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 THE DHS DEFENDANTS

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INTRODUCTION

At their core, Plaintiffs' claims against Defendants Ted Dallas, Teresa Miller, and Cathy Utz (collectively, the "DHS Defendants") are simple: the DHS Defendants had an affirmative duty to protect youth at Glen Mills Schools ("GMS"), yet violated the Eighth Amendment rights of each child there by implementing and maintaining deficient and affirmatively harmful licensing and complaint-investigation policies and practices. These deficient policies and practices remained consistent under the leadership of all three DHS Defendants — Defendant Dallas, Defendant Miller and Defendant Utz — and systematically and continuously placed every GMS resident in danger. *See, e.g.*, Pls. Br., Ex. 14, Decker Rep. at 13, 51.[1] Because of the DHS Defendants' harmful policies and practices, every GMS resident was confined in a dangerous institution that did not meet Pennsylvania's licensing requirements, and where residents were routinely subject to physical and psychological harm and mistreatment.

Faced with this straightforward showing, the DHS Defendants' response to Plaintiffs' Class Certification Motion fundamentally misunderstands Plaintiffs' motion, the relevant facts, the law, and the application of law to facts. *See* ECF No. 198 (the "DHS Opp'n"). The DHS Abuse Class is a prototypical class and Plaintiffs satisfied each of the requirements of Federal Rule of Civil Procedure 23(a) and each of the requirements of Federal Rule of Civil Procedure 23(b)(3). The Court should certify their proposed class.

In their Opening Brief, ECF No. 190, Plaintiffs establish that GMS residents' Eighth Amendment rights as related to the DHS Defendants are predicated on a "special relationship" that required the DHS Defendants to keep them free from harm while they remained confined at GMS.

[1] Unless otherwise noted, numbered exhibits refer to those attached to Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Class Certification and Appointment of Class Representatives and Class Counsel, ECF No. 188-1. Lettered exhibits refer to exhibits newly filed contemporaneously with this Reply.

See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989). Pennsylvania law required the Pennsylvania Department of Human Services ("DHS"), under the leadership and control of the DHS Defendants, to protect youth placed in residential facilities like GMS by ensuring that these facilities met the licensing and regulatory requirements set forth in 55 Pa. Code Chapter 3800 (the "3800 Regulations"). *See* 55 Pa. C.S. § 3800.2; DHS Opp'n at 4. The 3800 Regulations outline the "minimum requirements" that facilities like GMS must meet to maintain their Pennsylvania licenses. This includes requirements that children may not be "abused, mistreated, threatened, harassed or subject to corporal punishment," and that children have a "right to be treated with fairness, dignity, and respect." 55 Pa. C.S. §§ 3800.2(b), 3800.32. Pennsylvania law further requires DHS to immediately remove students from a 3800 facility if DHS finds "mistreatment or abuse of the clients likely to constitute an immediate and serious danger to the[ir] life or health," and tasks DHS to "deny, refuse to renew, or revoke" licenses if such a 3800 facility does not satisfy the 3800 Regulations. 55 Pa. C.S. §§ 20.37, 20.71(a). The 3800 Regulations unambiguously set forth the DHS Defendants' obligations to protect children in facilities including GMS: the DHS Defendants could only license facilities where children were not abused or mistreated and were required to immediately remove children from dangerous environments. *Id.*; *see also* 55 P.a. C.S. §§ 3800, *et seq.* The DHS Defendants fundamentally failed to meet their statutory, regulatory, and constitutional obligations to protect GMS children.

Due to their roles, the DHS Defendants had the ultimate responsibility to ensure DHS and its staff carried out their licensing requirements with regard to youth at GMS. The Secretary of DHS—the role held by Defendants Dallas and Miller—is the highest officer of the agency and is responsible for fulfilling DHS' mission, including keeping youth safe when they are confined in DHS-licensed facilities. *See, e.g.*, Ex. A, Dallas Dep. 46:2–47:11 ([redacted]

[redacted]); 47:6-9; 338:11–339:4 ([redacted]); Ex. B, Miller Dep. 30:21–32:4 ([redacted]). Defendant Utz, as the Deputy Secretary of the Office of Children Youth and Families ("OCYF"), was the highest-ranking official of the DHS division that directly oversaw the licensing of facilities like GMS. *See* Ex. C, Utz Dep. 42:1-5; 104:3-14.

The DHS Defendants violated the putative class members' Eighth Amendment rights in two specific ways. ***First***, the DHS Defendants implemented and maintained licensing policies and practices [redacted] and routinely renewed 3800 facilities' licenses without adequately monitoring the safety and well-being of children. Pls. Br., Ex. 14, Decker Rep. 7–11. Because of these deficient licensing policies and practices, DHS—under the leadership and control of each of the DHS Defendants—continually relicensed GMS and allowed children to be placed at GMS despite substantial evidence of ongoing abuse and mistreatment. *See, e.g.*, *id.* 26–27; Ex. C, Utz Dep. 119:4-22.

Even DHS' Regulatory Compliance Guide, which was developed [redacted] *See* Ex. D. Instead, [redacted] Ex. 14, Decker Rep. 7; *id.* 14 ([redacted]).

Second, the DHS Defendants implemented and maintained a faulty, cursory complaint investigation process that relied on deficient interviews of child abuse victims. This practice failed to hold GMS staff accountable for the abuse they perpetuated and perpetrated against GMS students. [redacted] See Pls. Br., Ex. 14, Decker Rep. 9–10; Pls. Br., Ex. 15, Cahill Dep. 44:19-45:8; 46:2-10; Ex. A, Dallas Dep. 108:8-14; 116:5-19. Colleen Cahill, a DHS licensing technician from 2017 to 2021 who interviewed students at GMS, [redacted] *See* Pls. Br., Ex. 25, Cahill Dep. Ex. 3, 28474–75. Sandy Wooters, the Director of the Bureau of Human Services Licensing (the entity responsible for overseeing the licensing of GMS from 2012 to 2017) who worked for DHS before Cahill, [redacted]. *See* Ex. E, Wooters Dep. Ex 1, 16866; Pls. Br., Ex. 26, Wooters Dep. 108:4-20; Ex. F, Wooters Dep.119:5-15.

Despite the proliferation of concerns about youth not disclosing abuse, the DHS Defendants' policies and practices provided no mechanism to process these concerns. *See, e.g.*, Ex. 26, Wooters Dep. at 172:12–173:3 ([redacted]). The DHS Defendants solely relied on supervisees/employees to relay information to them about concerns they had. *See e.g.*, Ex. A, Dallas Dep. 131:3-23; 137:13-21; Ex. C, Utz Dep. 156:16–157:7; Ex. B, Miller Dep. 55:1-9. Defendant Miller expressed concerns about [redacted]. *See* Ex. B, Miller Dep. 135:19; 136:6; 138:14-140:8. Defendant Dallas similarly testified [redacted]

[redacted]. *See* Ex. A, Dallas Dep. 101:8–102:21.

Moreover, under both sets of policies and practices, when GMS' licensing or regulatory violations were brought to DHS' attention, the DHS Defendants' policies and practices allowed GMS to submit boilerplate corrective action plans. *See* Ex. 14, Decker Rep. 24–35. The DHS Defendants' policies and practices consequently allowed GMS nearly free reign to operate its facility in the abusive manner Plaintiffs have alleged. *See id.* And the DHS Defendants' policies and practices concerning tracking and reviewing data led them to ignore stark patterns in the allegations and complaints emerging from GMS. *Id.* 25–26 ([redacted]); Ex. C, Utz Dep. 150:9–151:10 ([redacted]); Ex. A, Dallas Dep. 130:21–133:14 ([redacted]).

Every GMS student had a constitutional right to be placed at a residential treatment facility where they were safe from abuse, mistreatment, and harm. Every GMS student had a right to reside in a facilitate that met the 3800 Regulations' licensing requirements. GMS, with its "pervasive" "culture of intimidation and coercion" and "imminent" safety threat to all youth at its facility plainly did not meet those requirements, *see* Ex.1, ERO, 1, 5–6, and every student placed at GMS was harmed by the DHS Defendants' defective policies and practices. All three DHS Defendants failed in fulfilling their responsibility to every student at GMS by implementing and maintaining policies and practices that permitted GMS to violate the rights of all GMS students.

This action, and this Court, is best situated to address the DHS Abuse Class's claims.

I. Plaintiffs Satisfy the Rule 23(a) Factors

A. Plaintiffs Satisfy Commonality

DHS Defendants do not dispute that they engaged in overarching policies and practices that enabled the systematic abuse and mistreatment of GMS students. Instead, the DHS Defendants baselessly argue that Rule 23(a)(2) requires a specific written policy authorizing abuse and that the abuse must be identical for every class member. Rule 23(a) imposes no such obligation. Plaintiffs have adequately alleged two common policies and practices that satisfy the Rule 23(a)(2) requirement that there be common questions capable of class-wide resolution.

"[T]he commonality standard of Rule 23(a)(2) is not a high bar; it does not require identical claims or facts among class members," rather a **single common issue of law or fact** shared by the named plaintiffs and the putative class will satisfy commonality. *In re Prudential Ins. Co. Am. Sales Pracs. Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998). Critically, the "focus of the commonality inquiry is not on the strength of each class member's claims but instead on whether the **defendant's conduct was common as to all of the class members**." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 298 (3d Cir. 2011) (cleaned up—emphasis added); *see also Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 528 (3d Cir. 2004) (focusing commonality inquiry on **defendant's conduct**, not on conduct of individual class members); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183 (3d Cir. 2001) (identifying common questions focused on **defendant's conduct**); *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994) (commonality is necessarily shown when the **defendant** "engag[ed] in a common course of conduct toward" the class members); *In re Cmty. Bank of N. Va. Mortg. Lending Pracs. Litig.*, 795 F.3d 380, 397 (3d Cir. 2015); *see also Ross v. Gossett*, 33 F.4th 433, 438–39 (7th Cir. 2022) (finding common question of whether supervisors violated prisoners' Eighth Amendment rights by instituting uniform shakedown policy).

Here, every putative class member shares a common contention that the DHS Defendants' policies and practices regarding licensing and complaint investigation violated each class member's Eighth Amendment rights and is "capable of classwide resolution." *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011). Each putative class member's claim is predicated on DHS Defendants' confinement of the class members—and thus the DHS Defendants' corresponding affirmative (and basic) duty to keep the class members safe from harm. *DeShaney*, 489 U.S. at 199–200; *see also Remick v. City of Philadelphia*, No. 20-1959, 2022 WL 742707, at *9 (E.D. Pa. Mar. 11, 2022) (finding a common question of "[w]hether the practices and policies implemented by Defendants and Defendants actions and inactions have caused the unconstitutional conditions of confinement" at issue).

As described above, Plaintiffs have provided extensive and compelling evidence that the DHS Defendants maintained and executed deleterious policies and practices that led to the systemic denial of the proposed class's constitutional rights. The evidence shows that the DHS Defendants violated the class's constitutional rights in two specific ways: (1) the DHS Defendants maintained licensing policies and practices that failed to ensure the safety and wellbeing of GMS youth; and (2) the DHS Defendants maintained deficient complaint-review policies and practices that utterly failed to capture, track, or address years of complaints of abuse and mistreatment at GMS. *See, e.g.*, Ex. 14, Deckert Rep. 24–35. To be clear, Plaintiffs do not complain that the DHS Defendants ***lacked*** policies or practices. Rather, Plaintiffs complain that DHS Defendants' actual policies and practices described above caused the putative class's harm.

By carrying out these policies and practices, the DHS Defendants failed to satisfy their affirmative duty to keep GMS students safe and violated the Eighth Amendment right of each GMS student to be safe from harm while in custody. When the state takes a person into custody and holds that person against their will, the state assumes responsibility for that person's safety and well-being. *DeShaney*, 489 U.S. at 199–200. By restricting that person's liberty, government officials also limit the person's ability to act on their own behalf, and therefore create a "special relationship." *Benedict v. Sw. Pa. Hum. Servs., Inc.*, 98 F. Supp. 3d 809, 821 (W.D. Pa. 2015) (citing *DeShaney*, 489 U.S. at 199–200 and *Morrow v. Balaski*, 719 F.3d 160, 167 (3d Cir. 2013)). In turn, that special relationship imposes an obligation for the state to protect the confined person from harm—including harm caused by state agents. *Id.* An Eighth Amendment claim in this context must meet two requirements: (1) the deprivation a plaintiff alleges must be objectively, sufficiently serious; and (2) the state official must demonstrate deliberate indifference to the confined person's health or safety. *Beers-Capitol v. Whetzel*, 256 F.3d 120, 125 (3d Cir. 2001) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). Although deliberate indifference typically is measured subjectively, a factfinder may conclude that an official knew of a substantial risk because it was obvious. *Id.* at 131.

Whether an official had requisite knowledge of substantial risk—and thus a duty to protect the confined person from harm—is a "question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer*, 511 U.S. at 842. It may also be shown if the risk at issue was "obvious." *Beers-Capitol*, 256 F.3d at 131.[2] Circumstantial evidence that

[2] Plaintiffs continue to assert that their claims should proceed under the Fourteenth Amendment because they are youth adjudicated delinquent, and not convicted prisoners, and alternatively that the Eighth Amendment standard as applied to children is more protective and less deferential to officials than the standard applied to adult prisoners.

officials knew of a substantial risk to the safety of confined persons may include "longstanding, pervasive, well-documented" notes about similar issues. *Farmer*, 511 U.S. at 842–43. Where a deliberate-indifference claim implicates a supervisor, the plaintiff may establish supervisory liability by showing that "the risk of constitutionally cognizable harm is so great and so obvious that the risk and the failure of supervisory officials to respond will alone support findings of the existence of an unreasonable risk, of knowledge of that unreasonable risk, and of indifference to it." *Beers-Capitol*, 256 F.3d at 134 (quoting *Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989)).

A plaintiff may also establish a claim against a supervisor for his or her policies or practices by showing that: (1) the policies or procedures in effect at the time of the plaintiff's alleged injury created an unreasonable risk of constitutional violation; (2) the defendant-official was aware that the policy created an unreasonable risk; (3) the defendant was indifferent to that risk; and (4) the constitutional injury was caused by the failure to implement the supervisory practice or procedure. *See Diecks*, 885 F.2d at 1118 (relying on *City of Canton v. Harris*, 489 U.S. 378, 389 (1989)). A supervisor cannot escape liability by showing that he or she did not know that a *specific* confined person was in danger: "it does not matter . . . whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." *Farmer*, 511 U.S. at 843.

Applying this well-established legal framework to Plaintiffs' claims, common questions capable of class-wide resolution include, for example only and without limitation, the following:

- Whether the DHS Defendants violated the putative class members' Eighth Amendment rights by implementing and maintaining policies and practices which resulted in DHS staff, for example: (i) carrying out licensing inspections of GMS without meaningful consideration of allegations of GMS' serious abuse of its students; (ii) accepting boilerplate corrective action plans—regardless of GMS' non-compliant conduct—that did not hold GMS accountable; (iii) failing to track data regarding complaints of abuse, harm, or mistreatment at GMS; (iv) continuing to relicense GMS, despite mounting complaints of abuse; and (v) failing to timely issue an ERO or revoke GMS' licenses.
- Whether the above policies and practices created an unreasonable risk of violating the putative class members' constitutional rights.

Cf. Ross, 33 F.4th at 437 (listing common questions).

The answer to each of these questions will either be "yes" (in which case the DHS Defendants will be liable to the putative class), or "no" (in which case class-wide relief against the DHS Defendants is unavailable). Either way, the above questions are "of such a nature that [they] are capable of classwide resolution—which means that determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350.

* * *

The DHS Defendants' argument in opposition does not alter Plaintiffs' showing on the commonality requirement. At core, the DHS Defendants, conflate Plaintiffs' claims. The proposed class consists of GMS students, all of whom bring Eighth Amendment claims against the DHS Defendants because of the DHS Defendants' policies and practices with regard to licensing and complaint investigation. Every putative class member seeks the same remedy: a judgment that such policies and practices were unconstitutional and damages for their suffering because of those unconstitutional policies and practices. *Cf. J.B. v. Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999) (concluding commonality was not established where putative class members each

had different circumstances, legal claims, and corresponding remedies). Put simply, "[c]ontrary to Defendants' characterizations, Plaintiffs do not challenge individual instances of unconstitutional conduct; rather, they challenge the general policies, customs, and practices employed by [the DHS Defendants] that are allegedly violative of the Constitution." *Inmates of Northumberland Cnty. Prison v. Reish*, No. 08-cv-345, 2009 WL 8670860, at *18 (M.D. Pa. Mar. 17, 2009).

The DHS Defendants attempt to undermine Plaintiffs' eligibility for class certification by pointing to ways in which putative class members may have suffered different mistreatment or abuse at GMS. That attempt fails. DHS was the sole Pennsylvania agency tasked with licensing and regulating GMS. DHS Opp'n at 4–5; DHS Ex. 4; DHS Ex. 5. By implementing and maintaining policies and practices that allowed GMS' abusive practices to continue and which permitted GMS to remain open and licensed, the DHS Defendants harmed each student through identical action: by subjecting them to abuse and mistreatment without recourse. Rule 23 does not require that a putative class has endured precisely the same injuries and the Supreme Court has made clear that "a court should focus on the 'dissimilarities' between class members only 'to determine (as Rule 23(a)(2) requires) whether there *is* even a single common question.'" *Wallace v. Powell*, Nos. 09-286, 09-291, 09-357, 09-630, 09-2535, 10-1405, 2013 WL 2042369, at *6 (M.D. Pa. May 14, 2013) (quoting *Wal-Mart*, 564 U.S. at 359) (emphasis in *Wal-Mart*); *see also Wal-Mart*, 564 U.S. at 359 (explaining that "for purposes of Rule 23(a)(2) even a single common question will do") (cleaned up). Importantly, "as long as all putative class members were subjected to the ***same harmful conduct by the 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 (citing *Baby Neal*, 43 F.3d at 56) (emphasis added).

The contrary authority on which the DHS Defendants rely is irrelevant. ***First***, in *Ferreras v. Am. Airlines, Inc.*, the plaintiffs alleged that their employer violated wage laws because the employer's timekeeping system defaulted to paying employees based on their work schedules rather than on the actual shifts they worked, and that the employer required supervisory approval for employees to work overtime. 946 F.3d 178, 181 (3d Cir. 2019). The Third Circuit vacated an order certifying the class, not because (as the DHS Defendants argue) the plaintiffs and the putative class suffered different injuries, but because answers to common questions could not be gleaned by analyzing the employers' timekeeping system and policies. *Id.* at 185–86. Put another way, the questions could not be answered "by common evidence about the timekeeping system because a yes or no answer tells us nothing about actual common work habits, if there are any. The plaintiffs will still need to go through the process of proving that each individual employee worked overtime and is thus entitled to additional compensation, regardless of any common evidence about [the employer's] timekeeping system." *Id.* at 185. By contrast, here the question of whether the DHS Defendants instituted and maintained the alleged unconstitutional policies and practices can be answered "yes" or "no" and that answer would drive class-wide resolution of claims against the DHS Defendants.

Likewise, the DHS Defendants' reliance on *Mielo v. Steak 'n Shake Operations, Inc.*, is misplaced. In *Mielo*, the plaintiffs sought class certification of all individuals with *qualified* mobility disabilities who encountered accessibility barriers at any Steak 'n Shake restaurant in the United States. 897 F.3d 467, 475 (3d Cir. 2018). But the Third Circuit in *Mielo* was not concerned with whether plaintiffs may have suffered different injuries; instead, the court affirmed denial of class certification because plaintiffs did not allege a common course of conduct, like a discriminatory practice or a policy permitting inaccessible steep slopes in parking lot facilities that

could be resolved on a class-wide basis. *Id.* at 488–89. Accordingly, *Mielo* is inapposite to Plaintiffs' claims against the DHS Defendants.

Juxtaposed against these cases, class-certification is appropriate where plaintiffs allege all individuals in a facility like GMS were subject to the same threat of injury based on a common policy or practice. *See, e.g.*, *Hagan v. Rogers*, 570 F.3d 146, 158 (3d Cir. 2009) (citing *Hassine v. Jeffes*, 846 F.2d 169, 177 (3d Cir. 1988)); *Williams v. City of Philadelphia*, 270 F.R.D. 208, 215 (E.D. Pa. 2010) (finding commonality satisfied because plaintiffs pled a systemic denial of constitutional rights because of prison overcrowding, even though not all putative class members were currently placed in an overcrowded dormitory); *Clarke v. Lane*, 267 F.R.D. 180, 196–97 (E.D. Pa. 2010) (finding commonality satisfied because the class-certification motion rested on defendants' failure to provide adequate healthcare, even though some class members had obtained adequate medical care); *Chiang v. Veneman*, 385 F.3d 256, 265–67 (3d Cir. 2004) (concluding commonality was not precluded by different experiences or outcomes suffered by putative class members where the putative class's common allegation was an overarching discriminatory policy or practice), *abrogation on other grounds recognized by Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)); *Remick*, 2022 WL 742707, at *9 (holding that "[a]lthough out-of-cell time may take different forms—for instance, lack of 'access to showers, medical care and treatment, in-person disciplinary hearings, phones, visits, programs, and recreation'—it is a 'pattern of noncompliance' experienced by all putative class members.") (cleaned up); *Richburg v. Palisades Collection LLC*, 247 F.R.D. 457, 462 (E.D. Pa. 2008) (The "low bar" of satisfying commonality "recognizes that, even where factual differences may exist between putative class members, the class action may be a useful method of resolving those issues that are common to them all.").

Because Plaintiffs have identified at least two policies and practices that DHS Defendants implemented and maintained, and because those polices and practices applied to each putative class member in an identical way, Plaintiffs have satisfied their "low burden" of establishing commonality.

B. Plaintiffs Satisfy Typicality

"Typicality requires that 'the claims or defense of the representative parties are typical of the claims or defenses of the class[.]'" *Duncan v. Governor of Virgin Islands*, 48 F.4th 195, 207 (3d Cir. 2022) (quoting FED. R. CIV. P. 23(a)(3)). "In a nutshell, typicality guards against class representatives who have 'unique interests that might motivate them to litigate against or settle with the defendants in a way that prejudices the absentees.'" *Id.* (quoting *Baby Neal*, 43 F.3d at 63). Courts consider three factors "[t]o weed out those atypical class representatives":

> (1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be 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 (3) the interests and incentives of the representative must be sufficiently aligned with those of the class.

Id. (quoting *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 599 (3d Cir. 2009)). Even relatively pronounced factual differences "will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of class members, and if it based on the same legal theory." *Baby Neal*, 43 F.3d at 58; *see also De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (affirming typicality finding for proposed 23(b)(3) class challenging a farmworker recruitment system even though some of the named plaintiffs had not worked for the defendant company during the disputed years, and even though it was unclear whether all plaintiffs had worked in the same employment role as the named plaintiffs).

Here, all three typicality factors compel a finding that the named plaintiffs' claims against the DHS Defendants are typical of the putative class's claims. ***First***, the named plaintiffs' claims are identical in terms of both the legal theory advanced and the factual circumstances underlying the theory. ***Second***, the named plaintiffs are not subject to a unique defense as relevant to their claims against the DHS Defendants. ***Third***, the named plaintiffs' interests are aligned with those of the putative class.

The DHS Defendants fundamentally misunderstand Plaintiffs' claims against them. The distinctions in the type and scope of physical or psychological harm suffered by Plaintiffs and the putative class members at GMS are irrelevant with respect to the claims against the DHS Defendants. As explained above, with respect to the DHS Defendants, the Plaintiffs challenge neither individual instances of action or inaction, nor discrete decisions. Rather, Plaintiffs challenge the DHS Defendants' policies and practices related to licensing and investigation of complaints.[3] Each named plaintiff and each putative class member were subject to an identical result (that is, GMS remaining open and continuing its abuse toward its students) because of these failings. *See, e.g.*, *Baby Neal*, 43 F.3d at 58 ("Where an action challenges a policy or practice, the named plaintiff suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice.") (cleaned up); *Wallace*, 2013 WL 2042369, at *7 (typicality satisfied where "the class representatives and class members all rely on identical theories of liability.").

[3] For this reason, the DHS Defendants are wrong that because certain former GMS students did not suffer physical or mental abuse, their claims ***against the DHS Defendants*** (as opposed to against GMS) are somehow unable to be certified. This fundamental misunderstanding infects the entirety of the Opposition Brief.

Accordingly, the named plaintiffs' claims ***against the DHS Defendants*** are typical of the putative class members' claims ***against the DHS Defendants*** because the course of conduct undertaken by the DHS Defendants affected each named plaintiff and each putative class member in the same way because each class member was left to languish at GMS as the DHS Defendants' policies and practices allowed GMS to remain open.[4]

C. Plaintiffs Satisfy Adequacy

"The adequacy prerequisite demands that 'the representative parties will fairly and adequately protect the interests of the class.'" *Duncan*, 48 F.4th at 209 (quoting FED. R. CIV. P. 23(a)(4)). "Its primary purpose is 'to determine whether the named plaintiffs have the ability and the incentive to vigorously represent the claims of the class.'" *Id.* (quoting *In re Cmty. Bank*, 795 F.3d at 393). "Thus, for a class representative to be adequate, she must 'have a minimal degree of knowledge about the case and have no conflict of interest with class counsel and members of the class [.]'" *Id.* (quoting *In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig.*, 967 F.3d 264, 272 (3d Cir. 2020)).

The DHS Defendants do not argue that the named plaintiffs do not have a minimal degree of knowledge about the case, and they do not argue that the named plaintiffs have a conflict of interest with class counsel and members of the class—which should end the inquiry and the Court should conclude that the named plaintiffs satisfy the adequacy requirement. Instead, the DHS Defendants again misrepresent or misunderstand Plaintiffs' claim and the applicable law, as they

[4] Even if the DHS Defendants have unique defenses to any of the named plaintiffs' claims against them, those unique defenses do not automatically defeat typicality. *See, e.g.*, *Zeffiro v. First Pa. Banking & Tr. Co.*, 96 F.R.D. 567, 570 (E.D. Pa. 1983) (explaining that "particular factual differences, differences in the amount of damages claimed, or even the availability of certain defenses against a class representative may not render his or her claims atypical" so long as the named plaintiff and class members have an interest in prevailing on similar claims).

contend there is a conflict between the named plaintiffs who "suffered actual physical injuries" and those who "suffered no physical injury." DHS Opp'n at 30. As stated repeatedly, Plaintiffs' claims against the DHS Defendants focus on the ***DHS Defendants'*** conduct, not on the abuse GMS inflicted on the Plaintiffs. Thus, *Amchem* is inapposite. *Cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997).[5]

* * *

For the first time in over four years of litigating this action, the DHS Defendants now claim that the named plaintiffs lack standing to sue Defendant Dallas. This belated argument fails for two reasons. ***First***, Plaintiffs challenge the policies and practices which were implemented and maintained by *all three* DHS Defendants. Accordingly, Defendant Dallas' policies and practices affected the named plaintiffs, and the entire class, regardless of whether one of the named Plaintiffs was held at GMS during Defendant Dallas' tenure. ***Second***, to the extent the Court wishes to entertain this belated attack on standing, the named Plaintiffs have not only alleged, but proved, that the DHS Defendants' policies and practices—including those implemented and maintained by Defendant Dallas—affected them and every member of the putative class.

Indeed, "an indirect causal relationship will suffice, so long as there is a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant." *Richard Roe W.M. v. Devereux Found.*, 650 F. Supp. 3d 319, 333 (E.D. Pa. 2023) (quoting *Toll Bros., Inc. v. Twp. Of Readington*, 555 F.3d 131, 142 (3d Cir. 2009)). As Secretary of DHS from 2015 until late 2017, Defendant Dallas was directly and indirectly in control of, and responsible for, DHS' juvenile-justice policies and practices—including those regarding licensing and addressing complaints of abuse during that time period. There was no meaningful change in the licensing or

[5] Indeed, DHS' ERO explained that every student at GMS was in imminent danger. *See* Ex. 1, ERO, at 1.

complaint investigation policies or practices between each of the DHS Defendants, even with a shift in licensing authority from one branch of DHS to another – the unconstitutional policies and practices persisted across the class period. *See, e.g.*, Ex. 14, Deckert Rep.13; *id.* 15 ([redacted]). Accordingly, Defendant Dallas is at least one cause of the putative class members' injuries. *See Devereux*, 650 F. Supp. 3d at 334 ("[P]laintiff's alleged injury is that they live in an environment with policies that expose them to an ongoing risk of abuse. Devereux's policies are one cause of that alleged injury, and it cannot avoid this fact by hiding behind the actions of third parties[,]"); *see also A v. Nutter*, 737 F. Supp. 2d 341, 357 (E.D. Pa. 2010) (concluding causation standing element was satisfied because the "[complaint] sufficiently avers that polices or customs of City Defendants—including a failure to supervise child placements, investigate reports of abuse and neglect, provide full information on medical conditions and treatment to caregivers—resulted in actual or imminent injury to plaintiffs.").

Accordingly, named plaintiffs are adequate class representatives.[6]

[6] To the extent the Court is inclined to agree with the DHS Defendants regarding standing to sue Defendant Dallas, Plaintiffs respectfully request the opportunity to fully brief the issue on its own and not as an belatedly tacked onto an opposition to a class-certification motion.

D. Plaintiffs Satisfy Numerosity

Incredibly, the DHS Defendants somehow argue that Plaintiffs have failed to satisfy numerosity because they have not established that joinder of 1,661 class members is impracticable. This baseless argument runs headlong into the law. In evaluating numerosity, courts are permitted to "accept common sense assumptions." *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 205 (E.D. Pa. 2001) (quoting *In re Cephalon Sec. Litig.*, No. 96-cv-633, 1998 WL 470160, at *2 (E.D. Pa. Aug. 12, 1998)). Understandably, courts have reasoned that "[c]ommon sense dictates" joinder is impracticable "where the class numbers in the thousands." *Kerrigan v. Philadelphia Bd. of Election*, 248 F.R.D. 470, 474 (E.D. Pa. 2008) (quoting *Stewart v. Assocs. Consumer Discount Co.*, 183 F.R.D. 189, 194 (E.D. Pa. 1998)). And the Third Circuit "presume[s] joinder is impracticable when the potential number of class members exceeds forty." *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 896 (3d Cir. 2022) (citing *Mielo*, 897 F.3d at 486).

To the extent further inquiry into numerosity is required, courts in the Third Circuit sometimes look to the *In re Modafinil* factors to determine whether joinder is impracticable. *See In re Modafinil Antitrust Litig.*, 837 F.3d 238, 253 (3d Cir. 2016) (explaining a "non-exhaustive list" of factors a district court can consider includes "judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, the financial resources of class members, the geographic dispersion of class members, the ability to identify future claimants, and whether the claims are for injunctive relief or damages.").

Plaintiffs satisfy numerosity under both a pure numbers analysis and the *In re Modafinil* factors. Plaintiffs' proposed class is sufficiently numerous because it includes 1,661 putative class members. It is obviously impracticable to join 1,661 plaintiffs in this litigation. Judicial economy would not be aided by requiring 1,661 plaintiffs to file separate lawsuits against the DHS Defendants. And the putative class members are best served by a class action—the numerosity

requirement here "creates greater access to judicial relief, particularly for those persons with claims that would be uneconomical to litigate individually." *Marcus*, 687 F.3d at 594 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985)).

II. Plaintiffs Satisfy the Rule 23(b)(3) Factors

A. Plaintiffs Satisfy the Predominance Requirement

The DHS Defendants' attempt to invent a new requirement that class plaintiffs allege the existence of a written document to show a common policy or practice existed is found nowhere in the law and runs contrary to well-established caselaw. As explained in Plaintiffs' Opening Brief, Plaintiffs' claims are analogous to those in *Ross v. Gossett*, in which incarcerated plaintiffs claimed painful prison-wide shakedowns were carried out "pursuant to a common policy or practice implemented, overseen, and encouraged by" the Department of Correction supervisors in violation of their Eighth Amendment rights. 33 F.4th at 435. The DHS Defendants try to distinguish *Ross* because, in their view, *Ross* turned on the existence of a "uniform behavior" or policy, whereas Plaintiffs here, in their view, complain about a policy of inaction. DHS Opp'n at 37. The DHS Defendants' proffered distinction is inaccurate and, in any event, beside the point.

In *Ross*, the district court identified many common questions applicable to the shakedown polices:

> whether Defendants developed and carried out a uniform policy and practice that had the effect of depriving the putative class members of their Eighth Amendment right to be free from cruel and unusual punishment; whether the shakedowns were executed in the manner Defendants contend or as Plaintiffs claim; whether Defendants engaged in a conspiracy to deprive the putative class members of their constitutional rights through the shakedowns; and whether the Defendants knew of, approved, facilitated and/or turned a blind eye to the alleged unconstitutional shakedowns.

33 F.4th at 437. There, the district court determined that answering those questions "does not require individualized consideration and will resolve the liability aspect of this litigation and for

each of the class claims." *Id.* On appeal, the Seventh Circuit affirmed the district court, noting that at the merits stage, regardless of which side prevails, resolving the questions "will provide a common answer as to the claims of the putative class that the shakedown policy created and implemented by supervisors violated their constitutional rights." *Id.* at 439.

With respect to predominance, the Seventh Circuit concluded that "[t]he class action relates only to the supervisors, and the claims relate only to their actions with respect to the design and implementation of the allegedly-unconstitutional policy." *Id.* at 440–41. The court also explained that "[e]ven assuming a damages assessment would require individual evidence . . . the [district] court did not abuse its discretion in determining that the common issues as to liability establish predominance." *Id.* at 441 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)); *see also Bouaphakeo*, 577 U.S. at 453–54 ("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 properly 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.") (cleaned up).

Here, as in *Ross*, Plaintiffs' claims against the DHS Defendants rest squarely on the DHS Defendants' role in creating, implementing, and maintaining the uniform challenged policies and practices regarding licensing, investigations, and responding to complaints of abuse. As in *Ross*, Plaintiffs' claims against the DHS Defendants succeed or fail based on common questions about the DHS Defendants' policies and practices.

Contrary to the DHS Defendants' argument, *Wal-Mart* reinforces, rather than undercuts, Plaintiffs' argument. In *Wal-Mart*, the plaintiffs "wish[ed] to sue about literally millions of employment decisions in one case" and there was no "glue holding the alleged *reasons* for all those decisions together," and therefore no common answer to the key employment discrimination

inquiry "*why was I disfavored*"? *Wal-Mart*, 564 U.S. at 352 (emphases in original). Indeed, in *Wal-Mart*, the Supreme Court determined that the plaintiffs failed to provide convincing proof of a company-wide discriminatory pay and promotion policy, and therefore they could not demonstrate a single common issue to satisfy commonality. *Id.* at 342, 359. The class-certification barrier in *Wal-Mart* was that because there was no uniform way of deciding pay or promotions there was no uniform class treatment.

By contrast, as described above, Plaintiffs have identified two specific overarching policies and practices that applied consistently and uniformly to all GMS students, and thus uniformly to the class. Here, unlike in *Wal-Mart*, the factfinder can determine with respect to the entire putative class whether the DHS Defendants' alleged policies and practices violated the Plaintiffs' Eighth Amendment rights.

Finally, *Baby Neal* does not preclude class certification. Although the *Baby Neal* plaintiffs sought to certify a Rule 23(b)(2) class rather than a Rule 23(b)(3) class, the gravamen of the Third Circuit's analysis was whether the plaintiffs alleged the same policies and practices violated their rights. *See Baby Neal*, 43 F.3d at 64 ("Because the children in the system are comparably subject to the injures caused by this systemic failure, even if the extent of their individual injuries may be affected by their own individual circumstances, the challenge to the system constitutes a legal claim applicable to the class as a whole."). Importantly, the Third Circuit in *Baby Neal* did not hold that the class could not be certified as a Rule 23(b)(3) class—that makes sense because the plaintiffs there moved for class certification under Rule (b)(2), not Rule (b)(3), so any discussion of Rule (b)(3) would merely be *dicta*. *See id.* at 63 ("We emphasize that the individual differences in the children's circumstances *might* indeed militate against certification *if the action sought certification under 23(b)(3)* because the court would need to evaluate those differences in the event

that the plaintiffs prevailed and were entitled to monetary damages.") (emphases added). Accordingly, DHS Defendants' reliance on *Baby Neal*, a Rule 23(b)(2) case, as dispositive in this Rule 23(b)(3) action is misplaced. Moreover, the Third Circuit in *Baby Neal* made clear that "[e]ven where individual facts and circumstances do become important to the resolution, class treatment is not precluded." *Id.* at 57.

Here, the common issues overwhelmingly predominate over any individual issues. Because resolution of common questions regarding the DHS Defendants' liability for their overarching unconstitutional policies and practices will advance the litigation and benefit all class members, Plaintiffs have satisfied the predominance requirement.

B. Plaintiffs Satisfy the Superiority Requirement

Plaintiffs' claims are unquestionably best resolved through a class action. Importantly, ***not one*** of the state mass tort cases related to GMS have asserted claims against the DHS Defendants. Plaintiffs are unaware of, and the DHS Defendants have not identified, a single alternative lawsuit asserting claims against the DHS Defendants for the misconduct Plaintiffs have alleged in this litigation. Because the Plaintiffs asserted their claims against the DHS Defendants before the state-court mass tort action was established, the lack of individual cases against the DHS Defendants does not mean that former GMS students are not motivated to pursue claims against the DHS Defendants. And, because Pennsylvania does not recognize *American Pipe* tolling,[7] and the statute of limitations for the claims against the DHS Defendants has passed for most (if not all) of the class members, this Court remains the only avenue for putative class members to assert their claims against the DHS Defendants. *See, e.g.*, *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 943 (Pa. Super. Ct. 2002) (concluding *American Pipe* tolling "only extends to members of a putative class who

[7] *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

brings his or her action in the same court after denial of class certification," holding that a putative class action filed in New York did not toll the statute of limitations in Pennsylvania state court, and stating that the same holding would apply if the putative class action was first filed in federal court).

Further, the DHS Defendants' assertion that "at least half the class" brought a claim against GMS in state court is unquestionably false. *See* DHS Opp'n at 39. As has been widely publicized, the mass tort action covers alleged abuse, including sexual abuse, extending back to the 1980s. *See Glen Mills Litigation Over Abuse Allegations Is Consolidated Into Mass Tort*, EISENBERG ROTHWEILER WINKLER EISENBERG & JECK (June 16, 2020), https://www.erlegalteam.com/in-the-news/glen-mills-mass-tort/. Plaintiffs' claims in this lawsuit are limited to harm which occurred between 2017 and 2019 (or between 2013 and 2019 for limited minority tolling exceptions) and do not include sexual abuse claims. Given the public reporting that many claimants in the mass tort action are asserting claims for abuse that long predated 2017 (or 2013), it is certain that the number of proposed class members who have filed individual state-court claims is not 800, but some fraction of that number.[8]

Finally, as discussed more fully above and in the opening brief, as well as in of Plaintiffs' Reply to GMS, certifying the DHS Abuse class is manageable, appropriate, and most efficient given the class-wide common questions. The trial will be easily managed as all relevant facts pertain to the DHS Defendants. Unquestionably, what would ***not*** be manageable or desirable would be to hold hundreds of separate, individual trials, re-litigating the same questions regarding whether the DHS Defendants violated class members' Eight Amendment rights by creating, implementing, and maintaining unconstitutional policies and practices.

[8] The DHS Defendants have not suggested that ***any*** of the state court claims are brought against them.

Accordingly, the Plaintiffs have demonstrated a class action is the superior method of resolving 1,661 identical claims against the DHS Defendants.

III. The DHS Defendants Are Not Entitled to Qualified Immunity

The DHS Defendants bear the burden of proving they are entitled to qualified immunity. *Burns v. Pa. Dep't of Corr.*, 642 F.3d 163, 176 (3d Cir. 2011) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). They have failed to meet their burden.

"The qualified immunity defense is traditionally analyzed in two steps. First, a court must determine whether the facts alleged, taken in the light most favorable to the plaintiff, make out the violation of a constitutional right. Next, the court must examine whether the right at issue was 'clearly established' at the time of the challenged conduct." *Pinkney v. Meadville, Pa.*, 648 F. Supp. 3d 615, 643 (W.D. Pa. 2023) (cleaned up). The Court has "discretion to decide which of the two prongs of qualified-immunity analysis to tackle first." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

As this Court decided when it denied the DHS Defendants' motion to dismiss, the rights the Plaintiffs seek to assert were clearly established at the time of their injury. ECF No. 59 at 35 ("Plaintiffs' right under the Eighth Amendment to be free from excessive force and to receive adequate medical care and food was also clearly established under precedent handed down by both the United States Supreme Court and our Court of Appeals."). This Court concluded that "[b]ecause plaintiffs have sufficiently alleged a violation of their clearly-established constitutional rights, defendants are not entitled to qualified immunity." *Id.* at 36.

Thus, the only remaining question for class-certification is whether the Plaintiffs can establish violations of a constitutional right on a class-wide basis. They can. The DHS Defendants erroneously rely on *Rouse v. Plantier*, 182 F.3d 192 (3d Cir. 1999) to advance a series of flawed arguments based on a fundamental misunderstanding of that case. *Rouse* does *not* require, as the

DHS Defendants suggest, that the qualified immunity analysis for each of the three DHS Defendants be assessed against each individual class member. To the contrary, *Rouse* is clear that the conduct of each ***defendant*** is the element of the qualified immunity analysis entitled to individualized review. *Rouse*, 182 F.3d at 200 ("[T]he District Court should have addressed the specific conduct of each of the individual defendants in determining whether that particular defendant acted in an 'objectively unreasonable' manner.").

Rouse, then, simply requires that the Court evaluate the individual conduct of Defendants Dallas, Miller, and Utz, vis-à-vis their implementation and maintenance of the constitutionally defective policies and practices that harmed the putative class. *See also Reitz v. Cnty. of Bucks*, 125 F.3d 139, 147 (3d Cir. 1997) (explaining that qualified immunity "requires application of the law to the particular conduct at issue"); *Bakalis v. Golembeski*, 35 F.3d 318, 326–27 (7th Cir. 1994) ("Qualified immunity is an individual defense available to each individual defendant in his individual capacity."). These questions are clearly capable of class-wide resolution, as each putative class member was affected in the same way by the individual conduct of Defendants Dallas, Miller, and Utz. And as discussed above, each GMS student had an identical constitutional need—to be kept safe while in the care, custody, and control of DHS. *DeShaney*, 489 U.S. at 199–200. Each of the DHS Defendants owed the same, singular duty to each of the 1,661 putative class members: to protect them from harm. *See Benedict*, 98 F. Supp. 3d at 821 (citing *Morrow*, 719 F.3d at 167).

CONCLUSION

For these reasons, and the reasons explained in Plaintiffs' Opening Brief, ECF No. 190, Plaintiffs respectfully request that the Court certify the DHS Abuse class.

Dated: November 30, 2023

BY: */s/ Marsha L. Levick*

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CERTIFICATE OF SERVICE

I, Roger A. Dixon, Esq., certify that on November 30, 2023, I caused the foregoing Plaintiffs' Reply in Support of Their Motion for Class Certification and Appointment of Class Representatives and Class Counsel 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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