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 DEFENDANTS GMS AND IRESON'S OPPOSITION

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I. INTRODUCTION

Plaintiffs seek certification of three issues classes against Glen Mills Schools and, with respect to the first issues class, Randy Ireson ("GMS"):[1] first, an "Abuse Issues Class;" second, an "Education Issues Class," and third, a "Disability Discrimination Issues Class." As described in their opening briefing, Plaintiffs propose that the sensible course is for this Court to certify a class of issues that can be resolved class-wide to streamline future individual suits and promote potential settlement. In opposition to this proposal, GMS offers only an unpredictable and unmanageable path forward for this litigation. It suggests that the best course of action is a parade of individual suits before this court in which each and every element of each and every claim against each and every defendant is tried for each member of the putative class. Plaintiffs respectfully disagree.

GMS's scattershot opposition to certification is, for the most part, an opposition to a brief that Plaintiffs never filed. It is responsive to arguments that Plaintiffs have not raised and fundamentally misunderstands Plaintiffs' issue class framework, claims, and arguments, while largely re-treading arguments against certification of issue classes that the Third Circuit has already evaluated and squarely rejected. There is a disturbing thread that runs through GMS's opposition: GMS says that it simply committed too many different harms to be subject to class wide resolution of any sort. However, the fact that GMS violated the rights of so many former residents is not the shield they think it is, as Plaintiffs challenge a top-down system that violated the rights of all students in similar ways that can be proved using common evidence. As laid out in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Class Certification and Appointment of Class Representatives and Class Counsel (ECF No. 188-1) ("Pls. Br."), all of the

[1] "GMS" refers to Glen Mills Schools and Defendant Randy Ireson when referencing the Abuse Issues Class. The Education and Disability Issues Classes are brought against GMS as an entity alone and GMS does not reference Defendant Ireson in discussion of those claims.

proposed classes satisfy the requirements of Fed. R. Civ. Pro. 23. Resolving questions of duty and breach in one proceeding will significantly simplify resolution of this matter and avoid inefficient, piecemeal and inconsistent judgments across hundreds of putative class members.

II. PLAINTIFFS' PROPOSED CLASSES SATISFY RULE 23(A).[2]

A. Plaintiffs' Proposed Classes Satisfy Commonality.

GMS alleges that Plaintiffs merely restate their causes of action for purposes of establishing commonality. But its own arguments belie this characterization. Plaintiffs of course do describe which elements of their causes of action can be established class-wide. (*See, e.g.,* Pls. Br. 31-33, 40-42, 45-46). But that is precisely the inquiry that is required at this stage: the Court must determine whether the elements of Plaintiffs' issues are provable through common evidence. *See, e.g., Reyes v. Netdeposit,* LLC, 802 F.3d 469, 489 (3d Cir. 2015). In *Reyes*, the Court determined that both "predominance and commonality are satisfied" where the elements of Plaintiffs legal theory involve "common questions of law and fact capable of *proof by evidence common to the class*." *Id.* (emphasis added). In GMS's own opposition, it concedes that predominance has been satisfied. GMS acknowledges that the proposed issues have been selected precisely because they are the common issues. (GMS's Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification (ECF No. 192) ("GMS Opp'n") 21). They note that 23(c)(4) issue class claims "almost automatically" meet Rule 23(b)(3)'s predominance requirement because "once the issues to be certified are narrowed down to make them sufficiently 'common,' *it is virtually axiomatic that common issues will predominate*." *Id.* (citing *In re Marriott Int'l, Inc*., 78 F.4th 677, 689 (4th Cir. 2023)). This is not a flaw of 23(c)(4) classes – it is the point. It is similarly "axiomatic" that the proposed issues satisfy commonality. After all, as the Third Circuit has noted, the commonality

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[2] GMS does not challenge that Plaintiffs satisfy numerosity or typicality, and therefore, Plaintiffs do not address those points in their reply.

inquiry is largely subsumed by that of predominance. *See, e.g., Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 297 (3d Cir. 2011). Nevertheless, Plaintiffs respond to GMS's specific arguments as to the issues classes.

1. *Plaintiffs Abuse Issue Class Satisfies the Commonality Requirement.*

GMS expresses a mistaken belief that the Abuse Issue Class needs to demonstrate the same injury for purposes of issue class certification. This is incorrect. Members of the Abuse Issues Class do not allege and do not need to allege that GMS caused them the same injury. Rather, Plaintiffs allege that *elements* relevant to the later-to-be-proved individual injuries of claimants are suitable for class-wide resolution, due to the common practices and policies of GMS.

a. Eighth Amendment Claims Satisfy Commonality.

First, GMS notes the obvious – that Eighth Amendment doctrine "actually encompasses a number of different theories of liability" – to incorrectly suggest that Plaintiffs are attempting to include the gamut of Eighth Amendment theories in their issue class claims. (GMS Opp'n 18). But GMS later concedes that Plaintiffs have indeed specified a particular Eighth Amendment theory: deliberate indifference to conditions posing a substantial risk of serious harm. (Pls. Br. 30).

Next, GMS argues that Plaintiffs merely restate the elements of their Eighth Amendment claim. But the fact that the elements of Plaintiffs' Eighth Amendment issue claims (like substantial risk of harm and deliberate indifference) are capable of class-wide proof independent from issues of individual injury are precisely what render them common. *In re Suboxone (Buprenorphine Hydrochloride & Nalaxone) Antitrust Litig.*, 421 F. Supp. 3d 12, 76 (E.D. Pa. 2019) (finding commonality satisfied for 23(c)(4) over Defendant's arguments which conflated the question whether a legal violation occurred with the impact of that violation on individual plaintiffs). GMS next argues that Plaintiffs present "disparate allegations" to the extent briefing noted various "policies, policy failures, and risks" arising from GMS. (GMS Opp'n 19). But GMS mistakes

varied *evidence* for varied *allegations*. Plaintiffs here *allege* an Eighth Amendment violation under a deliberate indifference theory. Various "policies, policy failures, and risks" represent the common *evidence* by which Plaintiffs can prove that theory. That many of the policies and practices are *evidence* that GMS violated the Eighth Amendment is not a defense. If *any* or *several* of GMS's policies or uniform practices are found to have violated the Eighth Amendment, all members of the class will acquire the right to prove that one or more of those violative policies or practices caused their individual constitutional injury. In this way, resolution of the question of which policies, practices, or combination thereof violated the Eighth Amendment will support Plaintiffs' claims by "resolv[ing] an issue that is central to the validity of each one of the claims in one stroke." *Mielo v. Steak 'N Shake Operations, Inc.*, 897 F.3d 467, 489 (3d Cir. 2018) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011)).[3]

In response, GMS decides to distort the requirements at this stage and demand that Plaintiffs limit themselves to one source of evidence in supporting their issue class claims. But Plaintiffs are not required to try their case in chief in class certification briefing. Rather, Plaintiffs must show that they *can* prove the elements for which they seek class certification through evidence common to the class. Here, Plaintiffs allege that through policies and practices applying equally to all putative class members, GMS subjected class members to a substantial risk of serious harm to which GMS was deliberately indifferent in violation of the Eighth Amendment. The policies described in greater detail in Plaintiffs' opening brief include GMS's

[3] Defendants may contend that the Third Circuit's opinion in *Mielo* prohibits this theory of class certification. *Mielo,* 897 F.3d at489. But *Mielo*'s holding is of little relevance in the context of the Abuse Issues class where Plaintiffs do not purport to show a unified harm. *See In re Suboxone* 421 F. Supp. 3d at 77, *aff'd sub nom. In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig.*, 967 F.3d 264 (3d Cir. 2020) (finding commonality satisfied for a 24(c)(4) class where proof of a legal violation and proof of injury are distinct requirements).

(Pls. Br. 2-4). This constitutes "harm complained of" that is "common to the class" *Hassine v. Jeffes*, 846 F.2d 169, 177 (3d Cir. 1988); *Halman Aldubi Provident & Pension Funds Ltd. v. Teva Pharms. Indus. Ltd.*, No. 20-4660, 2023 WL 7285167, at *10 (E.D. Pa. Nov. 3, 2023) (noting that the commonality requirement "demands that class members' claims depend upon a common contention of such a nature that it is capable of class-wide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

This alone does not satisfy Plaintiffs' burden, as Plaintiffs must also show that this is provable through common evidence. But that too is satisfied. GMS's "variety of policies, actions, and inaction" (GMS Opp'n 16) are the common evidence through which that common legal contention can be proven. Rather than supporting its arguments, GMS's repeated walkthroughs of its various policies and practices merely highlight the mountain of common evidence through which Plaintiffs might prove their common contention. *See In re Suboxone*, 421 F. Supp. 3d at 75 (noting that where a proposed issue "centers on the defendants' conduct, not the actions of individual class members…the issue is susceptible to classwide proof").

Take GMS's as an example. As Plaintiffs described, GMS leaders were aware that (Pls Br. 3-4). That policy, then, is evidence that students were incarcerated under conditions that put students at substantial risk of serious harm. GMS's continued enforcement of that policy despite awareness is evidence of their deliberate indifference to that risk. Should a fact finder determine that this

constitutes a violation of the Eighth Amendment, individual claimants may proceed with claims that this violative policy was a cause of their individual constitutional injury and prove their damages. A similar class-wide finding could apply to any of GMS's policies or practices. In contrast, litigating these same questions case by case would unnecessarily waste judicial resources and run the risk of conflicting results.

b. Negligence Claims Satisfy Commonality.

So too for Plaintiffs' negligence claims. GMS again attempts to leverage their varied failings as a shield against any form of class-wide resolution. GMS argues that Plaintiffs misread *Russell* in stating that duty and breach are issues of law for which only common evidence was required. (GMS Opp'n 16). Notably absent from GMS's accusations of "misreading" is the actual language of the Third Circuit:

> **Duty is an issue of law**. Therefore, it must be decided separately from breach, causation, and damages. *See Sharpe v. St. Luke's Hosp.*, 573 Pa. 90, 821 A.2d 1215, 1219 (2003). It is true that deciding if the Commission had a duty to investigate requires balancing several factors. *Id*. But none of that requires individual evidence, for each patient shared the same distanced relationship of trust with the Commission. **Likewise, breach would require only common evidence**…

Russell v. Educ. Comm'n for Foreign Med. Graduates, 15 F.4th 259, 273 (3d Cir. 2021) (emphasis added). GMS spends considerable page length struggling to explain why these words do not mean what they say, substituting its own analysis for that of the Third Circuit. (GMS Opp'n 16 (arguing that *Russell* says only that breach is "potentially susceptible" to common evidence)). As a question of law, duty is susceptible to common proof, as was described in Plaintiffs' motion. (Pls. Br. 31-33). GMS appears to agree, conceding that at some level it realizes it "owed its students some duty of care." (GMS Opp'n 22).

For breach, GMS's attempt to distinguish the present case from that in *Russell* fails for the same reason as its Eighth Amendment arguments: it confuses varied *evidence* with varied

allegations. GMS says that breach is not "so clean" here because GMS's behavior "encompass[es] a broad range of actions and policies related to an equally broad range of subject matter" including "excessive use of physical restraints by staff, a failure to chronicle and analyze the use of physical restraints, improper training, insufficient employee discipline, the failure to check employee references/engage in background checks, and insufficient 'policies and protocols' regarding student abuse reporting and potential retaliation." (GMS Opp'n 17). But this is no different than evidence of the "range of actions" related to the alleged breach by the Commission in *Russell*.[4] That GMS failed in "varied forms at various levels ***of the organization***" is not a shield against common resolution of breach, it is evidence in support of it. (GMS Opp'n 17).

2. *Plaintiffs' Education Issues Class Satisfies Commonality.*

With regard to the proposed Education Issues Class, Plaintiffs are no longer pursuing an equal protection claim against GMS. (Compl. (ECF No. 1) Count IV). In addition, GMS misconstrues Plaintiffs' issues as challenging the court-ordered placement of class members at GMS when in fact Plaintiffs refer to GMS depriving class members of an education following their placement at the facility. In light of the need for clarity, Plaintiffs have re-phrased the proposed issues class to more accurately reflect their claims against GMS: (1) whether GMS failed to provide an adequate legally compliant education under state and federal law; (2) whether GMS

[4] Though GMS attempts to paint the breach in *Russell* in as narrow terms as possible, it can only do so much. The Court in *Russell* noted that the breach inquiry would involve evidence of what actions the Commission took (or did not take) in investigating the purported fraud, whether there was evidence that Commission should have known of the fraud, evidence of what steps were taken in response to warnings from *various different parties* including the state of New Jersey, and whether the Commission should have taken certain actions after the fraudulent physician was placed in other residency programs. *Russell*, 15 F.4th at 273.

deprived students of a high school education without due process; and (3) whether GMS's educational programming harmed students.[5]

In its opposition, GMS chooses to ignore the core of Plaintiffs' arguments, and instead, tries to distract by identifying multiple ways in which it failed its students. However, GMS does not dispute that as a PRRI, it assumed liability for providing a legally compliant education to its students.[6] (*See* e.g., 2017 and 2018 Agreements Between GMS and Chester County Intermediate Unit) (ECF No. 12-2, 3) ("Glen Mills Schools shall be responsible for provisions of a Minimum Educational Program of Instruction for 180 days or a minimum of 900 hours of instruction at the elementary level and … 990 hours at the secondary level …"). GMS held this obligation for all students, a fact that is *common to all students at GMS during the putative class period*. Furthermore, GMS does not contest that it failed to fulfill those obligations or that Plaintiffs have identified common evidence regarding GMS's education program applicable to all class members.[7]

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[5] While GMS suggests in a footnote that Plaintiffs' proposed Education Issues Class is undermined by the absence of a private right of action, this is incorrect. State and federal courts have recognized the legal entitlement of a Pennsylvania student to challenge the deprivation of an education in numerous contexts. *See e.g., Velazquez v. East Stroudsburg Area School District*, 949 A.2d 354 (Pa. Commw. Ct. 2008) (enforcing legal right of student living with non-parent to attend school under 24 P.S. § 1302); *In re Hoke v. Elizabethtown Area Sch. Dist.*, 833 A.2d 304 (Pa. Commw. Ct. 2003) (upholding right of a child to attend public school following expulsion from a prior school). *See also Nancy M. v. Scanlon*, 666 F. Supp. 723 (E.D. Pa. 1987) (invalidating as unconstitutional state law provision allowing districts to deny school admission to children in foster care); *Patrick v. Success Acad. Charter Sch., Inc.*, 354 F. Supp. 3d 185, 216 (E.D.N.Y. 2018) (finding that placement in materially inferior alternative education program could deprive a student of property interest in education).

[6] While Plaintiffs do not need expert support to identify legal standards, GMS incorrectly asserts that Plaintiffs do not have expert support for this proposition. Dr. Gagnon's report clearly states that [redacted] Ex. 31, Gagnon Rpt. 20, citing Ex. A, Deposition of Special Education Coordinator Rema Pikes ("Pikes Dep."), 24:6-9.

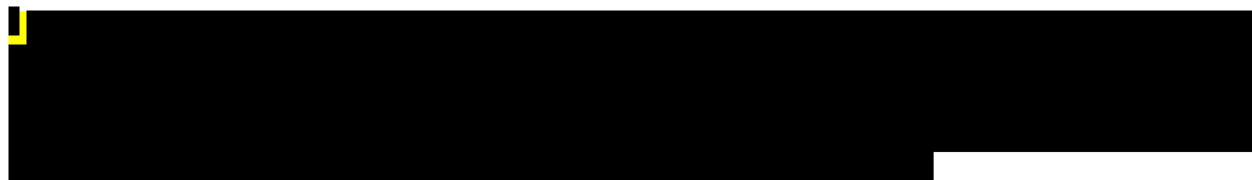
[7] Instead, GMS argues that [redacted] (GMS Opp'n 35 n.20). However, this is a limited description of Dr. Gagnon's critique. Dr. Gagnon documented

To satisfy commonality, "[a]ll plaintiffs need not suffer the same injury; rather, the fact that the plaintiffs were subjected to the injury or faced the immediate threat of these injuries suffices for Rule 23…. [and] [e]ven where individual facts and circumstances do become important to the resolution, class treatment is not precluded." *In re Suboxone,* 421 F. Supp. 3d at 47, *aff'd sub nom. In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig.*, 967 F.3d 264 (3d Cir. 2020) (citing *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994)). While Plaintiffs provide examples of different ways in which GMS failed to fulfill its obligations, this does not change the fact that, as a result of GMS's common policies and procedures applicable to class members *no student at GMS had access to the legally compliant education they were entitled to receive.* Any individualized circumstances, or what some students may have found "preferable" are irrelevant to this point.

GMS inexplicably argues that Plaintiffs have not identified any "discrete question[s] of law whose determination will resolve an issue that is central to the validity of each individual plaintiff's claim in one stroke." (GMS Opp'n 34 (internal citations removed)). First, as GMS acknowledges, *Russell* explicitly rejected the idea that resolving liability was a precondition to certification of an issues class. 15 F.4th at 269-70; (GMS Opp'n 25). Second, by nature of being an issues class, Plaintiffs identify three questions that are central to the validity of each Plaintiffs' claim: (1) whether GMS failed to provide an adequate legally compliant education under state and federal law; (2) whether GMS deprived students of a high school education without due process; and (3) whether GMS's educational programming harmed students. The resolution of any one of these questions is central to each of Plaintiffs' claim and all can efficiently be decided yes or no for the entire proposed class at once because the answers to each are based on common GMS policies, programs, procedures and practices applicable to all class members. (*See* Ex. 31, Gagnon Rpt. at 20).[8]

3. *Plaintiffs' Disability Discrimination Issues Class Satisfies Commonality.*

GMS also argues that Plaintiffs cannot meet the Rule 23(a) commonality requirement for their Disability Discrimination Issues Class, again arguing that the claims are too individualized. But again, and as described in more detail in Plaintiffs' Reply to the Opposition of Defendant PDE to Plaintiffs' Motion for Class Certification ("PDE Reply"), the Disability Discrimination Issues Class is based on GMS's common course of conduct as to all members of the Disability



Discrimination Issues Class (*e.g.,* the common failure to modify policies, procedures, curriculum etc. for students with qualifying disabilities) thereby satisfying commonality. (Pls. PDE Reply, Section III(B)). *See V.W. ex rel. Williams v. Conway*, 236 F. Supp. 3d 554, 575 (N.D.N.Y. 2017). Once again, the specifics of each putative member's disability are irrelevant as GMS's common policies are the basis for liability determination and Plaintiffs must only "demonstrate that the systemic challenge is equally important to the named Plaintiffs as to the unnamed Plaintiffs." *CG v. Pennsylvania Dep't of Educ.,* No. 06-1523, 2009 WL 3182599, at *6 (M.D. Pa. Sept. 29, 2009). Here, GMS failed to consider the qualifying disabilities of GMS students in any of its policies.

While the Americans with Disabilities Act ("ADA") can indeed be violated in many ways, there is no doubt that ADA violations can also be aggregated into a class action when the issues in question are common to those in the class. *See, e.g.*, *Liberty Res., Inc. v. City of Philadelphia,* No. CV 19-3846, 2020 WL 3816109, at *3-4 (E.D. Pa. July 7, 2020) (Bartle, J.); *Frederick L. v. Dep't of Pub. Welfare of Pa*., 422 F.3d 151, 160 (3d Cir. 2005) (vacating and remanding finding against class in action brought under ADA). Here, there is no question that multiple common facts and legal issues exist with regard to the Disability Discrimination Issues Class. Many of these facts involve GMS's common policies, practices, and conduct, applicable to all students within the Disability Discrimination Issues Class. (*See* Pls. Br. 11-14, 45-47).

GMS's use of examples is unpersuasive. While different students may have had some different experiences, the issues set forth are nonetheless common among all students in the Disability Discrimination Issues Class. For example, GMS failed to take students' disabilities into account when imposing restraints and disciplinary sanctions, as a systemic practice with all students. (*See, e.g.*, Pls. Br., Ex. 5 Cosgrove Dep. 155:12-156:7, 218:2-11; Ex. 7, Ireson Dep. 84:7-13, 85:11-24; Ex. 33, Powell Dep. 86:16-87:19). Indeed, GMS's liability based on its lack of effort

to make accommodations for students with disabilities can be adjudicated and resolved without determining the extent to which students with disabilities were individually harmed by GMS's conduct. Accordingly, unlike the cases relied on by GMS in opposing certification, this is not a case where individualized facts are determinative and "so widely divergent" as to warrant adjudication on an individualized basis. *See e.g.*, *Mielo*, 897 F.3d at 490. Rather, liability can be determined on a class-wide basis focused on Defendant's conduct and uniform policies and practices as to all identified class issues, and remedies can be fashioned on an individual basis. *See In re Suboxone*, 421 F. Supp. 3d at 75 (issues focused on the defendants' conduct are susceptible to class-wide proof).

B. Plaintiffs' Proposed Classes Satisfy Adequacy.

GMS does not meaningfully challenge adequacy for any of Plaintiffs' proposed classes, instead relegating this argument to footnotes. However, for completeness of the record, Plaintiffs respond to those arguments here.

In a single footnote, (GMS Opp'n 31 n.16) GMS argues that because the Prison Litigation Reform Act ("PLRA") bars compensatory damages, the approach of Plaintiffs here makes a "strategic trade-off" that is at odds with the interest of class members rendering Plaintiffs inadequate class representatives. But this argument proceeds from GMS's profound misunderstanding of the PLRA as totally barring compensatory damages, not to mention its inapplicability to this case. As addressed elsewhere, this argument fails. (*See* Section IV(A)).

In the sections regarding Plaintiffs' proposed Education Issues Class and Disability Discrimination Class, GMS asserts in footnotes, with no support or basis, that "Plaintiffs' interest in preserving this litigation as a class action is squarely at odds with the interests of class members, who will bear the cost of those choices but receive little benefit." (GMS Opp'n 44 n.29, 49 n.33). GMS has not identified how certification of its failure to provide a legally compliant education or

disability discrimination issues are at odds with any individual's claim. Individuals will have a full opportunity to litigate their individual circumstances after issues common to the class are determined, which increases efficiencies to this court and class members. Accordingly, GMS's adequacy argument fails.

III. PLAINTIFFS' PROPOSED ISSUE CLASSES SATISFY RULE 23(B).

A. Common Issues Predominate for Plaintiffs' Proposed Issues Classes.

Defendants concede that by nature of the proposed issue class framework, common questions predominate, as the issues selected for certification are those that predominate. (*See* GMS Opp'n 21 (citing *In re Marriott Int'l, Inc.,* 78 F.4th 677, 689 (4th Cir. 2023) for the proposition that 23(c)(4) classes will "almost automatically" satisfy predominance)). It is axiomatic, then, that they satisfy commonality. *See* Section II(A). Plaintiffs also satisfy predominance.

1. *GMS's Remaining Critiques of Plaintiffs' Ability to Satisfy Predominance for the Education Issues Class are Ineffective.*

As discussed in Section II(A), individual differences do not predominate here where Plaintiffs seek certification based on systemic policies and practices. While at GMS, no student was able to access the education they were entitled to under federal and state law. Courts have repeatedly certified classes where Plaintiffs challenged uniform practices of failure or inaction and identified such common pervasive conduct to support commonality and predominance. *See, e.g., Parsons v. Ryan,* 289 F.R.D. 513, 521 (D. Ariz. 2013), *aff'd*, 754 F.3d 657 (9th Cir. 2014) (certifying class of state inmates alleging deliberate indifference to medical needs "where all inmates are subjected to Defendant's actions or lack thereof, because they have the sole responsibility for health care policy"); *Brooklyn Ctr. for Independence of the Disabled v. Bloomberg,* 290 F.R.D. 409, 418-19 (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 "the class members have diverse disabilities and will not all be affected by the alleged omissions in . . . the same way"); *D.L. v. D.C.*, 302 F.R.D. 1, 13 (D.D.C. 2013), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017) (disabled children in the District were subject to uniform failures and inadequacies caused by the same agency); *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) (where former students at a beauty college alleged violations of RICO and state consumer fraud law, citing numerous deficiencies, the fact that there was variation among the class grievances or that some students educated in the program passed a qualifying exam did not defeat commonality and undermine certification. Rather, a common nucleus of operative facts was enough to satisfy the commonality requirement of Rule 23(a)(2) and Rule 23(b)(3)).

Whether students may have "arrived at GMS at various ages, ranging from 12 and 18, from different schools, different jurisdictions, different states, and even different countries," (GMS Opp'n 37) does not change the fact that, while at GMS, they did not have access to a legally compliant education. (*See, e.g.,* Ex. E, Gagnon Dep. I 184:4-22 ████████████ While length of stay and extent of injury may influence the amount of compensatory education a plaintiff may receive, Plaintiffs are not seeking certification on that issue, and as such, that analysis will be saved for a later date, as described in Plaintiffs' proposed trial plan in Section V(A). *See Russell*, 15 F.4th at 274 (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"). Plaintiffs

instead assert that GMS systemically failed to ensure that all students had access to a legally compliant education.

In addition, while GMS attempts to analogize GMS's failure to provide a legally compliant education in violation of Plaintiffs' rights under the constitution and federal and state law to a defective tire, that comparison is simply inapposite. Following GMS's analogy, unlike as the court explained in *Marcus v. BMW of N. Am., LLC*, where some tires go flat for reasons unrelated to their defects, here all students were impacted by the deprivation of an education as GMS systemically failed to offer educational programming that was compliant with state and federal law. 687 F.3d 583, 604 (3d Cir. 2012). This question predominates over any individualized question, as its determination will show whether it was even possible for a student to receive the quality education they were entitled to obtain.[9]

More specifically, GMS contends that Plaintiffs' arguments fail to consider the education students received prior to arriving at GMS. However, simply because a student may have had educational difficulties prior to attending GMS does not excuse GMS from providing a legally compliant education to each GMS student. GMS's argument against superiority, relying on cherry-picked testimony [REDACTED] on GMS's obligation to provide him with an appropriate education, is misplaced. (GMS Opp'n 37). Taken in full context, Dr. Gagnon clearly affirmed his opinion that a student's previous lack of school attendance does not extinguish or alter a school's obligation to provide him with a legally compliant education. (Ex. F, Gagnon Dep. II at 236:10-240:20 [REDACTED]

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[9] Moreover, at this phase of the litigation, Plaintiffs are not asking the court to find that all students were harmed – that is what trial is for. Instead, the Court need only make a determination that Plaintiffs could, through common evidence, show that students were harmed class-wide. *See Williams v. Sweet Home Healthcare*, LLC, 325 F.R.D. 113, 125 (E.D. Pa. 2018) ("In analyzing the predominance factor, courts must determine not only whether there are common questions of law or fact, but whether those questions are capable of class-wide answers through common evidence"). (*See also* Pls. Br. 8-14).

Dr. Gagnon's opinion regarding GMS's continuing obligation to students regardless of their previous school history, including lack of attendance, is consistent with the law. *Lauren G. ex rel. Scott G. v. W. Chester Area Sch. Dist.*, 906 F. Supp. 2d 375, 390 (E.D. Pa. 2012) (affirming finding of FAPE denial for period of poor school attendance); *A.W. v. Middletown Area Sch. Dist.*, No. 13-cv-2379, 2016 WL 6216093, at *8 (M.D. Pa. Oct. 25, 2016) (affirming hearing officer's award of compensatory education for school's failure to provide appropriate education to a student who was absent for 103 school days from November through March). The factual circumstances regarding the prior school experience for the Named Plaintiffs does not defeat superiority or change GMS's obligation to educate them.

GMS's critiques of Dr. Gagnon's testimony in support of Plaintiffs' allegations of class-wide harm are unsupported by the record. Dr. Gagnon's opinions regarding GMS's educational failures to "[e]very student that attended Glen Mills from 2013-2019" were derived from a close review of extensive data gathered using an accepted methodology within his field.[10] (Ex. E, Gagnon Dep. I 53:3-62:7; 143:12-144:23; Pls. Br., Ex. 31, Gagnon Rpt. 13-16). He reviewed thousands of records, including complete student records for a representative sample of former students at Glen Mills. (*Id.*). (Ex. E, Gagnon Dep. I at 61:7-20). GMS's challenge to Plaintiffs' reliance on this expert opinion in support of class certification should be rejected. *See Bowers v.*

[10] Dr. Joseph Gagnon, Ph.D., has extensive experience researching, assessing, and working in educational programs for youth in juvenile facilities. (Pls. Br., Ex. 31, 66-110). He has published peer-reviewed articles, conducted review of juvenile justice facilities, and teaches university-level courses on this subject. (Pls. Mem. in Supp., Ex. 31, at 68-88).

Nat'l Collegiate Athletic Ass'n, 564 F. Supp. 2d 322, 361 (D.N.J. 2008) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993)) (permitting an opinion derived from a "review of data, documents, and testimony relating to the NCAA's policies, literature in the field of disability education, and his own knowledge and experience in the areas of special education and quantitative methodology….is [] a conventional social science approach that courts have routinely admitted as methodologically reliable" under a court's "'flexible'" Rule 702 analysis).

Dr. Gagnon provided extensive documentation regarding the systemic failures of GMS that he determined based on his rigorous review of thousands of student records and policies, curricula, and other materials provided by GMS, the Commonwealth, and CCIU, which are documented in his 195-page report and described in great detail during his deposition. (Ex. E Gagnon Dep. I 10:21-11:6, 28:14-32:8, 48:5-49:3, 54:1-62:7, 72:22-74:4; Pls. Br., Ex. 31, Gagnon Rpt. at 13-16). Dr. Gagnon summarized his method for his analysis of Glen Mills educational program to include

(Ex. E, Gagnon Dep. I 10:21-11:6). Dr. Gagnon described in detail the statistical analysis that he conducted in order to determine the representative sample, (Ex. E, Gagnon Dep. I 54:7-60:15). He described that he has

(Ex. E, Gagnon Dep. I 61:13-62:1). As a result, GMS's claim that this method, which is consistent with the accepted method within Dr. Gagnon's field, cannot produce reliable results regarding the class-wide deficiencies in the educational program is baseless.

Moreover, neither GMS nor PDE offer a counter-analysis of the data Dr. Gagnon considered nor does any expert witness contradict or offer a counterproposal to his methodology.

B. Plaintiffs' Proposed Classes Satisfy Superiority.

Litigating the issue classes together in conjunction with common evidence relating to co-defendants, as described below in Section V(A), will promote efficiency and renders the present action superior. In addition, litigating the claims against GMS along with those against PDE and the DHS Defendants would reduce duplicative litigation, as the issues are intertwined and involve common evidence. This Court has already ruled that claims against different defendants should not be severed for these same reasons. (*See* ECF No. 59 at 51-53 ("Duplication of trials thus would be inefficient" where "plaintiffs' claims of insufficient education at Glen Mills are intertwined with plaintiffs' claims regarding physical abuse.")). The intertwined nature of Plaintiffs' claims has borne out through discovery. For example, establishing the impact of the abusive culture and harmful policies at GMS will require common evidence about the [REDACTED] (Ex. G Ireson Dep. 12:8-19; Ex. H, Cosgrove Dep. 54:4-56:7; Pls. Br. at 4) [REDACTED] (Ex. H, Cosgrove Dep. 54:4-56:7; Ex. A, 30(b)(6) Pikes Dep. 40:24-41:8), [REDACTED] (Ex. H, Cosgrove Dep. 146:13-151:3; Pls. Br. 2-8) [REDACTED] (Ex. H, Cosgrove Dep. 146:13-151:3; Pls. Br., Ex. 1, March 25, 2019 Emergency Removal Order), [REDACTED] (Pls. Br. 2-8), [REDACTED] (*See, e.g.*, Section II(A)(3)); [REDACTED] (Pls. Br., Ex. 42, PDE 30(b)(6), Clancy Dep. 301:17-24; Ex. 8, Muhammad Rpt. 9); [REDACTED] (*see e.g.*, Pls. Br., Ex. 39, Osher Rpt. at 10-11) [REDACTED] (*see, e.g.*,

Pls. Br., Ex. 31, Gagnon Rpt. at 45). (*See also* Pls. Br. 2-17). The certification of the issues classes against PDE and GMS will prevent the re-litigation of all these issues in successive litigation, streamlining any remaining issues that would need to be litigated individually, or as proposed below, as part of a bellwether process.

GMS attempts to draw a false equivalency to the Mass Tort proceeding pending in the Pennsylvania Court of Common Pleas ("PA Mass Tort") to demonstrate that it is superior to the present action. In their view, the PA Mass Tort is evidence that incentive exists for solo actions to prosecute individual rights outside of the class framework. (GMS Opp'n 22). But this is an inapt comparison. The superiority inquiry for an issue class like that proposed here does not look to whether claimants have incentive to bring solo damages actions to prosecute their rights. That would be non-sensical: individual damages claims are necessarily preserved by the issue class framework since claimants proceed with individual damages actions after resolution of class-wide issues. Instead, the inquiry is whether, detached from the individual damages actions to follow, an individual plaintiff would have any incentive to bring an action *purely related to resolving the proposed issues* on their own absent issue class certification. The answer is obvious: no. *See, e.g., C.P. v. New Jersey Dep't of Educ.*, No. 19-12807. 2022 WL 3572815, at *12 (D.N.J. Aug. 19, 2022) (noting that ***"with respect to the issues raised for certification*** here, the interest of individual members in controlling the prosecution of those questions would be minimal to nonexistent" and "it would be challenging if not impossible for any individual class member to muster the litigation resources to have any of these questions answered") (emphasis added).

Finally, GMS ignores several crucial facts about the PA Mass Tort that render it definitively *inferior*. First, the PA Mass Tort action *does not include* Eighth Amendment claims.[11]

[11] Notably the PA Mass Tort does not include any claims regarding education or disability discrimination.

GMS offers no explanation as to how a matter that lacks a central cause of action from the present issue class action is even comparable, let alone superior.

Second, most, if not all, members of the putative class here are unable to pursue their Abuse Issue Class claims in the PA Mass Tort because Pennsylvania does not recognize cross-jurisdictional tolling for claims brought in other state courts or in federal courts. *See Ravitch v. Pricewaterhouse,* 2002 PA Super 49, ¶ 11, 793 A.2d 939, 943 (2002) ("[T]he doctrine enunciated in *American Pipe* only extends to members of a putative class who brings his or her action in the same court after denial of class certification."). An action for damages arising from personal injuries is subject to a two-year statute of limitations in Pennsylvania. 42 Pa. Stat. and Cons. Stat. Ann. § 5524. Claims under the ADA are also subject to a two-year statute of limitations. *Esposito v. Ridgefield Park Bd. of Educ.,* 856 F. App'x 367, 370 n.9 (3d Cir. 2021) (applying IDEA's 2-year SOL to ADA claims). Even with minority tolling, most if not all putative class members are now barred from bringing claims in state court that arise from their experience at GMS. GMS offers no explanation as to how an action that the putative class is barred from participating in could ever be considered superior. *See In re Cmty. Bank of N. Virginia Mortg. Lending Pracs. Litig.,* 795 F.3d 380, 409 (3d Cir. 2015) (finding superiority satisfied in light of "difficult, if not insurmountable" tolling issues faced by putative class members).

Third, the PA Mass Tort does not include any claims against co-Defendants PDE or DHS Defendants. The present proposed class action is the only existing action that will resolve all alleged harms in one proceeding, as described above.

Fourth, while Defendants assert over 800 individuals have brought actions in state court, Plaintiffs want to clarify that these approximately 800 individuals are not at all co-extensive with the proposed class in this case, and any suggestion that they are is false. 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 putative class members who have filed individual state-court claims is not 800, but some fraction of that number. Indeed, GMS surely knows the exact overlap based on information in its possession and can itself confirm the likely limited overlap between the state and federal actions.

In addition, GMS's repeated invocation of *Mariott* is unavailing. *See In re Marriott Int'l, Inc.*, 78 F.4th 677 (4th Cir. 2023). In *In re Marriott*, the Fourth Circuit evaluated 23(c)(4) issues class claims that had been originally brought alongside a damages class under 23(b)(3). 78 F.4th at 684. After certifying the 23(b)(3) class against defendant Marriot, the district court determined that the issue class satisfied superiority because *not* certifying the issue class would result in unnecessary duplication. *Id.* The district court certified the issue class accordingly. In its opinion, the Fourth Circuit vacated certification of the damages class on the ground that the time to address a contractual class waiver applicable to all class plaintiffs was before, not after, a class is certified. *Id.* at 686. This ruling removed the predicate underpinning of the district court's superiority analysis of the issue class. *Id.* Accordingly, the Fourth Circuit vacated then remanded the 23(c)(4) issue class for fresh analysis in the absence of the 23(b)(3) damages class. *Id.* at 690. The opinion

contains no independent analysis of superiority of the proposed 23(c)(4) class. That GMS clings to this out-of-circuit authority for its main argument regarding its superiority challenge is telling.[12]

1. *GMS's Remaining Critiques of Plaintiffs Ability to Satisfy Superiority for the Disability Discrimination Issues Class Are Ineffective.*

For the reasons referenced above, Plaintiffs' Disability Discrimination Issues Class also satisfies superiority.[13] However, when discussing Plaintiffs' Disability Discrimination Issues Class, GMS also, without support, points to a "substantial risk that any attempt to litigate duty and breach in the abstract will unnecessarily burden or constrain future litigants asserting highly-personalized claims." (GMS Opp'n 49). Once again, GMS ignores the common conduct that subjected all qualifying students to disability discrimination: GMS's failure to modify its policies, discipline procedures and practices, or education program to accommodate students with disabilities. (*See, e.g.,* Ex. 31, Gagnon Rpt. at 28, 38-42, 52-59). These issues are common to all class members. Any individual matters regarding extent of injury will be assessed in the remedies phase, which will be available to class members and future litigants alike. As explained above, certifying these issues classes will prevent the re-litigation of liability issues in successive litigation, therefore easing the litigation responsibility for future litigants, rather than burdening or constraining them.

[12] If anything, the case is more aptly read to support Plaintiffs position where as here, Plaintiffs bring the present issue class alongside a 23(b)(3) damages class, and allowing for certification of the issues classes alongside the damages class would promote efficiency due to the overlapping issues. (*See* Plaintiffs' Reply to the Opposition of DHS Defendants to Plaintiffs' Motion for Class Certification ("DHS Reply")).

[13] Notably, GMS does not critique Plaintiffs' ability to satisfy superiority with regard to the Education Issue Class.

C. Plaintiffs' Disability Discrimination Class is Ascertainable.[14]

The Disability Discrimination Issues Class is ascertainable, as it is "defined with reference to [] objective criteria" and there is a "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 v. BMW of N. Am., LLC*, 687 F.3d 583, 593-94 (3d Cir. 2012)). While evidence used to satisfy ascertainability, such as a defendant's records, may exist 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) (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 308 n.2 (3d Cir. 2013).

The Disability Discrimination Issues Class is defined with 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. 45). 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. GMS argues that the issue class "implicate[s] students who were never formally determined to possess a disability," (GMS Opp'n 48), but the definition of disability under the ADA and Section 504 is intended to be construed broadly and class members can be identified outside of a formal determination, unlike that required under the IDEA. 42 U.S.C. § 12102 note. Plaintiffs have proposed that the Disability Discrimination Issues Class can be determined based on records maintained by the parties and GMS which reflect (1) [REDACTED], (Pls. Br., Ex. 37,

[14] GMS does not challenge ascertainability for the Abuse or Education issues classes, and therefore, Plaintiffs do not address those factors in their reply.

Student Data, GMSCA0381084), and (2) [redacted]

[redacted] (*See, e.g.*, Pls. Br., Ex. 55, Health and Safety Screen, GMSCA0000901). These records are objective, reliable, and exist in the possession of GMS, such that the determination of members of the Disability Discrimination Issues Class will not require a "mini-hearing on the merits." *See Contawe v. Crescent Heights of Am., Inc.,* No. 04-2304, 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 and entitled to protection against discrimination. *Compare* 42 U.S.C.A. § 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 the students with IEPs and 504 Plans, all of the parties have the records at this time to identify 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 that specifically indicate the existence of a physical or mental impairment that substantially limits a major life activity. (*See, e.g.,* Ex. 55, Health and Safety Screen, GMSCA0000901). For example, GMS's "Health and Safety Screen" includes extensive information regarding [redacted]

[redacted]

(*Id.*). 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. Dep't 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) ("for example, 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]"). The regulations under the ADA generally define "physical or mental impairment" as "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine" and "[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 28 C.F.R. § 35.104. GMS maintains records which 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. 42 U.S.C.A. § 12102(1) (ADA definition of "disability") *with* 34 C.F.R. § 104.3 (Section 504 definition of "handicapped person"). Thus, the identity of the members of the Disability Discrimination Issues Class can be simply 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' GMS student files contained a record of an impairment known to interfere with a major life activity. While the identity of each of these issue 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)'s ascertainability requirement. *See Byrd,* 784 F.3d at 164.

Courts have found ascertainability met when, as here, the class can be identified based on screening tools completed upon admission to a facility. *See, e.g., Steward v. Janek,* 315 F.R.D. 472, 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*, a class defined based on eligibility for Medicaid was ascertainable for a group of nursing home residents and individuals who were screened for admission to a nursing home because the facility had a practice of screening for Medicaid eligibility upon admission to the facility. Here, as in *Steward*, the Disability Discrimination Issues Class is defined only to include students who were placed at Glen Mills, [redacted] (Ex. A, 30(b)(6) Pikes Dep. 57:7-63:19 ([redacted]), 312:17-313:1 ([redacted])). In addition, GMS testified to the development of the record of an impairment known to interfere with a major life activity. (*Id.* 299:20-303:10 ([redacted]). Thus, the identity of each member of the class "is not only ascertainable, but has already been ascertained." *See Steward,* 315 F.R.D. at 488.

GMS misconstrues Plaintiffs' common issues and facts regarding the nature of its discrimination of students within the Disability Discrimination Issues Class. (GMS Opp'n 48). GMS discriminated against students with qualifying disabilities in "multiple ways through policies and practices that deprived students of equal access to education and subjected them to discipline due to GMS's systemic failure to provide accommodations to students with qualifying disabilities." (Pls. Br. 11-14). Consistently, Plaintiffs document that GMS had information regarding the existence of students with qualifying disabilities who were placed at the school, but

then did not provide accommodations or services to ensure their equal access. (Pls. Br. 11-14

GMS should not be permitted to hide behind its discriminatory failure to acknowledge students' disabilities and implement a system to identify students eligible for special education evaluations to defeat ascertainability, when documentation of students' qualifying disabilities exists within GMS's records and was also developed through GMS's own admissions screening processes. *See, e.g.,* Pls. Br., Ex. 55, Health and Safety Screen.

IV. PLAINTIFFS' PROPOSED CLASSES ARE APPROPRIATE FOR CERTIFICATION UNDER THE THIRD CIRCUIT'S RULE 23(C)(4) FRAMEWORK.

At the outset, Plaintiffs' decision to seek certification of issues classes under Rule 23(c)(4) is not some sort of abdication of the "traditional" class action as Defendants frame it. Rule 23(c)(4) is a legitimate pathway for class certification provided for under the federal rules and is often utilized by plaintiffs in the Third Circuit. GMS repeatedly suggests that the proposed issue classes simply do not address enough to substantially facilitate litigation. But this ignores the practical reality: the alternative is that each and every issue will need to be litigated with respect to each and every individual claimant. That is hardly the clean and efficient alternative that GMS makes it out to be.

A. Plaintiffs' Abuse Issues Class Should Be Certified Under Rule 23(c)(4).

GMS then turns to arguing that the Abuse Issues are not "appropriate" for certification under the factors enumerated by *Gates*. *Gates v. Rohm and Haas Co.*, 655 F.3d 255 (3d Cir. 2011). They open their argument, again, with their misreading of *Russell*, which according to GMS stands for the proposition that class certification is inappropriate, or *even prohibited* where issues like injury and damages remain unresolved. (GMS Opp'n 24-25). Only later does GMS begrudgingly admit that this is not what the court held. (GMS Opp'n 25 ("It is true that *Russell* rejected a rigid requirement that issues classes resolve liability as a precondition of certification.")).

Russell controls and is clear that the mere fact that certain issues related to a party's liability are left for individual determination is not a bar to issue class certification so long as certification substantially facilitates the dispute. 15 F.4th at 270. GMS's reliance on out-of-circuit authority cannot overcome this, where district courts in the Third Circuit have applied the *Gates* factors to evaluate this exact question and rejected the GMS approach. *See, e.g, In re Suboxone*, 421 F. Supp. 3d at 77 (applying *Gates* factors and finding that 23(c)(4) certification was appropriate where the issue "looks solely at the actions of the defendant without regard to their impact on any individual class members. Proof of [proposed issue] alone is a significantly complex question that will require copious amounts of witness testimony, documents, and expert analysis, all of which will be common to each individual class member. In lieu of having each individual plaintiff produce this evidence at a separate trial, issue certification will allow these determinations to be made by a single factfinder, leaving only the individual determinations concerning impact and damages for separate trials."); *C.P.* , 2022 WL 3572815, at *15 ("Given the complex issues of law and fact that apply to all of the class members, it would be most prudent to marshal them in one action for determination."); *In re FieldTurf Artificial Turf Mktg. & Sales Pracs. Litig.*, No. 17-2779, 2023 WL 4551435, at *11 (D.N.J. July 13, 2023) ("[T]he Court finds that certification will significantly

advance this litigation by determining key elements of FieldTurf's liability using class-wide evidence.”).

With law against it, GMS turns to semantics: it argues that there is a meaningful difference between elements of a legal claim being “conceptually distinct” and those elements being “in practice, separate” for purposes of class-wide resolution. (GMS Opp’n 28). GMS points to no authority for this novel argument. Even so, for purposes of the Eighth Amendment Abuse Issues, this is a distinction without a difference: deliberate indifference is both conceptually distinct and severable from causation and can be demonstrated separately. *See, e.g., Beers-Capitol v. Whetzel*, 256 F.3d 120, 134 (3d Cir. 2001) (noting that deliberate indifference is shown with respect to a policy or practice where: “(1) the existing policy or practice created an unreasonable risk of the Eighth Amendment injury; (2) the supervisor was aware that the unreasonable risk was created; (3) the supervisor was indifferent to that risk; and *(4) the injury resulted from the policy or practice.*”) (emphasis added).

GMS’s own argument supports the proposed framework here: it notes that a Plaintiff must show that “that the *unconstitutional policy* at issue directly caused the harm alleged.” (GMS Opp’n 28). It is the question of whether GMS policies and practices were in fact unconstitutional and were *capable* of causing harm that will allow Plaintiffs to proceed with individual claims that the policy at issue “directly caused” their alleged harm. (*See id.*).

This framework would not unduly constrain class members as GMS contends. Members of the putative class are not “forced” into adopting the present litigation framework. To the extent GMS expresses concern for the putative class being faced with an “untenable choice” it can take solace in the opt-out procedures afforded by Rule 23. So too with GMS’s speculation as to Plaintiffs’ likelihood of success in individual actions. Those arguments are beyond the scope and

beside the point of the present inquiry. If GMS is confident in its ability to litigate Plaintiffs' individual claims, the proposed Abuse Issues class should be of little concern.

GMS writes that if individual Plaintiffs pursue claims under the proposed issue class framework, potential individual recovery will be limited because according to GMS, "standalone emotional distress damages are barred under the Prison Litigation Reform Act, 42 U.S.C. § 1997e" ("PLRA"). (GMS Opp'n 31). This misinterpretation of the PLRA and its application to the facts of this case is striking. The PLRA applies only to "prisoners" as defined as individuals incarcerated at the time the suit was filed. *Ahmed v. Dragovich*, 297 F.3d 201, 210 (3d Cir.2002) ("[A] prisoner who has been released is not precluded by the PLRA from filing a § 1983 suit for incidents concerning prison conditions which occurred prior to his release."). There is no dispute that PA DHS issued an emergency removal order on March 25, 2019 and revoked Glen Mills' license on April 8, 2019. (*See* GMS Answer to Complaint, ECF. 70,¶ 1). There were consequently *no students* confined at Glen Mills when plaintiffs filed suit on April 11, 2019. Accordingly, GMS's passing reference to the PLRA is irrelevant.[15]

[15] Even if the PLRA did apply, as GMS points out, punitive damages are still available. (GMS Opp'n 31). Punitive damages in § 1983 cases are available when a defendant has acted with a "reckless or callous disregard of, or indifference to, the rights and safety of others." *Carroll v. Lancaster Cnty.*, 301 F. Supp. 3d 486, 514 (E.D. Pa. 2018). Though GMS dismisses punitive damages with a handwave, its conduct here, conduct that warranted a state-ordered shutdown and evacuation of its facility for the immediate safety of students, warrants substantial punitive damages. The PLRA also permits recovery for emotional damages when a plaintiff also suffered a physical injury, 42 U.S.C. § 1977e(e), as did so many putative class members who were physically abused by GMS staff and even hurt by other students as a consequence of GMS's confrontation culture and failing to course correct when faced with mounting evidence of harm to students at the facility. (*See, e.g.*, Pls. Br., Ex 5, Cosgrove Dep. 147:6-148:4; 149:8-10; Ex. 9, GMS's Physical Restraint Log GMSCA0401031; Pls. Br. 3 n.4)). Of course, these are also all damages questions that can be determined at later stages of this case and do not impact issues class certification.

B. Plaintiffs' Education Issues Class and Disability Discrimination Issues Class Should Be Certified Under Rule 23(c)(4).

As described in Plaintiffs' opening brief, the Gates factors favor certification for both the Education and Disability Discrimination Issues Classes. "The ability to certify issues classes accords the courts discretion to realize the advantages and efficiencies of class-wide adjudication of common issues when there also exist individual issues that must be tried separately." *Lisa v. Saxon Mortgage Servs.*, Nos. 11-4586, 12-5366, 2016 WL 5930846, at *3 (quoting *Newberg*, § 4:89 (5th ed. 2012)). The *Gates* factors have been characterized as a "functional, superiority like analysis." *Martin v. Behr Dayton Thermal Prods., LLC*, 896 F.3d 405, 412 (6th Cir. 2018). GMS's criticisms of Plaintiffs' *Gates* analysis for the Education Issues Class and Disability Discrimination Issues Class are unsupported.

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. GMS misstates and conflates Plaintiffs' issues classes with their assertion that all claims require an individualized analysis. As explained in Section II(A), the issues to be certified for class-wide resolution are focused on Defendants' conduct and are common to the entire class.

Moreover, this case is unlike *Gates*, *Lloyd*, and other (c)(4) environmental toxin cases where there were "extensive periods of contamination with multiple sources and various pathways" requiring individualized determinations to assess other potential sources and the extent to which injury occurred based on varying levels of exposure. *Lloyd v. Covanta Plymouth Renewable Energy, LLC*, 585 F. Supp. 3d 646, 657-58 (E.D. Pa. 2022) (Bartle, J.) (discussing *Gates* and other environmental cases). Instead, Plaintiffs' class allegations are straightforward and apply to all class members. GMS denied all students a legally compliant education and all students

were harmed as a result of their time at GMS; similarly, all students with disabilities were discriminated against, 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 about GMS's conduct are simple and common for all class members. GMS's policies and practices did not vary in relation to any individual former student, and their policies and practices had a similar impact on all class members.

For each issues class, Plaintiffs propose to certify an issue each on duty, breach, and the fact of injury. *Lloyd*, 585 F.Supp.3d at 659. The evidence to be presented for the issues relating to GMS is common and overlapping even across the classes. (*See* Sections II(A), III(A); Pls. Br. 2-17). The fact of damages or injury is appropriate for issue certification on each proposed class 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. *See Lloyd*, 585 F. Supp. 3d at 659. All students in the respective classes were injured by the legally noncompliant general education, and students with disabilities were discriminated against due to GMS's failure to consider a student's disability. (*See* Section II(A)(3)). GMS's failure to act impacts all students in each issues class. The evidence to prove this fact of injury will be common across the issues classes.

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

This case's complexity derives from the extensive record, interwoven roles of multiple defendants, and the overlap of education, disability, and abuse claims. The record includes thousands of documents, dozens of depositions, and expert analyses regarding Defendants' obligations under the law and the harm caused to all class members at GMS, which will be used

as common evidence. Proceeding with issues classes will simplify this complexity by providing a streamlined path for resolution of the common issues of duty, breach, and the fact of damages based on the presentation of common evidence.

Courts have approved issue-class certification for other complex cases. For example, a sister court in the Middle District of Pennsylvania held that certification of specific issues was "particularly appropriate" for plaintiffs' Section 1983, RICO and wrongful imprisonment claims in the matter of *Wallace v. Powell*, 2013 WL 2042369, at *20 (M.D. Pa. May 14, 2013). *Wallace* included the claims of thousands of youth and their parents alleging a conspiracy over a five-year period between two juvenile court judges, three detention facilities and their owner/builder. *Id.* at *1-2. 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 with similar reasoning in *In Re Flint Water Cases*, 558 F. Supp. 3d 459 (E.D. Mich. 2021). In that case, Plaintiffs were thousands of children, property owners, business owners, and other individuals who alleged they were exposed to lead and other contaminants from the City of Flint's municipal water supply. *Id*. at 471. In response to defendants' arguments about individualized circumstances, the *Flint* court found that issue certification was appropriate because "common evidence may appropriately establish aspects of the duty, breach and causation inquiries." *Id*. at 512. The court approved two issues classes with nine questions for issue-class treatment. *Id*. at 517-18.

3. *Issue 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 v. Sears, Roebuck & Co*., 702 F.3d 359, 362 (7th Cir.

2012), *cert. granted, judgment vacated*, 569 U.S. 1015 (2013), and *judgment reinstated*, 727 F.3d 796 (7th Cir. 2013). 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 444, 452 (3d Cir. 1997) (citation omitted).

GMS's argument that minimal efficiencies are gained by issue class certification is without merit. GMS argues that, because absent class members are unlikely to have resources to litigate only *part* of their claims, that they should be forced to litigate their *entire* claim. (GMS Opp'n 44). This argument is nonsensical. For each plaintiff to litigate their own claim, they would still need to show that GMS's policies and procedures deprived them of an education, or policies discriminated against them based on their disability, requiring them to analyze numerous documents that would be produced. In contrast, what Plaintiffs are proposing would require class members to have to show only information specific to their harm, significantly decreasing the burden of litigation.[16]

The Rule 23 (c)(4) framework is especially important in situations like this involving youth that were placed through the juvenile justice system, where a class ruling may help them begin the audacious process of litigating against the same institution that caused them harm. *Wallace*, 2013 WL 2042369, at *19 ("as Plaintiffs aptly note, the instant litigation is premised on claims by juveniles relating to the denial of their constitutional rights during the [circumstances surrounding

[16] GMS also claims that that

This conclusion misapprehends Dr. Belfield's analysis which focused on the social and economic burdens of failing to graduate from high school and misapplies his analysis as determinative of a probable per student damages award. Neither is accurate.

their detention]. As a result of their experiences during these proceedings, many class members harbor a distrust of the judicial system, rendering it unlikely that they will seek redress individually.") Here, as in *Wallace*, certification of issues classes will give individuals an extremely helpful head-start in litigating their claims, decreasing their burden, and promoting efficiency.

The only alternative to issue-class certification followed by individualized determinations on specific damages is full-blown trials for each of at least 1600 class members that must each address issues of duty, breach, harm, and specific damages. This is necessarily far less efficient, because it would require repetitive presentations of evidence on duty, breach, and fact of injury on all claims. Resolving the issues in one single issues trial instead would conserve the resources of both the court and the parties, including the resources of Defendants who will benefit from disputing 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 certification. The type and amount of damages will not be part of the liability determination under the substantive law of Plaintiffs claims. Instead, individualized damages will be addressed separately (if Defendants are found liable). 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" about Defendants' conduct).

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, for the reasons described above. Moreover, there are no choice of law conflicts presented in this matter.

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

There are also no unique constitutional or statutory issues here because partial certification will not damage any class member's statutory or constitutional rights. 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 relation to Section IV(B)(9).[17]

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

As described in response to Gates Factor 3, resolution of common issues 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, that determination cannot be relitigated for individual class members. If a defendant is found liable, that will not need to be relitigated before moving to specific damages trials. Mini-trials on damages may also function as bellwether proceedings, facilitating settlement.

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[17] While GMS contends that it is not a "public entity" and therefore no cognizable ADA claim may be asserted against it under Title II of the ADA, this is incorrect. (GMS Opp'n 45 n.31). As the U.S. Department of Justice has explained, Title II of the ADA applies not only to state and local governments but to private entities that contract with county and state agencies and are responsible for the operation or management of juvenile justice placements. *See* U.S. Dep't of Just., *Americans with Disabilities Act, Title II Regulations Supplementary Information*, https://www.ada.gov/law-and-regs/title-ii-2010-regulations (last visited Nov. 29, 2023); 28 C.F.R. § 35.152; *see also C.K. v. Nw. Hum. Servs.,* 255 F. Supp. 2d 447, 451 (E.D. Pa. 2003) (concluding that facility for children adjudicated delinquent was subject to 1983 liability because it performed "a function 'quintessentially governmental'").

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

Certification of the proposed issues classes will be most effective 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. For example, if it is determined that GMS has no liability to the class, or has no duty to class members, then all class members will be bound by that decision, and GMS can be assured that the litigation is over.

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

Individual proceedings to identify specific damages to which a class member is entitled will not prejudice any individual or defendant.

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

As the Third Circuit explained approvingly of potential paths in *Russell*, "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*, 655 F.3d 255 at 273). The same is true for issues relating to duty and the fact of damages—these will not be repeated in individual damages trials because the individual trials will have preclusive issue-class rulings on the issues proposed for certification. The second-round juries will not decide issues pertaining to GMS's conduct. No

reexamination problems arise under the framework Plaintiffs propose.[18] 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. GMS'S REMAINING ARGUMENTS ARE UNAVAILING.

A. Plaintiffs' Trial Plan Demonstrates that the *Present* Issue Class Framework is Manageable.

As GMS notes in its opposition, a pre-certification trial plan is "not" a "hard-and-fast requirement." (GMS Opp'n 13). That is, of course, because a trial plan must be tailored to the issues to be tried. Moreover, the proposed issue class framework proposed by Plaintiffs is not a novel proposition. As discussed throughout Plaintiffs' briefing, including at Section III(B), 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 e.g., In re FieldTurf*, 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"). Nevertheless, while it

[18] No Defendant has raised an argument pursuant to the Reexamination Clause of the Seventh Amendment, and it is not a problem here. 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* 113 F.3d at 452 n.5 "Partial certification" or "[t]rying a bifurcated claim before separate juries does not run afoul of the Seventh Amendment" so long as: [1] the same factual issue is not "'tried by different, successive juries'"; [2] "the verdict form for the first jury" is carefully crafted "so that the second jury knows what has been decided already"; and [3] "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, 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)).

is too early in the litigation for the detailed trial plan Defendants prematurely request,[19] for the convenience of the Court, Plaintiffs provide here a two-phase potential trial plan, showing that these claims can be litigated efficiently and in an organized manner.

1. *Phase I: Issues Trial*

Plaintiffs propose that in Phase I, the Court try the issues certified for class-wide treatment. This would include all classes certified against GMS, PDE, and the DHS Defendants. For GMS,[20] this would establish (1) whether GMS owed a duty to students that it subsequently breached, and whether GMS violated the Eighth Amendment, (2) whether GMS failed to provide the required educational program under state and federal law, whether that was without due process, and whether the students were therefore harmed, and (3) whether GMS owed a duty to students with disabilities that it subsequently breached, and whether it discriminated against students with disabilities. If necessary, at the close of parties' presentations at trial, parties could confer regarding the questions to be submitted to the jury, so they can accurately capture the evidence presented at trial. These questions will be written with sufficient specificity for future juries to utilize in subsequent proceedings. This phase would address key issues that apply to all class members, streamlining and simplifying the subsequent phases of the litigation, *C.P.*, 2022 WL 3572815, at *10 ("The Third Circuit has held that the kinds of classes that may be certified under 23(c)(4) classes may be issues related to overall liability, particular elements of a claim, or issues that would substantially advance litigation.").

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[19] A more detailed trial plan cannot be determined prior to the court's determination on what issues are certified, and will likely involve parties meeting and conferring on an agreed upon plan.

[20] *See* PDE Reply for issues to be litigated at Phase I regarding PDE; DHS Reply for claims to be litigated at Phase I regarding DHS.

2. *Phase II: Bellwether Process*

In Phase II, Plaintiffs would propose bellwether proceedings to allow parties to anticipate the results and value of similar future cases. Issues that were litigated in Phase I against all parties, such as duty and breach, or violation of state or federal law, would *not need to be re-litigated*. Therefore, these bellwether trials would address only the remaining issues of individualized causation and damages, where appropriate. While, again, it is premature to determine how bellwether plaintiffs would be chosen, how many bellwether trials will be necessary, and what claims would be tried at each bellwether trial, the process would allow for multiple plaintiffs with varying circumstances to present their claims. An option that parties may consider, but the Court is not limited to, is use of a "Plaintiff Fact Sheet" to gather initial information from putative individual claimants, from which parties could each make selections regarding their preferred bellwether plaintiffs. A Plaintiff trial pick and Defense trial pick could then proceed with their individual claims. This process would provide parties an accurate picture of the value of various claims and influence how the litigation will proceed. More importantly, for the Court and the parties, this process will assist with assessing the value of claims and similarly situated class members.

Following both Phase I and Phase II, or concurrently with Phase II, Plaintiffs propose that parties utilize the mediation process and/or a special master.[21] Meditation may be facilitated by the information gathered during the issues trials, as well as information on potential recoveries from the bellwether trials. Additionally, a special master could be appointed to assist with resolving issues such as damages calculations, however, the exact role of a special master would need to be determined at a later date commensurate with the determinations at prior stages of the litigation.

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[21] Alternatively, should the court find that the bellwether process is not appropriate, the court could engage a special master immediately after "Phase I."

B. Plaintiffs Have Standing to Pursue Issue Class Claims

GMS argues that Plaintiffs lack standing to litigate the proposed class issues because to do so would be litigating GMS policies that may not have been a factor in their individual injuries. (GMS Opp'n 10-11). Plaintiffs, they say, are limited "to litigating only those GMS actions, inaction, policies, or policy failures that are directly related to their injuries" and cannot challenge those that may have injured only other students. (*Id*). But this is not a standing argument. In suggesting otherwise, GMS proffers an approach to evaluating standing in class actions that has been considered and rejected by the Third Circuit. *See Neale v. Volvo Cars of N. Am.*, LLC, 794 F.3d 353, 368 (3d Cir. 2015). In *Neale*, in responding to a standing challenge in a product liability action, the Third Circuit noted that its analysis of the proposed class would involve evaluating whether named plaintiffs could represent the class if their experiences were distinct from those of the putative class with respect to an allegedly defective product. *Id.*

But the court concluded that these concerns were addressed not through a standing analysis, but through Rule 23 itself.[22] *Id.* ("These 'interests' or 'injuries' are tested by the requirements of Rule 23."); *see also* 7AA Charles A. Wright et al., Fed. Prac. & Proc. Civ. § 1785.1 (3d ed.) ("[C]laims on behalf of others who have similar, but not identical, interests ***depend not on standing, but on an assessment of typicality and adequacy of representation***."). In attempting to "shoehorn" its same Rule 23 arguments into an Article III standing challenge, GMS "confuse[s] distinct Rule 23 requirements." *Neale*, 794 F.3d at 368.

[22] GMS's authority for this standing argument is revealing. The Court's reason for reversal in *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 (1982), from which Defendants reference a lone footnote, was the district court's "failure to evaluate carefully the legitimacy of the named plaintiffs' plea that he is a proper class representative ***under Rule 23(a).***" 457 U.S. at 160 (emphasis added). GMS cannot use Article III standing as a rhetorical crutch for otherwise flimsy Rule 23 challenges.

Even if the Court were to consider GMS's standing argument as something other than a Rule 23 challenge by a different name, GMS's argument still fails. Central to GMS's argument is the idea that named Plaintiffs are limited to litigating GMS actions that directly related to their injuries. But this proceeds from the false premise that the proposed issue class framework is litigating "individual injuries" at all. As is a common refrain in GMS's briefing, individual injuries are to be litigated in subsequent actions. (*See* GMS Opp'n 24 (noting that under the proposed approach, "injury, causation, and damages—are left unresolved")). In fact, that the proposed issues for class-wide resolution *do not* include individual injury determinations is central to Plaintiffs' arguments.

It's for this same reason that the authority GMS relies on to support its standing challenge is uncompelling. GMS's authority, *Blum v. Yaretsky,* 457 U.S. 991, 999 (1982) and *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982), neither of which dealt with an issue class, are of little relevance here. As the Third Circuit in *Russell* indicated, relief afforded by a 23(c)(4) issues class like that proposed here is best thought of as "a type of declaratory judgment, [that] may eventually transform into a judgment awarding damages." 15 F.4th at 275. In this way, the standing arguments raised by GMS miss the point. Standing is satisfied for purposes of the relief sought in this action if the "practical consequence" of the resolution of the issue class questions leads to an "increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Utah v. Evans*, 536 U.S. 452, 464 (2002). Accordingly, the Third Circuit has held that "a plaintiff seeking a declaratory judgment has Article III standing if there is substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *TruePosition, Inc. v. LM Ericsson Tel. Co.*, 977 F. Supp. 2d 462, 473 (E.D. Pa. 2013) (citations omitted).

Resolution of the class issues would increase the likelihood that a plaintiff would obtain relief on their claims by limiting the number of elements to be proven in subsequent actions. *See, e.g., In re Atlas Roofing Corp. Chalet Shingle Prods. Liab. Litig.*, No. 13-md-2495, 2018 WL 2929831, at *8 (N.D. Ga. June 8, 2018*)* (finding that plaintiffs had standing to seek declaration where it "would make it more likely that the Plaintiffs would obtain the necessary relief from the Defendant because it would establish an essential component to liability").

GMS's standing argument again attempts to leverage the "voluminous, diverse" ways in which GMS failed students as a shield against any class-wide resolution – an argument that is as unconvincing as it is revealing. Plaintiffs have identified multiple common GMS policies, procedures, and practices which form the basis for issues class certification. This demonstrates that resolution turns on GMS's common conduct. The fact that there are multiple common policies and courses of conduct does not undermine certification. For example, for the Abuse Issues class, if *any* policy or practice of GMS is found to violate the Eighth Amendment (many do) or if GMS Defendants are held to have breached an owed legal duty (it did), *any* member of the putative class would obtain the right to seek recovery in an individual action against GMS, one made more expedient by the nature of the settled issues. This will be true so long as a given Plaintiff can produce individual evidence of that their harms emanated from the common practice found to violate the Eighth Amendment or applicable legal duty. In addition, as discussed in Sections II(A) and III(A), Plaintiffs are challenging the policies and practices of GMS relating to educational deprivations and disability discrimination as a whole, which harmed them just as it did other issues class members. GMS's arguments that Plaintiffs do not provide sufficient evidence that a specific policy caused their injury (be that the named plaintiffs or otherwise) is an argument that GMS is free to make down the road, but it is inapplicable here.

C. Plaintiffs Rely on Appropriate Authority.

Next, Defendants argue that Plaintiffs improperly rely on Rule 23(b)(2) cases in their discussion of the present issues class action that relies on 23(b)(3), arguing that an analysis between the two is "fundamentally different from class actions, like this one, seeking monetary damages." (GMS Opp'n 12-13). This argument does not survive the slightest scrutiny. It is certainly not news to Defendants or this Court that Rule 23(b)(2) and 23(b)(3) class actions *both* must satisfy the thresholds of 23(a). To the extent that Plaintiffs rely on 23(b)(2) caselaw for discussion of 23(a) elements that overlap with those required for 23(b)(3), Plaintiffs submit that they are worthy of the Court's consideration. Courts throughout the Third Circuit agree. *See, e.g., Reyes*, 802 F.3d at 486 (citing 23(b)(2) case for analyses of 23(a) elements in 23(b)(3) case); *In re Suboxone Antitrust Litigation*, 421 F. Supp. 3d at 47 (same); *C.P.*, 2022 WL 3572815 at *11 (same).

Moreover, GMS inaccurately describes the proposed issue classes against GMS as "seeking monetary damages." While the present action may "eventually transform into a judgment awarding damages" damages and other issues are saved for individual actions notwithstanding certification under FRCP 23(b)(3). *Russell,* 15 F.4th at 275. In this way, the relief sought is more similar to declaratory relief, as the Third Circuit acknowledged. *Id.* This renders the 23(b)(2) caselaw is even more relevant to the Court's analysis here.

GMS takes specific issue with Plaintiffs' discussion of *Baby Neal for & by Kanter v. Casey,* 43 F.3d 48 (3d Cir. 1994), but GMS's arguments only highlight its fundamental misunderstanding of the present action. GMS advances two arguments. First, in line with the argument discussed above, GMS says that *Baby Neal* is a 23(b)(2) case and its analysis is inapplicable to a class "seeking monetary damages." (GMS Opp'n 12). Second, GMS suggests that to the extent *Baby Neal* is applicable, its broad conception of commonality has not survived the Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 348 (2011). Neither argument holds.

GMS's first argument fails, like others advanced by GMS, because it again attempts to characterize the proposed classes against GMS as "seeking monetary damages." GMS is reminded, yet again, that the present action seeking issue class certification is *distinct from a class action for damages*. While it is clear that GMS believes its strongest case is against a class action seeking monetary damages, it is not facing one here – regardless of how often it insists it is. GMS is happy to point this out in briefing when it suits its arguments (*see* GMS Opp'n 22), but GMS cannot have it both ways. Because the relief sought by certification of the issue classes is more like declaratory relief, as the Third Circuit indicated in *Russell*, *Baby Neal* is instructive.[23]

GMS further suggests that *Baby Neal's* broad conception of commonality has not survived the Supreme Court's opinion in *Dukes*. Cursory inspection shows this to be inaccurate. *See, e.g.*, *Halman*, 2023 WL 7285167, at *10 (E.D. Pa. Nov. 3, 2023) (citing *Baby Neal* for the proposition that "Commonality is established if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class."); *Reyes*, 802 F.3d at 486 (citing *Baby Neal* for the proposition that commonality "is easily met"); *Dukich v. IKEA US Retail LLC,* 343 F.R.D. 296, 306 (E.D. Pa. 2022) (Bartle, J.), appeal dismissed, No. 23-1049, 2023 WL 4421396 (3d Cir. Apr. 17, 2023) (citing *Baby Neal* for the proposition that "the bar is not high" for commonality and that it "does not require identical claims or facts among class member[s]."); *In re Cmty. Bank of N. Virginia Mortg. Lending Pracs. Litig.*, 795 F.3d 380, 397 (3d Cir. 2015) (citing *Baby Neal* for the proposition that "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."); *Rodriguez v Nat'l City Bank*, 726 F.3d 372, 383 (3d Cir. 2013) (citing *Baby Neal* for the proposition that "there may be many legal and factual differences among the members

[23] As described in the DHS Reply, *Baby Neal* is also applicable in the Rule 23(a) analysis for a damages class. (*See* DHS Reply, Section II(A)).

of a class, as long as all were subjected to the same harmful conduct by the defendant."); *In re Suboxone Antitrust Litigation*, 421 F. Supp. 3d at 47 (citing *Baby Neal* for the proposition that "[a]ll plaintiffs need not suffer the same injury; rather, the fact that the plaintiffs were subjected to the injury or faced the immediate threat of these injuries suffices for Rule 23").

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Class Certification.

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 Plaintiffs' Memorandum of Law 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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