (3d Cir. 2015) (compensatory education awards are calculated "for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem") (citation omitted); (*see, e.g.*, Pls. Br., Ex. 49, Belfield Rep. 16-17 and Table A1 (average length of stay at Glen Mills was 9.7 months)).

PDE relies on inapposite case law for its argument that a student cannot recover compensatory education from both an LEA and an SEA. (*See* PDE Opp'n 32-33). In PDE's cases, the plaintiff student did not assert separate claims against the SEA, but instead sought to recover from an SEA after the LEA was unable to provide relief for *its own* violations under the IDEA. For example, in *Charlene R. v. Solomon Charter School*, the student sought relief from PDE after the student's former charter school (the LEA) ceased operations and could not fund the compensatory education it owed for its own violations under the IDEA. 63 F. Supp. 3d. 510, 514 (E.D. Pa. 2014). PDE's cases and holdings are distinct from this action, in which Plaintiffs seek equitable remedies from the SEA based on deprivations created by its own policies and practices—remedies courts have "broad discretion" to award. *See, e.g.*, *Cordero*, 795 F. Supp. at 1364.

In addition, contrary to PDE's claims, the voluntary dismissal of CCIU has not placed Named Plaintiffs in conflict with absent class members on account of the release of tolled education claims. PDE cites no authority holding that a conflict exists with respect to one defendant when plaintiffs voluntarily dismiss claims against a separate defendant on terms that all class

members can access equally. (*See* PDE Opp'n 31) (citing *Pearl v. Allied Corp*., 102 F.R.D. 921, 923-24 (E.D. Pa. 1984), and *Mielo v. Bob Evans, Inc.*, 2015 WL 1299815, at *11 (W.D. Pa., 2015)). In *Mielo*, the court found a lack of typicality and in *Pearl*, a lack of adequacy, due to the plaintiffs' abandonment of "certain claims that may be available and advantageous to the absent putative class members" with respect to the *same* defendant against whom they were seeking class certification. *Mielo*, 2015 WL 1299815 at *9; *see also Pearl*, 102 F.R.D. at 923. Neither of these cases involved multi-party litigation for which claims were alleged against each defendant separately. Indeed, any concerns that absent class members' claims would be precluded are nonexistent with respect to PDE. Moreover, a class member who does not agree to the settlement terms offered by CCIU is free to pursue claims against CCIU as well.

Moreover, the nature of the issues to be certified is another reason why no conflict exists. Named Plaintiffs are not seeking certification of the damages issue as it is one that requires an individual determination and, unlike the issues that have been proposed for certification, is not suitable for class treatment under Rule 23(c)(4). If absent class members do not submit claims for compensatory education under the CCIU settlement, this may only change the *amount* of compensatory education owed to them by PDE—that is, it only affects damages. *See, e.g.*, *Scott C. by & through Melissa C. v. Riverview Gardens Sch. Dist*., 19 F.4th 1078, 1083 (8th Cir. 2021) (SEA and LEA are joint and severally liable for education violation).

Second, while the CCIU settlement has the potential to provide Named Plaintiffs and all class members with *some* relief, it will be partial and not sufficient to compensate for the harm caused by PDE. *See Corey H.*, 995 F. Supp. at 903 (SEA liable for role in LEA's inappropriate special education programming, despite LEA settlement); *see also Scott C.*, 19 F.4th at 1083 (affirming district court's decision to hold SEA jointly and severally liable with the LEA for

attorneys' fees in education matter involving homeless students). For these reasons, Named Plaintiffs are not in conflict with issues class members.

3. *Named Plaintiffs' Claims Against PDE Are Typical of the Issues Classes.*

Named Plaintiffs are typical representatives of each of the issues classes proposed for certification based on PDE's common failure to ensure that a system existed to provide a legally compliant education, which is "the same unlawful conduct which affects both the named plaintiffs and the putative class." *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994); *see also Lloyd*, 585 F. Supp. 3d at 656 (class representatives claims must arise out of the "same event, practice or course of conduct" as the class) (citation omitted); *C.G.*, 2009 WL 3182599, at *6-7 (to satisfy typicality, plaintiffs need not show whether the conduct denied them an appropriate education or whether "all class members are affected [by the unlawful conduct] in the same way or to the same extent"). Here, Named Plaintiffs' claims against PDE arise out of the same course of PDE conduct: the failure to adequately oversee and monitor the education system for students at GMS.

Education Issues Class. Named Plaintiffs Derrick, Walter, and Thomas, along with all the Education Issues Class members, were similarly harmed by PDE's discriminatory conduct and failure to provide oversight or monitoring to ensure that the one-size virtual PLATO program provided a legally compliant education in accordance with Pennsylvania law. (*See, e.g.*, Ex. E, Derrick Dep. II 113:7-119:6; Ex. F, Thomas Dep. 121:3-122:19; Ex. G, Walter Dep. 114:4-115:1; *see also* Pls. Br. 8-11). Named Plaintiffs were placed at GMS, where they were subject to the PLATO system as the primary education platform, which PDE [redacted]. (Pls. Br., Ex. 42, PDE 30(b)(6), Clancy Dep. 228:10-14).

In addition, PDE discriminated against Named Plaintiffs and class members by failing to oversee or monitor the general education system at GMS, a PRRI, unlike other similar residential

placements for adjudicated youth that were not PRRIs. (*See* Pls. Br., Ex. 42, PDE 30(b)(6), Clancy Dep. 82:19-86:22; 103:15-104:8; 231:9-25). PDE allowed GMS as a PRRI to be "[redacted]," (*id.* at 86:7-22), while the education of students in other residential facilities for adjudicated youth "[redacted]." (*Id.* at 75:7-14). Because the legal theories underlying the Education Issues Class involve PDE's failure to oversee a general education program that was inadequate for *any* student, including those with disabilities, factual differences arising from Derrick's and Walter's disability status are irrelevant. *See In re Prudential*, 148 F.3d at 311; *see also* 34 C.F.R. § 300.17 (2023) (defining "[FAPE]" to include the "standards of the SEA"); 20 U.S.C. § 6311(b)(1)(B) (requiring each state to apply the same challenging academic content and achievement standards to all schools and all children within the state, including children with disabilities). Named Plaintiffs are typical of all members of the Education Issues Class.

Disability Discrimination Issues Class. Named Plaintiffs Derrick and Walter, along with all the Disability Discrimination Issues Class members, were subject to PDE's unlawful conduct—namely, the discriminatory failure to oversee and monitor GMS's education system. *See, e.g.*, Ex. E, Derrick Dep., Vol II, 127:12-130:10; Ex. G, Walter Dep. 95:5-13, 119:14-120:3. Derrick and Walter are students with qualifying disabilities to whom PDE owed a duty to ensure they were not discriminated against based on their disabilities while at GMS. Pls. Br. 15-17; Ex. E, Derrick Dep., Vol II, 127:12-130:10; Ex. G, Walter Dep. 95:5-13, 119:14-120:3; *see also, e.g.*, *C.G*, 734 F.3d at 235 (citing *Hornstine v. Twp. of Moorestown*, 263 F. Supp. 2d 887, 901 (D.N.J. 2003)) (holding "the IDEA provides a remedy for 'inappropriate educational placement decisions, regardless of discrimination,' while the ADA and RA prohibit and provide a remedy for discrimination").

PDE has admitted [redacted]. (Pls. Br., Ex. 42, PDE 30(b)(6), Clancy Dep. 165:16-188:24 ([redacted]). PDE wrongly characterizes Named Plaintiffs' claim as stemming solely from a "denial of FAPE," when in fact they involve the wholesale failure to ensure that GMS did not discriminate against students on the basis of their disabilities. *See* Pls. Br. 11-14. Named Plaintiffs Derrick and Walter are plainly typical.

Special Education Issues Class. Named Plaintiffs Derrick and Walter, along with all the Special Education Issues Class members, were subject to PDE's failure to ensure that GMS had a system for the provision of special education, which it did not. (*See, e.g.*, Ex. E, Derrick Dep., Vol. II 125:23-130:10, 304:2-5; Ex. G, Walter Dep. 120:6-121:4; Ex. 31, Gagnon Rep. at 42-52, 59-64 ("[redacted]")). Derrick and Walter were students eligible under the IDEA for whom PDE owed a duty to ensure they received a FAPE. (*See, e.g.*, Pls. Br., Ex. 58, Walter IEP; Ex. 57, Derrick IEP); *see Cordero,* 795 F. Supp. at 1362 ("The state must assure that in fact the requirements of the IDEA are being fulfilled. . . . [T]he dereliction of this supervisory duty constitutes a violation of the Act in and of itself"); *see also Gadsby,* 109 F.3d at 953 ("[T]he SEA is ultimately responsible for the provision of a [FAPE] to all of its students and may be held liable for the state's failure to assure compliance with IDEA"). PDE's lack of oversight failed to ensure that GMS had a system to provide special education as required under federal and state law. (Pls. Br. 15-17; Ex. 31, Gagnon Rep. 59-64). The factual differences in the experiences of Derrick and Walter—for example, that they participated in different educational tracks, (*see, e.g.*, Pls. Br., Ex. 59, Walter Education Plan Summary; Ex. 56,

Derrick Education Plan Summary)—are not relevant to the legal theory underlying the claims of the Special Education Issues Class, as all members were subject to GMS's wholesale lack of a system for the provision of special education. (*See* Pls. Br. 15-17). Named Plaintiffs Derrick and Walter are typical of all those in the Special Education Issues Class.

Suspected Special Education Issues Class. Named Plaintiff Thomas, along with all members of the Suspected Special Education Issues Class, was equally subject to PDE's failures. (*See, e.g.*, Ex. H, Michelle Dep. 170:3-172:14; Ex. A, PDE 30(b)(6), Clancy Dep. 261:4-11; *see also* Pls. Br. 15-17). The IDEA required PDE to ensure that GMS identified, evaluated, and served members of the Suspected Special Education Issues Class. *See, e.g., Cordero*, 795 F. Supp. at 1362. Although Thomas [redacted]. (Ex. H, Michelle Dep. 286:2-23; Pls. Br., Ex. 31, Gagnon Rpt. 42). Nevertheless, PDE did not ensure that there was a system at GMS for identification and evaluation of special education needs. The individual factual circumstances experienced by Thomas, as well as the other issues class members, have no effect on PDE's failure to ensure that GMS had a system in place for initial evaluations, which it did not. (Pls. Br., Ex. 31, Gagnon Rpt. 38-42; Ex. 40, GMS Special Ed. 30(b)(6), Pikes Dep. 252:4-254:2, 355:24-356:10).

Special Education Parent Issues Class. Named Plaintiffs Tina and Janeva, along with all members of the Special Education Parent Issues Class, were subject to PDE's failures. (Ex. I, Tina Dep. 218:24-220:2, 379:9-390:24; Ex. J, Janeva Dep. 277:7-282:9, 380:11-381:13; Pls. Br. 15-16). PDE had an obligation to ensure that GMS ensured meaningful parental participation for members of the Special Education Parent Issues Class under the IDEA. *See, e.g., Cordero*, 795 F. Supp. at 1362. The individual factual circumstances experienced by Tina and Janeva and the other issues class members have no effect on PDE's failure to ensure that GMS had a system in place

for meaningful participation, which it did not. (Pls. Br. 15-17; *id.*, Ex. 40, GMS Special Ed. 30(b)(6), Pikes Dep. at 238:20-239:19, 217:8-219:3; *id.*, Ex. 31, Gagnon Rpt. 44).

IV. PLAINTIFFS' PROPOSED CLASSES SATISFY RULE 23(c)(4)

Certification under Rule 23(c)(4) is appropriate where liability is capable of class-wide treatment even where damages claims are not. This is precisely the scenario presented here. Plaintiffs offer common theories of liability for which class-wide treatment is apt. Specifically, Plaintiffs allege that PDE failed to fulfill their duties and responsibilities as the supervising agency under federal disability law and as the SEA charged with broad duties to ensure that students at GMS received a secondary education. *See* 71 Pa. Stat. and Cons. Stat. Ann. § 352(a) (West 1963) (explaining PDE's duty to "administer all of the laws of this Commonwealth with regard to the establishment, maintenance, and conduct of the public schools"); *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 294 A.3d 537, 548 (Pa. Commw. Ct. 2023) (explaining PDE's role as overseeing various types of public schools and "other components of Pennsylvania's system of public education.").

A. Plaintiffs' Proposed Classes "Fit" Within Rule 23(b)(3)

Under Rule 23(b)(3), a court may certify a class where it "finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The issues classes proposed here satisfy Rule 23(b)(3)'s requirements.

B. Common Questions Predominate

When considering the predominance requirement in the context of an issues class, the Third Circuit follows the "broad view" that issues class certification is appropriate "even where predominance has not been (or cannot be) satisfied for the cause of action as a whole." *Russell*, 15

F.4th at 274. The predominance inquiry is satisfied with respect to an issues class where each of the proposed issues "would not require 'individualized review' in order to dispose of them. *See C.P.* 2022 WL 3572815, at *12 (quoting *Buck v. Am. Gen. Life Ins. Co.*, 17-cv-13278, 2021 WL 733809 (D.N.J. Feb. 25, 2021)). As the United States Supreme Court has emphasized:

> When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."

Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016); *see also Rapuano v. Trustees of Dartmouth Coll.*, 334 F.R.D. 637, 646 (D.N.H. 2020) (collecting cases in which plaintiffs have raised a common contention under the *Walmart* "same injury" test).

Courts have therefore found predominance in a wide variety of cases where individual inquiries are still required to determine eligibility for recovery. *See e.g., Gair v. Great Star Tools USA, Inc.*, 2023 WL 5985265, at *6 (M.D. Pa. Sept. 14, 2023) (finding predominance to adjudicate whether 400 employees were protected by applicable law although individual defenses and fact-specific damages would be required); *In re Flint Water Cases*, 499 F. Supp. 3d 399, 424 (E.D. Mich. 2021) (finding predominance supporting preliminary settlement certification where case involved thousands of individual plaintiffs alleging exposure to lead, legionella, and other contaminants from Flint's municipal water supply).

In its Opposition, PDE argues that Plaintiffs "cannot establish" predominance on the ground that any litigation regarding liability will be based on a "highly individualized" analysis of each class member's circumstances. In asserting this argument, PDE relies on cases that are distinguishable as they rejected class certification of entire disputes under Rule 23(b)(2), and focused on the role of LEAs rather than SEAs. PDE ignores the fact that Plaintiffs' proposed issues

classes focus on systemic common policies and inaction by PDE towards *all* class members in the face of duty, a liability issue that predominates over individual facts.

1. *Plaintiffs Challenge PDE's Uniform Practices and Inaction.*

Following *Dukes*, courts have continued to properly certify classes that challenge uniform practices of failure or inaction, holding that such common pervasive conduct supports commonality and predominance.[13] *See, e.g.*, *Parsons v. Ryan*, 289 F.R.D. 513, 521 (D. Ariz. 2013) (certifying class of state inmates alleging deliberate indifference to medical needs where all inmates were subjected to defendant's same actions or lack thereof); *Brooklyn Ctr. For Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 419 (S.D.N.Y. 2012) (finding commonality for a class challenging a "City-wide policy and [the city's] alleged failure to take into account the needs of disabled citizens," despite the fact that "the class members have diverse disabilities and will not all be affected by the alleged omissions in . . . the same way"); *D.L.*, 302 F.R.D. at 13 (disabled preschoolers subject to uniform failures and inadequacies perpetrated by the same agency).

While predominance is a more demanding standard, Rule 23 "does not require the absence of all variations in a defendant's conduct or the elimination of all individual circumstances." *Reyes*, 802 F.3d at 489; *see also Minter v. Wells Fargo Bank, N.A.*, 279 F.R.D. 320, 326-27 (D. Md. 2012)

[13] In assessing predominance, it is instructive to consider the scope of evidence relating to PDE's supervision, as delineated by the Court in addressing class certification in *Gaskin v. Pennsylvania*, 1995 WL 355346 (E.D. Pa. June 12, 1995). In that action, the Court readily identified common questions of law and fact—such as whether PDE failed to monitor school districts to ensure compliance with the IDEA—and deemed irrelevant differences in class members' specific disabilities: "What matters is that the Department of Education's alleged failure to monitor local school districts to ensure compliance with the provisions of the IDEA directly adversely affects each handicapped, school-age child in Pennsylvania. This issue is common to all members of the class." *Id.* at *3. *Gaskin* focused on whether PDE ensured that local districts implemented "comprehensive systems" to ensure provision of a FAPE. Common questions included whether staff providing special education services were trained; whether PDE properly monitored LEAs to ensure students were educated in the least restrictive environment; whether PDE ensured that local districts provided students with access to specially designed instruction, curriculum modification, and supplementary aids and services; and whether PDE ensured that districts provided the same opportunity to participate in and benefit from school services to students with disabilities. *Id.*

(finding predominance despite factual differences among putative class members where claim for equitable tolling was based on common contention of a "uniform and consistent process" by which a mortgage originator engaged with borrowers and concealed status of sham entity). Courts have also found commonality and affirmed class certification in cases involving education shams such as *Rosario v. Livaditis*, where former students at a beauty college alleged violations of RICO and state consumer fraud law, citing numerous deficiencies that impacted students differently. 963 F.2d 1013, 1017-18 (7th Cir. 1992). As the court held, variation among the class grievances, including whether some students passed a qualifying exam, did not defeat certification because a common nucleus of operative facts was sufficient to satisfy Rule 23(a)(2) and (b)(3). *Id.*

The predominance prong "asks whether the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Newberg*, § 4:49, at 195-96. This can be shown via experts and inferences of likely harm drawn from class-wide evidence. *See, e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015).

Here, Plaintiffs do not seek to litigate the merits of individual, fact-specific claims but rather seek declaratory relief as to whether PDE violated their constitutional rights and federal disability laws. Plaintiffs assert a systemic challenge focused on whether PDE met its obligations with respect to GMS students.

This case involves a hybrid Rule 23(c)(4) class similar to that certified by the court in *M.A. ex rel. E.S.*, where the complaint alleged that an entire class of children were subject to a common course of conduct and harmed by "systemic deficiencies in identifying and evaluating children who may reasonably be suspected of having a disability under the IDEA and providing special education services to those eligible in the timely manner required by law." WL 4799291, at *8.

While the court concluded that the entire suit was not maintainable as a class action under Rule 23(b)(2), it held that certain class issues satisfied certification requirements as to claims for injunctive and declaratory relief under the IDEA and that those claims could proceed via a Rule 23(c)(4) hybrid approach. As the court explained, the rule may be invoked to certify certain claims or issues under one of the Rule 23(b) categories of maintainable class actions while allowing other issues, such as pursuit of compensatory education as a remedy for the alleged IDEA violations, to proceed on an individual basis. *Id*. at *16.

2. *Class-wide Treatment of PDE's Liability Will Substantially Facilitate the Resolution of Plaintiffs' Common Claims*.

As the Third Circuit acknowledged in *Russell*, Rule 23(c)(4) authorizes certification of particular issues for class treatment, "even if those issues, once resolved, do not resolve a defendant's liability, provided that such certification substantially facilitates the resolution of the civil dispute . . . ." 15 F.4th 259, 270 (3d Cir. 2021). In remanding the *Russell* case for further consideration, the court recognized that the district court "may very well be correct" that certifying a class on duty and breach questions and then holding a single trial with preclusive determination is more efficient than presenting the same evidence over and over to separate juries. *Id.* at 272-73.

The present case contrasts sharply with *Russell*, which involved a tort where each claim was predicated on individual and unique proof regarding the question of whether a defendant's negligence proximately caused emotional injuries, the nature and assessment of emotional damages, and affirmative defenses. The efficiency to be obtained here is far more compelling: a determination of PDE's liability based on common operative facts and evidence applicable to all class members, with subsequent individualized proceedings to determine damages.

First, class treatment can determine whether PDE had a duty to ensure the availability of a secondary education for GMS students and whether the GED and/or credit-recovery program

failed to provide that education. This will resolve a significant issue for all 1600 students based on common facts. The only differences among Plaintiffs would entail the time period for which a former student failed to receive a secondary education. This question may be easily ascertained for each student based on his documented length of stay at GMS.

Second, a determination can be made based on common consistent facts as to whether PDE failed to ensure the availability of a legally compliant special education system capable of conferring a FAPE. Following such determination, the case can proceed to narrowed individual proceedings. Unlike other special education matters where a child's IEP might be the focus of a determination and the remedy involves an assessment of current deficits, needs, etc., here, all putative class members were impacted by common PDE policies and practices and they are not seeking individualized remedies such as changes to an IEP or school placement. Rather, they seek a calculation of damages and compensatory education based on their length of stay at GMS.

For example, a trial court proceeding may determine PDE's liability for failure to ensure a legally compliant special educating process. A subsequent proceeding to address how to remedy the harm to individual students would rely on the hour-for-hour structure adopted by the Third Circuit to award a compensatory education remedy. *See, e.g.*, *D.F. v. Collingswood Borough Bd. Of Educ.*, 694 F.3d 488, 499 (3d Cir. 2012) (quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir.1996)) (where compensatory education is warranted, the student "is entitled to [it] for a period equal to the period of deprivation, excluding the time reasonably required for the school district to rectify the problem"); *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012) (same); *Mary T. v. Sch. Dist. Of Phila.*, 575 F.3d 235, 249 (3d Cir. 2009); *Downingtown Area Sch. Dist. V. G.W.*, 2020 WL 5981902, at *4 (E.D. Pa. Oct. 8, 2020) (same). In addition, plaintiff-specific factsheets and affidavits could be used to address disability discrimination, and

tiers can be created. Notably, bellwether phases have been used in the disability discrimination context. *See e.g., T.P. by & through S.P. v. Walt Disney Parks & Resorts U.S., Inc.*, 445 F. Supp. 3d 665 (C.D. Cal. 2020). Plaintiffs' proposed Trial Plan further elucidates how this case can be most efficiently adjudicated through a class-wide liability phase and an individual damages phase. (*See* Plaintiffs' Reply to the Opposition of Defendant GMS to Plaintiffs' Motion for Class Certification ("GMS Reply") Section V.A.)

C. Plaintiffs Satisfy Superiority

PDE argues that class certification would be highly inefficient and difficult to manage. This is incorrect. First, certification of issues classes against PDE and GMS would promote efficiency by preventing the re-litigation of these issues in successive litigation, streamlining remaining issues that would need to be litigated individually or, as proposed in GMS Reply Section V(A), as part of a bellwether process.

Second, PDE provides no explanation for why this litigation would be "difficult to manage." The proposed issues class framework proposed by Plaintiffs is not a novel proposition. Rule 23(c)(4) classes are routinely certified and "courts commonly use Rule 23(c)(4) to certify some elements of liability for class determination, while leaving other elements to individual adjudication—or, perhaps more realistically, settlement." *Russell*, 15 F.4th at 269 (citations omitted); *see also, e.g., In re FieldTurf Artificial Turf Mktg. & Sales Pracs. Litig*., 2023 WL 4551435, at *9 ("the Court is not concerned about management difficulties that may arise as a result of certifying these two discrete issues while leaving other aspects of liability and damages to individual adjudication"). While it is too early in the litigation for the detailed trial plan Defendants prematurely request,[14] for the convenience of the Court, Plaintiffs provide a

[14] A more detailed trial plan cannot be determined before the Court decides which issues will be certified, and will likely require the parties to meet and confer to agree upon the approach.

prospective two-phase trial plan narrative showing how the claims could be litigated efficiently in Plaintiff's Reply to GMS's Opposition to Class Certification. (*See* GMS Reply Section V(A)). There are many procedural tools available to both parties and the Court to efficiently litigate these issues, under the Rule 23(c)(4) framework.

D. Plaintiffs' Proposed Classes Are Ascertainable

Plaintiffs' issues classes are ascertainable, as they are all "defined with reference to [] objective criteria" and there are "reliable and administratively feasible mechanism[s] for determining whether putative class members fall within the class definition[s]." *See Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013) (citing *Marcus*, 687 F.3d 583, 593-94). While evidence such as a defendant's records may be used to identify class members at the certification stage, "'ascertainability only requires the plaintiff to show that class members *can be identified*.'" *Byrd v. Aaron's Inc*., 784 F.3d 154, 164 (3d Cir. 2015), *as amended* (Apr. 28, 2015) (emphasis in original) (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 308 n.2 (3d Cir. 2013)).

Here, PDE does not challenge the ascertainability of the Education Issues Class and the Special Education Issues Class, which are ascertained based on enrollment documents produced by GMS. (PDE Opp'n 34-37, 41-42; Pls. Br. 50-51, 57; *id.*, Ex. 37, Student Data, GMSCA0381084; Ex. 31, Gagnon Rpt. at 14-16). Similar documents produced by Defendants through discovery provide a "reliable and administratively feasible mechanism" to show that the members of the Disability Discrimination Issues Class, Suspected Special Education Issues Class, and the Special Education Parent Issues Class can be identified. (*See, e.g.*, Pls. Br. 56 (using Ex. 37, Student Data, to identify the Disability Discrimination Issues Class)); *see also Hayes*, 725 F.3d at 355; *Byrd*, 784 F.3d at 164. As a result, each of Plaintiffs' issues classes is ascertainable.

Disability Discrimination Issues Class. The Disability Discrimination Issues Class is defined using objective criteria to include "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." (Pls. Br. 53). The ADA and Section 504 include parallel definitions of qualifying disability, which is an impairment that substantially limits "major life activities," including physical and neurological functions. 42 U.S.C. § 12102(2); 34 C.F.R. § 104.3; *see McElwee v. Cnty. of Orange*, 700 F.3d 635, 640 (2d Cir. 2012) ("the standards adopted by the [ADA and section 504] are nearly identical"). Plaintiffs have proposed that the Disability Discrimination Issues Class can be determined based on records maintained by the parties and GMS which reflect (1) the identity of students with IEPs and 504 Plans, (Pls. Br., Ex. 37, Student Data, GMSCA0381084), and (2) whether any student had a record of an impairment known to interfere with major life activities. (*See, e.g.*, Pls. Br., Ex. 55, Health and Safety Screen, GMSCA0000901). These records are objective, reliable, and exist in the possession of the parties and GMS, such that the determination of members of the Disability Discrimination Issues Class will not require a "mini-hearing on the merits." *Contra Contawe v. Crescent Heights of Am., Inc.*, 2004 WL 2966931, at *6 (E.D. Pa. Dec. 21, 2004).

First, the identities of students with IEPs and 504 Plans will identify a significant portion of the Disability Discrimination Issues Class. Students with IEPs and Section 504 Plans are, by definition, individuals with disabilities under the ADA and Section 504. *Compare* 42 U.S.C. § 12102(1) (ADA definition of "disability"), *with* 34 C.F.R. § 104.3 (Section 504 definition of "handicapped person"); 34 C.F.R. § 104.3(l)(2)(iii) ("a qualified handicapped person means . . . a handicapped person . . . to whom a state is required to provide a free appropriate public education under [the IDEA]"). Thus, for 529 students with IEPs and 504 Plans, all of the parties have the records at this time to identify their membership within the Disability Discrimination Issues Class.

Next, for students with qualifying disabilities who did not have IEPs or 504 plans, GMS maintained health records indicating the existence of a "[redacted]." (*See, e.g.*, Pls. Br. Ex. 55, [redacted], GMSCA0000901). For example, GMS's "[redacted]" includes extensive information about the physical and mental impairments of GMS students, including categories for "[redacted]" and "[redacted]." (*Id.* GMSCA0000902). Under Section 504 and the ADA, "the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made." U.S. Dept. of Educ. Off. of Civ. Rts., *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, https://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html (last visited Nov. 29, 2023) ("[A] school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504 and [the ADA].").

GMS maintains records that document whether a student has a record of an impairment known to interfere with a major life activity sufficient to qualify under the ADA and Section 504. *See* 42 U.S.C. § 12102(1) (ADA definition of "disability"); 34 C.F.R. § 104.3 (Section 504 definition of "handicapped person"). Thus, the identity of members of the Disability Discrimination Issues Class can be determined based on a review of the list of students identified as having an IEP or 504 plan, along with a review of whether the remaining students' student files contained a record of an impairment known to interfere with a major life activity. The existence

of these records within student files maintained by GMS indicates that these class members "can be identified" to satisfy Rule 23(b)(3)'s ascertainability requirement. *See Byrd,* 784 F.3d at 164.[15]

Courts have found classes ascertainable when, as here, they can be identified based on screening tools completed upon admission to a facility. *See, e.g.*, *Steward v. Janek*, 315 F.R.D. 472, 488, 493 (W.D. Tex. 2016) (certifying class of "Medicaid-eligible persons . . . who are being, will be, or should be screened for admission to nursing facilities"). In *Steward*, the defendants relied on the same authority as PDE, (PDE Opp'n 39-40), to argue that Medicaid eligibility is only assessed after the state has received a Medicaid application, so an unknown number of individuals presumably existed who were Medicaid-eligible but who had never completed an application. *Steward*, 315 F.R.D. at 488. The court rejected that argument, reasoning that "the proposed class does not include unidentified potentially Medicaid-eligible individuals with whom the state has had no contact" because it was defined based on individuals who resided in nursing homes or were screened for admission to a nursing facility, both of which required use of a screening tool. *Id.*

Here, as in *Steward* and unlike in PDE's cited authority, the Disability Discrimination Issues Class is defined only to include students who were placed at GMS, who all were subject to health screening, including psychological screening, upon admission. GMS has testified to this [redacted]. Ex. K, GMS 30(b)(6), Pikes Dep. 57:7-63:19 ([redacted]), *id.* at 312:17-313:1 ([redacted]), *id.* at 299:20-303:10 ([redacted]). Thus, the

[15] Contrary to PDE's suggestion, GMS had a duty to make reasonable accommodations for *all* students with physical or mental impairments that interfere with a major life activity. This duty is not limited to impairments that interfere with learning. *See* 34 C.F.R. § 104.12 and 28 C.F.R. § 35.104 (broadly defining physical or mental impairment).

identity of each member of the class "is not only ascertainable, but has already been ascertained." *See Steward,* 315 F.R.D. at 488.

PDE briefly contends that the Disability Discrimination Issues Class is impermissibly "overbroad" and will encompass individuals with disabilities whose ability to access learning was not impacted by their disability.[16] This is simply not the case. The definition expressly refers to students with qualifying disabilities under 504 which are defined as: any students with "a physical or mental impairment which substantially limits one or more major life activities," "has a record of such an impairment," or "is regarded as having such an impairment." 34 C.F.R. § 104.3(j)(2)(i). This is an identifiable group, nearly all of whom did not receive accommodations, and for whom Plaintiffs claim PDE owed a duty to ensure equal access to education. *See, e.g.*, *C.G. v. Pa. Dep't of Educ*., 734 F.3d 229, 235 (3d Cir. 2013). Second, medical and education records can be used to identify those students with qualifying disabilities who were eligible for accommodations. (Pls. Br., Ex. 31, Gagnon Rep. at 38-42); *D.L.*, 302 F.R.D. at 16 ("Definiteness is not mandated by Rule 23" but rather a judicial creation stating that a class must be (1) "adequately defined" and (2) "clearly ascertainable").

Suspected Special Education Issues Class. The Suspected Special Education Issues Class is defined by objective criteria to include "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

[16] The U.S. Department of Education has rejected claims that the ADA or Section 504 limits protection in schools to students whose impairments concern learning. *See, e.g.*, U.S. Dept. of Educ. Off. of Civ. Rts., *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, https://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html (last visited Nov. 29, 2023) Instead, it instructs: "rather than considering only how an impairment affects a student's ability to learn, a recipient or public entity must consider how an impairment affects any major life activity of the student and, if necessary, must assess what is needed to ensure that student's equal opportunity to participate in the recipient's or public entity's program." *Id.*

IDEA." Pls. Br. 61. Plaintiffs' Education Expert Dr. Joseph Gagnon outlined objective criteria that could be used to ascertain members of the Suspected Special Education Issues Class. (Pls. Br., Ex. 31, Gagnon Rep. 38-42). Documented behavioral indicia requiring an evaluation are defined as "[redacted]" combined with "[redacted]" or "[redacted]." (*Id.* 38-39). Documented academic indicia requiring an evaluation are defined as "[redacted]'" (*Id.* 39) (quoting 22 Pa. Code § 14.125, *Criteria for the determination of specific learning disabilities*, at https://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/022/chapter14/s14.125.html&d=reduce). Documented developmental indicia requiring an evaluation are defined as "[redacted]" indicating a diagnosis of Attention Deficit Disorder ("ADD") or Attention Deficit Hyperactivity Disorder ("ADHD"). *Id.* at 39. As a result, the definition of the Suspected Special Education Issues Class references "objective criteria." *See Hayes*, 725 F.3d at 355.

The members of the Suspected Special Education Issues Class can be determined based on records maintained by GMS that reflect student enrollment dates and documented behavioral, developmental, or academic indica of being a "child with a disability" entitled to an evaluation while at GMS. These records exist within the educational files that Dr. Gagnon reviewed for the representative sample, which are maintained for all former students by GMS. Ex. 31, Gagnon Rep. at 38-42, 112-47. While the identity of each of these issues class members are not known to

Plaintiffs at this time, the existence of these records within student files maintained by GMS indicates that these class members "can be identified" to satisfy Rule 23(b)(3)(c)'s ascertainability requirement. *See Byrd*, 784 F.3d at 164.

The identities of the members of the Suspected Special Education Issues Class will not require a "mini-hearing" as suggested by PDE, as each student within the class was a student of the GMS facility and has records maintained by GMS that can be used to determine their need for evaluation. *See Steward*, 315 F.R.D. at 488. GMS testified [redacted], (Ex. 40, 30(b)(6) Pikes Dep. 341:16-343:20), [redacted]. (*Id.* 355:24-356:10). The Suspected Special Education Class can be identified using these same records and the objective criteria identified by Plaintiffs.

PDE's argument that the Suspected Special Education Class is a "classic 'fail-safe'" class should be rejected. (PDE Opp'n 43). Establishing that a student is a member of this class *alone* does not establish liability for failure to ensure that a system existed at GMS to evaluate students suspected of having disabilities. (*See* Pls. Br. 15-17, 61-62); *see also Cordero*, 795 F. Supp. at 1360 ("It is the state's obligation to ensure that the systems it put in place are running properly and that if they are not, to correct them."). Again, PDE fails to distinguish between the systemic issues claims for which Plaintiffs seek certification against it, as the SEA, and the distinct claims that a student otherwise may have against the LEA. *See Corey H.*, 995 F. Supp. at 912 ("[T]he [SEA] has repeatedly failed to make the necessary distinction between micro-managing every child's placement and ensuring that the [LEA] has sufficient guidelines and resources to systematically [comply with the IDEA.]").

Special Education Parents Issues Class. As with the Special Education Issues Class, the ascertainability of which was not challenged by PDE, the Special Education Parents Issues Class is ascertainable based on the records maintained by GMS. The identity of each child with a disability who was a former student of GMS is known and documented. (Pls. Br., Ex. 37, Student Data, GMSCA0381084). GMS possesses documents, including IEPs, (*see, e.g.*, Ex. L, Walter IEP, GMSCA0000624), and Student Data Sheets, (*see, e.g.*, Ex. M, Walter Student Data Sheet, GMSCA0000607), that record the names and contact information for parents. While the identity of each of these issues class members is not currently known to Plaintiffs, the existence of these records within the student files maintained by GMS indicates that these class members "can be identified" to satisfy Rule 23(b)(3)'s ascertainability requirement. *See Byrd*, 784 F.3d at 164. PDE's claim that some students were "emancipated" while at GMS indicates a lack of understanding of the statutory structure of the IDEA, which designates individuals to serve in the role of "parent" for all eligible students to the age of 21—34 C.F.R. § 300.30—and requires an LEA to appoint a surrogate parent when needed. *See* 34 C.F.R. § 300.519. There is a record of a "parent" for each student with an IEP. As a result, this class is ascertainable.

E. The *Gates* Factors Favor Certification for Each Proposed Issues Class

Plaintiffs have established that the proposed issues classes are "appropriate" for certification under the *Gates* factors. *See Gates v. Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011) (quoting Principles of the Law of Aggregate Litigation §§ 2.02-05 (2010)); *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 201 (3d Cir. 2009). Rule 23(c)(4) provides, "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." Under this rule, a court may grant class certification to litigate certain issues, while allowing the remaining issues to proceed on an individual basis. *See Gates*, 655 F.3d at 272–74. "The ability to certify issues classes accords the courts discretion to realize the advantages and

efficiencies of classwide adjudication of common issues when there also exist individual issues that must be tried separately." *Lisa v. Saxon Mortgage Servs.*, 2016 WL 5930846, at *3 (E.D. Pa. Oct. 11, 2016) (quoting *Newberg*, § 4:89 (5th ed. 2012)); *see also In re Chiang*, 385 F.3d 256, 267 (3d Cir. 2004) ("[C]ourts commonly use Rule 23(c)(4) to certify some elements of liability for class determination, while leaving other elements to individual adjudication—or, perhaps more realistically, settlement."). The *Gates* factors have been characterized as a "functional, superiority like analysis." *Martin v. Behr Dayton Thermal Prod.*, 896 F.3d 405, 412 (6th Cir. 2018)

1. *The type of claims and issues in question are susceptible to efficient class-wide resolution.*

Where "the issues proposed for certification here would apply to the class as a whole this factor is satisfied." *C.P.*, 2022 WL 3572815, at *15. PDE conflates Plaintiffs' issues classes with the assertion that all education *claims* require an individualized analysis. (PDE Opp'n 24). As explained in Section III.B above, the liability-related issues to be certified are focused on Defendants' conduct and are common to the entire class.

Notably, this case is unlike *Gates* and *Lloyd* and other (c)(4) environmental toxin cases with "extensive periods of contamination with multiple sources and various pathways" that required individualized determinations to assess other potential sources and the extent to which injury occurred based on varying levels of exposure. *Lloyd*, 585 F. Supp. 3d at 657-58. Instead, Plaintiffs' class allegations are straightforward and based on consistent conduct applicable to all class members: GMS denied all students a legally compliant education and all students were harmed because of their time at GMS. *See* Section III.B, *supra*. Regardless of an individual student's circumstances, all students were deprived of a secondary education, all students with disabilities lacked access to a special education system, and all students were educated in an environment of abuse and intimidation "so toxic" that individual factors are irrelevant. *Cf. Gates*,

655 F.3d at 268 (describing a path where Plaintiffs could show "the exposure was so toxic that such individual factors are irrelevant"). Likewise, Plaintiffs' allegations regarding PDE's conduct are common to all class members: PDE failed to oversee or monitor the general education program and provided insufficient oversight and monitoring of special education. PDE's conduct did not vary in relation to any individual student.

For each issues class, Plaintiffs propose to certify an issue on duty, breach, and the fact of injury. The evidence relating to PDE is common and overlapping across the classes. A jury can make class-wide findings on these issues because all students experienced the same programmatic education violations, absence of a special education system, and disability discrimination. *See* Section III.B, *supra*. Contrary to PDE's arguments, the proposed issues classes do not require an individualized factual analysis and unlike in *Lloyd*, injury and causation can be established through class-wide proof. *See Lloyd*, 585 F. Supp. 3d at 660.

For example, for the Education Issues Class, evidence regarding the quality of the GMS education program is common to all students. A finding that the PLATO program was inadequate and the GED program deprived GMS students of their right to a secondary education would apply to all students. Moreover, the deprivation of a secondary education would constitute an injury to all students. Similarly, with regard to the Special Education Issues Class, evidence that PLATO could not be modified, that no IEP meeting included an LEA representative as required by the IDEA, or that students with IEPs lacked access to special education teachers is common evidence applicable to all class members and reflects the absence of a special education system. The Disability Discrimination Issues class is focused on the general lack of policies or practices to protect against disability discrimination. The failure to consider and accommodate a student's

disability was program-wide and is capable of class-wide proof using common evidence. *See* Section III.B, *supra*.

The fact of damages or injury is appropriate for issue class certification here because this is not a case where some class members can be said to have no injuries at all. Plaintiffs ask the Court to certify issues classes to establish "fact of damage" determinations before one gets to a potential trial of individual measures of damages—precisely because the facts establishing damage are common to all class members. *Cf. Lloyd*, 585 F. Supp. 3d at 655 ("For example, the reasonableness of Covanta's odor mitigation practices is a question common to the putative class."). All students were injured by the legally noncompliant general education provided via PLATO and/or the GED program. All students with IEPs were harmed by the lack of a system for special education services; students with qualifying disabilities were harmed by GMS's failure to consider a student's disability. PDE's failure to act impacts all students in each issues class as reflected by common evidence.

2. *The overall complexity of the case favors issue-class certification.*

This case's complexity derives in part from its extensive record, the interwoven roles of multiple defendants, and the overlap of abuse and education claims. Contrary to PDE's argument, proceeding with issues classes will simplify this complex case enormously by providing a streamlined path for resolution of the common issues of duty, breach, and the fact of damages for each issues class.

Courts have approved issues-class certification for other complex cases. For example, one court held that certification of specific issues was "particularly appropriate" for plaintiffs' Section 1983, RICO, and wrongful imprisonment claims. *Wallace*, 2013 WL 2042369, at *20. In *Wallace*, thousands of youth and their parents alleged a conspiracy over a five-year period between two juvenile court judges, three detention facilities, and their owner/builder. *Id.* at *1, *3. The court

found all *Gates* factors satisfied and certified two classes and two subclasses for all issues of multiple defendants' liability. *Id*. at *2, *20-21. Complex issues classes were also certified in *In re Flint Water Cases*, where Plaintiffs included thousands of children, property owners, business owners, and other individuals who alleged they were exposed to lead and other contaminants from the city's municipal water supply. 558 F. Supp. at 459, 471. In response to defendants' arguments about individualized circumstances, the *Flint* court found "common evidence" appropriate to establish "aspects of duty, breach and causation inquiries." *Id*. at 512. The court approved two issues classes with nine questions for issues-class treatment. *Id*. at 517-18. Plaintiffs' narrative trial plan follows a similar path. (*See* GMS Reply Section V(A)).

3. *Issues certification is the most efficient way of resolving common issues given realistic procedural alternatives.*

The key question, as Judge Posner put it, is: "Is it more efficient, in terms both of economy of judicial resources and of the expense of litigation to the parties, to decide some issues on a class basis or all issues in separate trials?" *Butler*, 702 F.3d at 362. Issues class certification will aid the Court and the administration of justice in this case. As the Third Circuit has observed, "[s]everance of the question of liability from other issues can 'reduce the length of trial, particularly if the severed issue[s] [are] dispositive of the case, and can also improve comprehension of the issues and evidence.'" *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d at 452 n.5 (3d Cir. 1997) (citation omitted).

The only alternative to Plaintiffs' plan—issues-class certification followed by individualized determinations regarding specific damages—is full-blown trials for 1600 class members that each independently address issues of duty, breach, harm, and specific damages. This is necessarily far less efficient, because it would require repetitive presentations of evidence regarding liability and fact of injury on all claims. *See, e.g.*, *Lloyd*, 585 F. Supp. 3d at 660

(indicating that if causation or injury can be proven class-wide, the court may be able to avoid hearings for individual plaintiffs on those questions). Resolving the issue of liability based on common evidence in one single issues trial would conserve the resources of both the Court and the parties, including the resources of Defendants who will benefit from resolving common class-wide claims in a single trial rather than hundreds of individual trials.

The mere fact that individualized determinations are needed to ultimately resolve damages claims cannot defeat class certification, particularly in this case. The type and amount of damages will not be part of the liability determination under the substantive law of Plaintiffs' claims. Instead, individualized damages can be addressed separately based on common criteria and a bellwether phase, as Plaintiffs propose. Individualized assessments will only impact a computation of damages, not whether each class member was in fact injured and denied their rights as a result of Defendants' conduct. *See Wallace*, 2013 WL 2042369, at *20; *Russell*, 15 F.4th at 272-73 (describing efficiencies in a "single trial with a single, preclusive determination").

Here, PDE wrongly casts all of Plaintiffs' education claims as IDEA claims and suggests they are alleged procedural violations that would require individual trials later. (PDE Opp'n 25). This is not so. First, only the Special Education Issues Class, Suspected Special Education Issues Class and Special Education Parents Issues Class derive from the IDEA.[17] These claims allege a complete lack of any special education system at GMS, rather than single procedural violations. The absence of such a system, by definition, cannot provide any educational benefit or FAPE for students with disabilities. Courts have recognized the type of class-wide problems at GMS as substantive violations entitled to relief, including (i) the lack of an IEP process reasonably

[17] As explained in *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 168 (2017), and *Perez*, 598 U.S. at 147 if suit is brought under a different statute and the remedy sought is not for denial of a FAPE, those claims may proceed and exhaustion of the IDEA's procedures is not required, even where the suit arises directly from a school's treatment of a child with a disability.

calculated to provide educational benefit with no individualized instruction, *Bd. of Educ. of Hendrick C. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-07 (1982), (ii) the lack of modifications and accommodations to curriculum, *see e.g., D.S. v Bayonne Bd. of Educ.* 602 F.3d 553, 560, 565–66 (3d Cir. 2010), and (iii) the failure to implement material aspects of the IEP, *see, e.g.*, *Sumter Cnty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011).

The many procedural violations that permeated GMS's program were so pervasive and universal that they clearly denied a FAPE to each student, prevented parents from participating in their child's IEP process, and deprived students of educational benefits such that they are entitled to relief.[18] *See e.g., C.P.*, 2022 WL 3572815, at *7. In *C.P.*, the SEA argued that plaintiffs could not demonstrate with common proof that each plaintiff suffered a procedural violation, but the court found commonality in testimony about "consistent failures" that justified issues class treatment. *Id.* at *7. Likewise, Plaintiffs will show by common evidence of "consistent failures" based on systemic procedural and substantive IDEA violations, including the absence of an LEA at any IEP meetings, lack of parent participation in the IEP process, the inability to differentiate instruction in the PLATO program, the lack of access to special education teachers, and the lack of individualized services. *See, e.g.*, Section III.B, *supra*. While issues-class treatment will not resolve the case entirely, it will substantially advance the litigation by resolving in a single trial common issues of duty, breach, and fact of injury. *C.P.*, 2022 WL 3572815 at *10.

[18] Courts have recognized claims consistent with Plaintiffs to be substantive IDEA violations. *See, e.g., Singletary v. Cumberland Cty. Schs.*, 2013 WL 4674874 (E.D.N.C. Aug. 30, 2013) (parents denied meaningful participation because IEP substance was predetermined without them); *C. Dauphin Sch. Dist*, 109 LRP 14862 (Pa. SEA 2008) (failure to hold meeting to discuss IEP and evaluation led to denial of FAPE); *Davis v. Wappingers C. Sch. Dist*., 431 Fed. Appx. 12 (2d. Cir. 2011) (failure to have all appropriate personnel at IEP meeting, consider data, and timely implement IEP was denial of FAPE); *Sch. Bd. of City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 944 (E.D. Va. 2010) (procedural violation of failure to evaluate rose to substantive violation due to effect on contents of IEP).

4. *The substantive law underlying the claims supports resolution by certification of issues classes.*

The substantive law in this case is appropriate for issues class certification as it does not require a person-by-person inquiry to determine class-wide liability. *See Wallace*, 2013 WL 2042369, at *20; *see also* Section III.B, *supra*. There are no choice of law conflicts in this matter.

5. *There are no constitutional or statutory obstacles to issues class certification.*

PDE does not claim any unique constitutional or statutory issues and partial certification will not damage any class member's statutory or constitutional rights. (PDE Opp'n 26). Moreover, the procedural safeguards of Rule 23, are constitutionally mandated and "grounded in due process." *Russell*, 15 F.4th at 265. Certification of the proposed issues classes will not present any Seventh Amendment problems, for the reasons discussed in footnote 19 below.

PDE's claim is unfounded that it will be prejudiced because it cannot identify in advance what claims may be precluded in future litigation. Both the claims against PDE and the factual basis for each claim are clear and emanate from PDE's lack of oversight and monitoring of GMS's education program in violation of PDE's obligations as an SEA. The resolution of Plaintiffs' claims against PDE will trigger the same preclusive effect as any other matter, and PDE and class members will be on notice of the issues litigated that are essential to the judgment. *See New Hampshire v. Maine*, 532 U.S. 742, 748 (2001).

6. *The preclusive effect of resolving common issues on a class-wide basis is expedient and provides valuable efficiency to resolving the class claims.*

Once again, PDE argues there will be no preclusive effect of an issues class trial because individualized trials will be needed to resolve every claim. This is not the case, for all the reasons explained above. Resolution of common issues of duty, breach, and fact of injury will dispose of

the most complex and time-consuming aspects of the case, allowing individual plaintiffs to proceed with individual damage claims at a much lower cost. The judgments of an issues class trial will have preclusive effect, which makes this a more expedient manner of proceeding. If a defendant is found not liable on these claims, they cannot be relitigated for individual class members. If a defendant is found liable, that finding will not need to be relitigated before moving to specific damages trials or facilitating potential settlement.

7. *The resolution of common issues on a class-wide basis will ensure effective and fair resolution of the remaining issues.*

PDE does not dispute this factor, claiming it is "neutral." (PDE Opp'n 26). Nevertheless, certification of the issues classes for duty, breach, and fact of injury will be the most effective to proceed, for all the reasons explained herein, and will ensure an effective and fair subsequent resolution of specific damages for all parties by establishing common findings of the first elements. If it is determined that PDE has no liability to the class, or has no duty to class members, then all class members will be bound by that decision, and PDE can be assured that the litigation is over.

8. *Individual proceedings will have no prejudicial impact upon one another.*

PDE also does not dispute this factor, claiming again that it is "neutral." (PDE Opp'n 26). Individual proceedings to determine specific damages to which a class member is entitled will not prejudice any individual or defendant. Plaintiffs also anticipate that individual proceedings will be based on common factors such as the length of time at GMS. *See, e.g., G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 626 (3d Cir. 2015) (compensatory education awards are calculated based on the length of time of the deprivation).

9. *The evidence to be presented on each issues class is common and subsequent juries will not need to reexamine findings of the class jury.*

As the Third Circuit explained approvingly of *Russell*'s potential paths, there are "efficiencies to be gained by certifying a class on these issues because it will allow for a single

trial with a single, preclusive determination about [the Defendants'] conduct, rather than the presentation of the same evidence about [Defendants] again, and again, and again to separate juries." *See Russell*, 15 F.4th at 272-73. The "evidence presented in support of liability will be different than that needed to establish individualized damage claims." *Wallace*, 2013 WL 2042369, at *20 (approving (c)(4) class and citing *Gates*). The same is true for duty and fact of damages—these will not be repeated in individual damages trials because the individual trials will have preclusive issues-class rulings on the issues of duty, breach, and the fact of damages. Issues class trials will focus on PDE's conduct in relation to the GMS program. The second-round juries will not decide issues pertaining to PDE's conduct but rather will focus exclusively on damages. No reexamination problems arise under the framework Plaintiffs propose.[19]

For example, determining whether PDE had a duty to provide oversight or monitoring of the education program at GMS (Education Issues Class), a duty to students with qualifying disabilities (Disability Discrimination Issues Class), a duty to ensure that GMS had a system to provide individualized special education services to students with disabilities (Special Education Issues Class), and whether PDE's actions and inactions breached its duty will require common evidence about the legal obligations of PDE in relation to GMS and facilities like it and common evidence of any oversight activities for the program. But none of that requires individual evidence

[19] The Reexamination Clause of the Seventh Amendment is not implicated here, nor has any Defendant so argued. The Reexamination Clause "is not against having two juries review the same evidence, but rather against having two juries decide the same essential issues." *See In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 452 n.5 (3d Cir. 1997) "Partial certification" or "[t]rying a bifurcated claim before separate juries does not run afoul of the Seventh Amendment" so long as: (i) the same factual issue is not "'tried by different, successive juries'"; (ii) "the verdict form for the first jury" is carefully crafted "so that the second jury knows what has been decided already"; and (iii) "the first jury makes sufficiently detailed findings, [which] are then akin to instructions for the second jury to follow." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 167, 169 n.13 (2d Cir. 2001) (citations omitted) (*abrog. on other grounds*). "[I]f done properly, bifurcation will not raise any constitutional issues,'" *Martin*, 896 F.3d at 417 (citation omitted)—a proposition with which "leading class action treatises agree." *Id.* (citing 2 *Newberg* § 4:92 (5th ed. 2010)).

for each former student because all students have the same relationship with and expected duty from PDE. *See Russell*, 15 F.4th at 273. Plaintiffs' claims relate to PDE's treatment of the GMS program, so a finding that PDE discriminated against students based on their placement at GMS (Education Issues Class) would apply to all former students. "No absent class member would have anything special to add in [his] individual trial. There will be plenty left for individual proceedings, but these major issues could be resolved on a class-wide basis." *Russell*, 15 F.4th at 273.

Here, "[t]he Court has several options with which to consider damages" following the class-wide proceeding of common issues of liability. *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 349 (D. Md. 2012). The flexibility of the issues-class certification mechanism will ensure the litigation is resolved efficiently (especially in comparison with the alternatives) while ensuring fairness to all parties.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Class Certification and Appointment of Class Representatives and Class Counsel.

Dated: November 30, 2023

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CERTIFICATE OF SERVICE

I, Roger A. Dixon, Esq., certify that on November 30, 2023, I caused the foregoing Reply Brief in Support of Plaintiffs' Motion for Class Certification and Appointment of Class Representatives and Class Counsel in Response to Defendant PDE's Opposition to be filed using the Court's Case Management/Electronic Case Filing system (CM/ECF), through which email notice of the filing was sent to all counsel of record.

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