UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

D.R., as a minor through parent and next friend Dawn Richardson, A.K., as a minor through parent and next friend, Angy Keelin, C.D.M., as a minor through parent and next friend Crystal McCadden, C.M., as a minor through parent and next friend Crystal McCadden, J.T. as a minor through parent and next friend Nakiya Wakes, N.S., as a minor through parent and next friend Nakiya Wakes, J.W., as a minor through parent and next friend Kathy Wright, C.D., as a minor through parent and next friend Twanda Davis, D.K. as a minor through parent and next friend Rachel Kirksey, M.K. as a minor through parent and next friend Rachel Kirksey, O.N., as a minor through parent and next friend Manita Davis, D.T. as a minor through parent and next friend Manita Davis, D.D. as a minor through parent and next friend Willie Daniels, C.W. as a minor through parent and next friend Chandrika Walker, J.B. as a minor through parent and next friend Jeree Brown, individually and on behalf of all similarly situated persons,

Plaintiffs,

v

Michigan Department of Education, Genesee Intermediate School District, Flint Community Schools,

Defendants.

**CLASS ACTION**

No. 16-CV-13694-AJT-APP

HON. ARTHUR J. TARNOW

**MICHIGAN DEPARTMENT OF EDUCATION'S MOTION TO DISMISS**

Kary L. Moss (P49759)
Kristin L. Totten (P72942)
Daniel S. Korobkin (P72842)
Michael S. Steinberg (P43085)
Attorney for Plaintiffs
ACLU Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6800
kmoss@aclumich.org
ktotten@aclumich.org
Dkorobkin@aclumich.org
msteinberg@aclumich.org

Gregory G. Little
Lindsay M. Heck
Walter A. Ciacci
Dominique N. Forrest
Laura A. Grai
Attorney for Plaintiffs
White and Case LLP
1155 Avenue of the Americas
New York, NY 10036-2787
(212)819-8200
gregory.little@whitecase.com
lindsay.heck@whitecase.com
walter.ciacci@whitecase.com
Dominique.forrest@whitecase.com
laura.grai@whitecase.com

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David G. Sciarra
Jessica Levin
Attorneys for Plaintiffs
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
(973) 624-1815
dsciarra@edlawcenter.org
jlevin@edlawcenter.org

Timothy J. Mullins (P28021)
Attorneys for Defendant
Genesee ISD
Giarmarco, Mullins & Horton, PC
101 W. Big Beaver Rd – 10th Floor
Troy, MI 48084-5280
(248) 457-7020
tmullings@gmhlaw.com

Timothy J. Haynes (P41196)
Travis M. Comstock (P72025)
Katherine J. Bennett (75913)
Attorneys for Defendant Michigan Department of Education
Michigan Department of Attorney General
Health, Education & Family Services Division
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700
haynest3@michigan.gov
comstockt@michigan.gov
BennettK1@michigan.gov

Fredrick A. Berg (P38002)
Attorney for Defendant City of Flint
150 West Jefferson,
Suite 100
Detroit, MI 48226
(313)225-7000
berg@butzel.com

**MICHIGAN DEPARTMENT OF EDUCATION'S MOTION TO DISMISS**

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant Michigan Department of Education (Department) moves this Court to dismiss the Complaint. The Department states in support:

1. Plaintiffs' Complaint seeks declaratory and injunctive relief to vindicate the rights of school-age children residing in Flint due to elevated lead levels in the City of Flint's drinking water. Among other requests, the Complaint asks that this Court require universal preschool in Flint, enhanced educational screening in the Flint schools, court-monitored implementation of individualized education programs and disciplinary procedures in the Flint schools, and appropriate behavioral interventions consistent with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C § 1400 *et seq.,* in the Flint schools.

2. Count I of the Complaint is premised on alleged systemic failures of the Flint Community Schools (FCS) and Genesee Intermediate School District (GISD) to provide screening, special education services in the least restrictive environment thereby violating the IDEA, and safeguards to prevent improper discipline for disability-related behavior as required by the IDEA, the Rehabilitation Act, and the Americans with Disabilities Act. (Dkt. No. 1; Compl. ¶¶ 12–16, 364, 370, 381, 384; Pg. ID 9–11, 119, 121, 124–125.) Regarding the

Department, the Complaint alleges that it has systemically failed to provide FCS and GISD with sufficient funding, monitoring, oversight, and support to meet their obligations under the IDEA. (Dkt. No. 1; Compl. ¶¶ 16, 365, 371, 381, 384; Pg. ID 10–11, 119–121, 124–125.)

3. Count II of the Complaint alleges Defendants discriminated against Plaintiffs based on their respective disability by denying them access to services and programs available to nondisabled students in violation of the Rehabilitation Act, 29 U.S.C. § 794 *et seq*.

4. Count III of the Complaint alleges that Defendants discriminated against Plaintiffs based on their disability by denying them access to services and programs available to nondisabled students in violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq*.

5. Count IV alleges that Defendants FCS and GISD violated Michigan Compiled Laws § 380.1711(1)(a) by failing to provide a free appropriate public education.

6. Plaintiffs' claims against the Department are non-justiciable for three primary reasons. First, the IDEA, ADA, and Rehabilitation Act claims are subject to dismissal for failure to satisfy the administrative exhaustion requirements of § 1415 of the IDEA, 20 U.S.C. § 1415(b)(6), (f), (i)(2), (l); 34 CFR § 300.507 – 300.516; and Mich. Admin Code R 340.1724f. Second, Plaintiffs lack standing

under the IDEA, the Rehabilitation Act, and the ADA because their claims against the Department are purely procedural in nature and fail to establish an injury, proper causation, or redressability. Third, Plaintiffs' claim against the Department under the ADA is barred by the Eleventh Amendment because the Complaint fails to allege facts demonstrating that the Department denied access to services, programs, or activities on solely on the basis of a particular disability, and otherwise fails to allege facts to meet the necessary elements of a Title II claim.

7. Alternatively, the Court should dismiss this Complaint under Federal Rule of Civil Procedure 12(b)(6) because it fails to state a claim upon which relief may be granted based on the now familiar *Iqbal-Twombly* standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–679 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–556 (2007).

8. Count I of the Complaint (IDEA) sets forth only conclusory allegations and fails to state facts plausibly showing entitlement to relief due to statewide, systemic violations by the Department.

9. Counts II and III of the Complaint (Rehabilitation Act and ADA) do not state factual grounds supporting a discrimination claim against the Department under the Rehabilitation Act or the ADA because Plaintiffs' claims lack any factual allegation that the Department or its officers have intentionally

discriminated against the children of Flint solely on the basis of disability—a required factual predicate for this claim.

10. Count IV of the Complaint (Mich. Comp. Laws § 380.1701 *et seq*.) makes allegations against Defendants FCS and GISD only, not against the Department.

11. Pursuant to L.R. 7.1, on December 6, 2016, counsel for the Department contacted Plaintiffs' counsel to determine if they would concur in the relief sought, providing an explanation of the nature of and basis for this motion. Plaintiffs' counsel refused to concur, necessitating this Motion.

WHEREFORE, for the reasons set forth more fully in the attached Brief, Defendant Michigan Department of Education requests that this Court dismiss all claims against the Department under Fed. R. Civ. P. 12(b)(1) and alternatively under Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

Michigan Department of
Attorney General

/s/Timothy J. Haynes
Assistant Attorney General
Timothy J. Haynes
Travis M. Comstock
Katherine J. Bennett
Assistant Attorneys General
Attorneys for Michigan Department of Education
Health, Education & Family Services
P.O. Box 30758
Lansing, MI 48909
(517)-373-7700
HaynesT3@michigan.gov
ComstockT@michigan.gov
BennettK1@michigan.gov
P41196
P72025
P75913

Dated: December 8, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on December 8, 2016, I electronically filed the above document with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Timothy J. Haynes
Assistant Attorney General
Attorney for Defendant Michigan Department of Education
Health, Education & Family Services Division
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700
HaynesT3@michigan.gov
P41196

UNITED STATES DISTRICT COURT
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D.R., as a minor through parent and next friend Dawn Richardson, A.K., as a minor through parent and next friend, Angy Keelin, C.D.M., as a minor through parent and next friend Crystal McCadden, C.M., as a minor through parent and next friend Crystal McCadden, J.T. as a minor through parent and next friend Nakiya Wakes, N.S., as a minor through parent and next friend Nakiya Wakes, J.W., as a minor through parent and next friend Kathy Wright, C.D., as a minor through parent and next friend Twanda Davis, D.K. as a minor through parent and next friend Rachel Kirksey, M.K. as a minor through parent and next friend Rachel Kirksey, O.N., as a minor through parent and next friend Manita Davis, D.T. as a minor through parent and next friend Manita Davis, D.D. as a minor through parent and next friend Willie Daniels, C.W. as a minor through parent and next friend Chandrika Walker, J.B. as a minor through parent and next friend Jeree Brown, individually and on behalf of all similarly situated persons,

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Kary L. Moss (P49759)
Kristin L. Totten (P72942)
Daniel S. Korobkin (P72842)
Michael S. Steinberg (P43085)
Attorney for Plaintiffs
ACLU Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6800
kmoss@aclumich.org
ktotten@aclumich.org
Dkorobkin@aclumich.org
msteinberg@aclumich.org

Gregory G. Little
Lindsay M. Heck
Walter A. Ciacci
Dominique N. Forrest
Laura A. Grai
Attorney for Plaintiffs
White and Case LLP
1155 Avenue of the Americas
New York, NY 10036-2787
(212)819-8200
gregory.little@whitecase.com
lindsay.heck@whitecase.com
walter.ciacci@whitecase.com
Dominique.forrest@whitecase.com
laura.grai@whitecase.com

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David G. Sciarra
Jessica Levin
Attorneys for Plaintiffs
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
(973) 624-1815
dsciarra@edlawcenter.org
jlevin@edlawcenter.org

Timothy J. Mullins (P28021)
Attorneys for Defendant
Genesee ISD
Giarmarco, Mullins & Horton, PC
101 W. Big Beaver Rd – 10th Floor
Troy, MI 48084-5280
(248) 457-7020
tmullings@gmhlaw.com

Timothy J. Haynes (P41196)
Travis M. Comstock (P72025)
Katherine J. Bennett (75913)
Attorneys for Defendant Michigan
Department of Education
Michigan Department of Attorney General
Health, Education & Family Services
Division
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700
haynest3@michigan.gov
comstockt@michigan.gov
BennettK1@michigan.gov

Fredrick A. Berg (P38002)
Attorney for Defendant City of Flint
150 West Jefferson,
Suite 100
Detroit, MI 48226
(313)225-7000
berg@butzel.com

**MICHIGAN DEPARTMENT OF EDUCATION'S BRIEF IN SUPPORT OF MOTION TO DISMISS**

State of Michigan
Department of
Attorney General

/s/Timothy J. Haynes
Assistant Attorney General
Timothy J. Haynes
Travis M. Comstock
Katherine J. Bennett
Assistant Attorneys General
Attorneys for Michigan Department of Education
Health, Education & Family Services
P.O. Box 30758
Lansing, MI 48909
(517)-373-7700
HaynesT3@michigan.gov
ComstockT@michigan.gov
BennettK1@michigan.gov
P41196
P72025
P75913

Dated: December 8, 2016

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## CONCISE STATEMENT OF ISSUES PRESENTED

1. Plaintiffs' claims are non-justiciable because the IDEA claims fail to satisfy the requirement of administrative exhaustion, Plaintiffs have not met the elements of standing as to any of the claims, and the Eleventh Amendment bars their ADA claim.

2. Plaintiffs fail to state a claim against the Department because Count I (the IDEA claim) fails to show a statewide failure or a wrong that cannot be corrected by means currently provided by the State; Counts II (Rehabilitation Act claim) and III (ADA claim) fail to show the proposed class is eligible for services; and the Complaint does not otherwise allege facts showing the requisite discriminatory animus.

## CONTROLLING OR MOST APPROPRIATE AUTHORITY

### Constitution

U.S. Const. amend. 11

### Statutes

20 U.S.C. § 1415(b)(6), (f), (i)(2), (l)

### Cases

*Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

*Covington v. Knox Cnty. Sch. Sys*., 205 F.3d 912 (6th Cir. 2000).

*Fry v. Napoleon Comm. Sch.*, 788 F.3d 622 (6th Cir. 2015), *cert. granted*, __ U.S. __; 136 S. Ct. 2540 (2016).

## INTRODUCTION

The Flint water crisis is well known within the State and has given rise to numerous class actions seeking damages and remedies related to the allegedly actionable lead contamination of the City's public water system. And recovery efforts specific to addressing this crisis are vital. But not every lawsuit arising from the incident is legally viable and not every requested remedy appropriate. That is true here where there is no real connection between the Flint water situation and Plaintiffs' favored changes to delivery of special education in Michigan.

Through a number of federal statutes—the Individuals with Disabilities Education Act (IDEA), the Americans with Disabilities Act (ADA), and the Rehabilitation Act—Plaintiffs seek to vindicate the rights of school-age children who they claim have been placed at risk of developing a disability due to elevated lead levels in the Flint drinking water. The gravamen of the Complaint is that Flint Community Schools (FCS) and the Genesee Intermediate School District (GISD) will fail to identify, evaluate, and offer appropriate educational services to children who may develop disabilities due to past exposure to lead in the water supply in the City of Flint, and that the Michigan Department of Education (Department) will fail to monitor FCS and GISD and properly fund necessary programs and services required by federal law. But despite the length of the Complaint, Plaintiffs make only generalized and conclusory assertions of systemic violations

of the IDEA—and even those assertions concern future anticipated violations as opposed to present ones.

Apart from the jurisdictional defects that preclude consideration of these claims, Plaintiffs simply fail to present grounds on which relief may be granted against the Department under the now familiar *Iqbal-Twombly* standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–679 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–556 (2007). As a result, these claims fail as a matter of law. First, the Complaint is based on only conclusory allegations. Second, the factual predicates establishing the required discrimination and intent necessary to claims under the federal statutes relied on here are missing.

There may well be Flint schoolchildren who end up needing special services as a direct result of the Flint water crisis. But the appropriate remedy is not declaring that there is an affirmative duty to conduct testing and enhanced screening of *all* Flint children ages 3-5 and a need for universal preschool in Flint, enhanced educational screening in the Flint schools, implementing electronic medical recordkeeping within each Flint school, requiring the Department to test the water supply in FCS and GISD facilities, and review of every current individualized education program (IEP). The IDEA and related educational protections for students with disabilities are designed to provide specific rights and protections to individual students who are identified as disabled and not receiving a

free appropriate public education. They are not designed to, nor can they, provide the remedies sought.

Evaluation of children suspected of having a disability requires both specialized testing and the intimate, individual involvement of parents, students, and professionals. To the extent a remedy is needed, that remedy is to allow the current system to identify and address those problems and to allow these schoolchildren to utilize the federal, state, and local government programs and resources that are currently available to the Flint school system to address any issues arising from the water crisis in addition to the on-going individualized services provided under these federal laws. The State and Michigan Department of Education are not ignoring the situation and needs of the children in Flint.

## REGULATORY BACKGROUND

Plaintiffs' claims are based primarily on various requirements found in the IDEA: child find; free appropriate public education (FAPE) in the least restrictive environment; (LRE); disciplinary manifestation determinations; and access to general education classes like art and music. Thus, a summary of the applicable provisions of the IDEA and related regulations is helpful.

The IDEA provides federal money to assist states in educating children with disabilities. To qualify for federal assistance, a state education agency (SEA)[1] must

[1] In Michigan, the SEA is the Department.

demonstrate in a federally-approved plan that it has policies and procedures in effect assuring that all children with disabilities residing in the state have access to a free appropriate public education (FAPE) in the least restrictive environment tailored to the unique needs of each child by means of an individualized education program (IEP). *See* 20 U.S.C. § 1412(a)(1), (2), (4); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S 230, 232 (2009). The key word in the law and related requirements is "individual." Each plan is an individualized education plan developed to address the specific identified individual needs of the child. Plans are revised annually to address any individual changes in the child's needs. Yet, States are required to do this in a way that minimizes the number of rules, regulations, and policies to which the local educational agencies (LEA) are subject to under the IDEA. 20 U.S.C. § 1407(a)(3).

The IDEA defines FAPE to include "special education and related services" that meet state standards and that are "provided in conformity with the [IEP.]" 20 U.S.C. § 1401(9). "Special education" is "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability[.]" 20 U.S.C. § 1401(29). And "related services" are supportive services that "may be required to assist a child with a disability to benefit from special education[.]" 20 U.S.C. § 1401(26).

The IDEA also requires parents and schools "be given expanded opportunities to resolve their disagreements in positive and constructive ways." 20

U.S.C. § 1400(c)(8). And a school district is also required to provide a basic floor of educational opportunity consisting "of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 314 (6th Cir. 2007) (citing *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 201 (1982)).

In turn, an LEA,[2] or local school district, is eligible for assistance under the IDEA on a fiscal-year basis if it submits a plan that ensures the SEA holding the federal money that, first, it has policies, procedures, and programs in effect providing for the education of children with disabilities within its jurisdiction, consistent with the State's policies and procedures, and, second, that the funds provided will be properly expended. 20 U.S.C. §§ 1412, 1413.

Put more simply, the state (SEA) develops a plan ensuring that local school districts will identify and evaluate children with disabilities and special needs—child find. The local school district must then develop an IEP (which also involves the family). And the state must provide for administrative review to resolve disputes related to that plan.

[2] FCS and GISD are LEAs.

**Child Find**

The child find provisions of the IDEA impose an obligation on the states to develop an SEA plan that ensures through policies and procedures that all children with disabilities who need special education and related services are identified, located, and evaluated. The SEA plan must also provide for the development and implementation of practical methods ensuring that children identified by the LEA are currently receiving needed special education and related services. 20 U.S.C. § 1412 (a)(3); 34 C.F.R. § 300.111(a)(1). The IDEA imposes a "child-find" requirement on the states: their local schools must have policies and procedures in place to identify, locate, and evaluate children with disabilities who need special education and related services. *Fayette Cnty.*, 478 F.3d at 313.

In other words, the child find provisions of the IDEA impose the obligation of identifying, locating, and evaluating children with disabilities in need of special education and related services on each local school district (LEA). *See* 20 U.S.C. § 1412(a)(3)(A); 20 U.S.C. §§ 1414(a), (b). This includes those children "suspected of being a child with a disability [as that term is specifically defined in 34 C.F.R. § 300.8] and in need of special education, even though they are advancing from grade to grade[.]" 34 C.F.R. § 300.111(c)(1). The IDEA also "requires that knowledgeable personnel evaluate a child suspected of having a disability and determine whether there is a disability as defined by IDEA, and if so, the educational needs of the child." *Renner v. Bd. of Educ. of Pub. Schs. of Ann Arbor*,

185 F.3d 635, 638 n.2 (6th Cir. 1999). At the state level, the SEA must have an approved plan ensuring LEA compliance with the provision of funding, program development, and appropriate supervision and monitoring. In turn, the federal authority must ensure proper monitoring of the SEA's plan and provide appropriate funding to assist in carrying it out.

An LEA violates the IDEA and related SEA policies and rules only if '"school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate.'" *Fayette Cnty.*, 478 F.3d at 313 (adopting standards articulated in and quoting *Clay T. v. Walton Cnty. Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. Ga. 1997)); *Hupp v. Switzerland of Ohio Local Sch. Dist.*, 912 F. Supp. 2d 572, 590 (S.D. Ohio 2012).

Further, while parents, teachers, administrators, counselors or other professional staff may identify a child for evaluation, that evaluation cannot occur without the parents' consent and approval. 20 U.S.C. § 1414(a)(1)(D). Parents are an integral part of this process. Evaluations and services cannot be compelled.

Indeed, children should not be rushed to IDEA evaluations due to the lack of uniform development in very young students. *Fayette Cnty.*, 478 F.3d at 313–314 (school district violated the IDEA's child find provisions by not referring the child for an evaluation covering the student's second and third grade years, but not during kindergarten or first grade when interventions were initially provided).

Prior to providing any special education and related services, each LEA must conduct an initial evaluation. 20 U.S.C. § 1414; 34 C.F.R. § 300.301. Consistent with the notice and consent requirements in § 1414(b) and § 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. 20 U.S.C. § 1414(a)-(c); 34 C.F.R. § 300.301(b). The LEA must conduct the initial evaluation according to procedures outlined in §1414(b). Section 1414(b)(1) and 34 C.F.R. § 300.503 require the LEA to provide notice to parents describing the evaluation procedures. Section 1414(b)(2) provides the requirements for the LEA's conduct of the evaluation. Section 1414(b)(4) then provides that the LEA must determine if the child is a child with a disability, and if so, the educational needs of the child shall be made by a team of qualified professionals and the parent of the child (the IEP team).

Michigan has adopted policies and procedures regarding child find in accord with 34 CFR § 300.111. The relevant procedures are set forth in Part 2 of the Michigan Administrative Rules for Special Education Programs and Services, Rules 340.1721 – 340.1721b. The LEAs provide notice to parents describing the evaluation procedures. Mich. Admin. Code R. 340.1721. The LEA's multidisciplinary team conducts an initial evaluation of a child suspected of having a disability. *Id.* at 340.1721a. The team must make a recommendation of eligibility and prepare a written report to be presented to the IEP team by the

designated multidisciplinary evaluation team member who can explain the instructional implication of evaluation results. *Id*.

The Department, through the Michigan Office of Special Education, also distributes Michigan Special Education "One Pagers" to provide information to schools and parents, including Child Find and Timelines for Initial Evaluations. These documents explain fully the procedural safeguards available under the IDEA, federal and state regulations, and rules (Ex. 1, 2) and can be found on the Department webpage.[3]

**Individualized education program (IEP) to provide FAPE in the least restrictive environment**

A federally approved state plan also ensures that all children with disabilities have access to an IEP, or an individualized family service plan that meets the requirements of 20 U.S.C. § 1436(d). This plan is developed, reviewed, and revised for each child with a disability in accordance with 20 U.S.C. § 1414(d). 20 U.S.C. § 1412(a)(4).

[3] The Child Find and Timelines one page documents can be found at: https://www.cenmi.org/sites/default/files/documents/pdf/4766942d-5898-4c44-bb85-5b85ac4c062e.ChildFindMOP_8_3_12.pdf

https://www.cenmi.org/sites/default/files/documents/pdf/02351afb-caf9-4853-bb80-912fe0854d44.MDE-OSE-Timelines-for-Initials.pdf.

If the LEA determines that the child has an enumerated disability, the IEP team must develop an IEP for the child. 20 U.S.C. § 1414(d). An IEP is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with [§ 1414(d)]." 20 U.S.C. § 1414(d)(1)(A)(i). Each IEP is developed by an IEP team that is composed of the child's parents, at least one of the child's regular education teachers, at least one of the child's special education teachers, a qualified representative of the LEA, an individual who can interpret the instructional implications of the evaluation results, and, at the discretion of the parent or the LEA, other individuals who have knowledge or special expertise regarding the child. 20 U.S.C. § 1414(d)(1)(B).

An IEP must be "reasonably calculated to enable the child to receive educational benefits." *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 763 (6th Cir. 2001). An IEP "must confer a meaningful educational benefit gauged in relation to the potential of the child at issue," but does not guarantee any particular outcome. *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004) (internal quotation marks and citation omitted).

The federally approved state plan also ensures that all children with disabilities are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occur only when the nature or severity of the disability of

a child is such that education in regular classes with the use of supplementary aids and services cannot be satisfactorily achieved. 20 U.S.C. § 1412(a)(5).

The procedures for IEPs are identified in Part 2 of the Michigan Administrative Rules for Special Education Programs and Services, Mich. Admin. Code R. 340.1721e. Among other things, those Rules govern the LEA's conduct of the IEP evaluation and the FAPE created for the child identified as having a disability, including a statement of measurable goals. The IEP team must also make a recommendation of eligibility and prepare a written report to be presented to the IEP team. *Id*.

The Department's model IEP form specifically addresses the least restrictive environment and extra-curricular activities required in the IDEA. Additionally, the Quick Reference Guides emphasize that all students with disabilities are to be educated with their general education peers to the maximum extent appropriate and identify those circumstances, if any, when the student would be excluded from general education classes or activities. The Office of Special Education's model Procedural Safeguards Notice provides a full explanation of the procedural safeguards afforded disabled students.[4]

[4] The Procedural Safeguards Notice in English, Spanish, and Arabic can be found at: http://www.michigan.gov/mde/0,4615,7-140-6530_6598_36168-188305--,00.html.

**The IDEA administrative hearing and dispute resolution requirements**

States must have procedures that provide any party an opportunity to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of [FAPE] to such child[.]" 20 U.S.C. § 1415(b)(6)(A). If a parent is dissatisfied with the child's identification as potentially disabled, or the evaluation, or educational placement of the child, or the provision of FAPE, she can file a complaint and request an impartial due process hearing where an impartial hearing officer evaluates the parent's and the school's evidence and legal arguments. 20 U.S.C. § 1415(b)(6),(f).

The due process requirements of the IDEA are implemented in Michigan through the procedures set forth in Administrative Code R. 340.1724f. The due process complaint administrative hearing system is administered by the Department, decided by an independent hearing officer, and subject to review in state or federal court. Mich. Admin. Code R. 340.1724f(2), (6), and (7).

In addition to this due-process complaint hearing available to children and families, the State also has developed written procedures for investigating, resolving and remedying complaints of LEA and state noncompliance with the IDEA. *See* 34 C.F.R. §§ 300.151-300.153. *See also* U.S. Department of Education, OSEP MEMO 13-08, Dispute Resolution Procedures under Part B of the IDEA (Part B) (July 23, 2013). Michigan provides an informal "state complaint" procedure compliant with federal regulations in Part 8 of the Michigan

Administrative Rules for Special Education Programs and Services, Mich. Admin. Code R. 340.1851 – 340.1855. This "state complaint" process authorizes the Department to investigate complaints from any person, issue final reports, require corrective action, and impose sanctions on an LEA for failing to comply with plan requirements.

**State general supervision and monitoring under IDEA**

A state has only general supervisory and monitoring responsibilities under the IDEA. *See* 20 U.S.C. § 1416. Moreover, a state is required to set the priorities for its LEAs and identify relevant indicators to measure their compliance. This performance plan must be approved by the federal Secretary of Education. 20 U.S.C. § 1416(b). The Secretary of Education monitors performance of each state. 20 U.S.C. § 1416(a)(3).

The state also must report annually on each LEA's performance on the established state performance plan targets and separately assess a number of areas of IDEA compliance. 20 U.S.C. § 1416(b)(2)(C); 34 C.F.R. § 300.600(a)(2), (3). If the state determines that an LEA is not meeting its requirements, the SEA must take corrective action under § 1413(a)(2)(C) for each implicated fiscal year. 20 U.S.C. § 1416(f). These performance plan reviews include four specific categories required by federal regulation. 34 C.F.R. §300.600(a)(2). Deficiencies must be addressed using four principle enforcement mechanisms where applicable:

technical assistance, conditions on funding, a corrective action plan, and withholding funds. *Id.* at (a)(3).

The performance report for each LEA is published annually. Ex. 3 is the 2014-2015 public report for FCS.[5]

The Department complies with these supervisory and enforcement requirements and has a federally approved State Performance Plan.[6] The Department's Continuous Improvement and Monitoring System (CIMS)[7] is used to promote positive outcomes and ensure compliance with the IDEA and the Michigan Administrative Rules for Special Education. CIMS integrates the priorities of the IDEA and the State Performance Plan and assists LEAs with monitoring their individual activities and compliance.

In addition to CIMS information, the State, using established business rules, identifies those school districts most in need of technical assistance and makes regular on-site visits to assist them in returning to compliance. These findings are included in the State Performance Plan/Annual Performance. Michigan's federally

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[5] The public reports for all Michigan school districts and intermediate school districts are available on the MI School Data website, under the Special Education listing on the left by clicking on Annual Public Reporting – SPP and then creating an Indicator Report Summary for the district and select year. https://www.mischooldata.org/Default.aspx

[6] The Department's approved State Performance Plan is available at http://www.michigan.gov/mde/0,4615,7-140-6530_6598_31834-355225--,00.html

[7] http://cims.cenmi.org

approved State Performance Plan and Annual Performance Reports are available online through the CIMS. Examples of monitoring, corrective action, and verification of completion related to FCS are attached as Ex. 4, 5.

## PLAINTIFFS' COMPLAINT

The Complaint alleges that FCS and GISD systemically fail to provide screening, special education services in the least restrictive environment, and safeguards to prevent improper discipline for disability-related behavior as required by the IDEA, the Rehabilitation Act, and the ADA. (Dkt. No. 1; Compl. ¶¶ 12-16, 364, 370, 381, 384; Pg. ID 9-11, 119, 121, 124-125.) The Complaint alleges that the Department has systemically failed to provide FCS and GISD with sufficient funding, monitoring, oversight, and support to meet their obligations under the IDEA. (Dkt. No. 1; Compl. ¶¶ 16, 365, 371, 381, 384; Pg. ID 10–11, 119-121, 124-125.)

The Complaint identifies 15 representative plaintiffs who are students currently enrolled in FCS. (Dkt. No. 1; Compl. ¶¶ 20-34; Pg. ID 12–16.) The Complaint alleges that the population of three to four year-old children residing in Flint and children attending FCS *are at risk* of developing a disability due to their prolonged exposure to lead in the drinking water. (Dkt. No. 1; Compl. ¶¶ 74-75; Pg. ID 36–37.) The Complaint also alleges there are 907 students attending FCS identified as eligible for special education and that these identified students are not

receiving special education and related services in compliance with their IEP in the least restrictive environment under the IDEA and are subject to unduly harsh disciplinary measures without compliance with procedural requirements under the IDEA. (Dkt. No. 1; Compl. ¶¶ 76–81; Pg. ID 37–39.)

The unique allegations for each of the 15 individual named plaintiffs are contained in paragraphs 91 through 348 of the Complaint. The Complaint contains no allegations that any of the named Plaintiffs exhausted the administrative remedies available under the due process complaint procedures mandated in § 1415 of IDEA. Only one named Plaintiff, J.W., is alleged to have filed an informal state complaint with the Department requesting investigation under 34 C.F.R. §§ 300.151-300.153; Mich. Admin. Code R. 340.1851 - 340.1855. (Dkt. No. 1; Compl. ¶225; Pg. ID 81.) In that case, the Department investigated the complaint, determined that FCS was not in compliance with its obligations under the IDEA, and required corrective action. (Dkt. No. 1; Compl. ¶¶ 225, 233; Pg. ID 81, 83.) Neither does the Complaint allege any pending complaints against the Department, any findings that the Department needs intervention in implementing the IDEA, or any corrective action plan for the Department—all actions within the jurisdiction and authority of the federal Secretary of Education, not this Court. 20 U.S.C. § 1416(d).

## STATE RESPONSES TO THE WATER CRISIS IN THE AREA OF EDUCATION

Contrary to Plaintiffs' assertions, the State has made the Flint water crisis a priority. In the area of education alone, the State has appropriated over $18,000,000 dollars for the current 2016–17 school year for services and programs to children residing within Flint that address the concerns identified in the Complaint and others related to their development, nutrition, and monitoring. Mich. Comp. Laws § 388.1611s; 2016 Mich. Pub. Acts 268. This includes, for example, $6,155,000 appropriated for "Early On" to provide early intervention services for children younger than four years old, Mich. Comp. Laws § 388.1611s(4); $1,500,000 appropriated to provide universal preschool in Flint through school-day great start readiness programs, Mich. Comp. Laws § 388.1611s(5); $1,292,500 appropriated to FCS to employ nine school nurses and 26 social workers, Mich. Comp. Laws § 388.1611s(2); and $1,195,000 appropriated to increase staffing for the additional early childhood intervention services and early literacy services, including Early On coordinators, a psychologist, an early intervention teacher, a speech and language pathologist, a literacy coach, nutrition workers, and community resource coordinators, Mich. Comp. Laws § 388.1611s(3).

For the preceding 2016 fiscal year (the first school year in which the Flint water crisis was first reported), the State appropriated $9,200,000 of additional

funding for early childhood services to children under five years residing in Flint. Mich. Comp. Laws § 388.1611o. In addition, the State appropriated more than $36,000,000 in the Department of Education budget to develop and assist children in Flint. 2016 Mich. Pub. Acts 268 Article VI (Department of Education), pp. 33–45. Another $24,000,000 was appropriated for the Child Development and Care program in the Department's Office of Great Start through FY18 to provide additional support to children in Flint affected by the declaration of emergency. An additional $16,100,000 was appropriated for child care assistance and development in the Department's budget for fiscal year 2016. 2016 Mich. Pub. Acts 268 of 2016. In addition, $8,050,000 was appropriated for the Department's work-project related to the children in Flint. 2016 Mich. Pub. Acts 268 § 1010.

This ongoing State response is in addition to coordinated federal and local responses to the public health crisis in Flint.

## ARGUMENT

### I. Plaintiffs' claims are non-justiciable based on failure to exhaust and lack of standing; meanwhile, the Eleventh Amendment bars their ADA claim.

#### A. Plaintiffs' federal claims are subject to dismissal for failure to satisfy the IDEA administrative-exhaustion requirement.

The Complaint should be dismissed because it contains no allegations that any of the named Plaintiffs exhausted their administrative remedies. Nor does it

set forth facts that would justify bypassing the IDEA's administrative hearing requirements. While the question of whether failure to exhaust available administrative remedies is raised under Rule 12(b)(1) or 12(b)(6) is currently unsettled in the Sixth Circuit,[8] under either standard, Plaintiffs' failure to exhaust compels dismissal of the claims premised on alleged violations of the IDEA.

**1. The IDEA unambiguously requires exhaustion.**

The plain language of the IDEA requires that a person seeking relief for an alleged violation must first seek administrative review of the alleged non-compliance through the established impartial due-process complaint procedure. 20 U.S.C. § 1415(l); *see also* 20 U.S.C. §§ 1415(b)(6), 1415(f), and 1415(i)(2). The exhaustion requirement applies to allegations pertaining to "any matter relating to the identification, evaluation, or education placement of [a] child, or the provision of a [FAPE] to such child[.]" 20 U.S.C. § 1415(b)(6)(A). The exhaustion

[8] The Sixth Circuit has not definitively decided whether the failure to exhaust the IDEA's administrative remedies is jurisdictional. *Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ.*, Case Nos. 14-3575, 14-3833, 14-3834, and 15-3833, __ Fed. App'x. __, 2016 U.S. App. LEXIS 13073, *16-*18 (6th Cir. 2016) (Ex. 11). Other Courts of Appeals hold that failure to exhaust is jurisdictional. *See, e.g.*, *Stropkay v. Garden City Union Free Sch. Dist.*, 593 F. App'x 37, 40 (2d Cir. 2014) (citations omitted) ("Failure to exhaust the administrative remedies deprives the court of subject matter jurisdiction."). The Department asserts that the Complaint is non-justiciable both facially and factually because it does not allege exhaustion or facts to excuse exhaustion. Fed. R. Civ. P. 12(b)(1); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004). Alternatively, the Department requests dismissal under Rule 12(b)(6). See Argument II below.

requirement also applies to civil actions premised on the Constitution, the ADA, the Rehabilitation Act, or other laws protecting the rights of children with disabilities. 20 U.S.C. § 1415(l).

Courts have uniformly held that the plain language of the IDEA requires exhaustion before an aggrieved party may file suit in federal court. *See, e.g.*, *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 915 (6th Cir. 2000) (collecting cases). The Sixth Circuit recently explained that "exhaustion is required at a minimum when the claim explicitly seeks redress for a harm that IDEA procedures are designed to and are able to prevent[.]" *Fry v. Napoleon Cmty. Schs.*, 788 F.3d 622, 627 (6th Cir. 2015), *cert. granted*, __ U.S. __; 136 S. Ct. 2540 (2016). Indeed, exhaustion is required when "a plaintiff has alleged injuries that could be redressed to *any degree* by the IDEA's administrative procedures and remedies[.]" *Zdrowski v. Rieck*, 119 F. Supp. 3d 643, 662–63 (E.D. Mich. 2015 (emphasis added) (citing *S.E. v. Grant Cnty. Bd. of Educ.*, 544 F.3d 633, 642 (6th Cir. 2008)); *see also Ellenberg v. New Mexico Military Inst.*, 478 F.3d 1262, 1276 (10th Cir. 2007).

Exhaustion applies where the alleged harm is one "with educational consequences that is caused by a policy or action that might be addressed in an IEP [individualized education program]." *Fry*, 788 F.3d at 627. It also applies to any claim asserting violations under other statutes "seeking relief that is also available" under the IDEA. *Id*. at 626, quoting 20 U.S.C. § 1415(l). If there is ambiguity as

to the IDEA's power to remedy the alleged violations, "exhaustion should be required in order to give educational agencies an initial opportunity to ascertain and alleviate the alleged problem." *Carroll v. Lawton Indep. Sch. Dist. No. 8*, 805 F.3d 1222, 1227 (10th Cir. 2015) (citation omitted).

The exhaustion requirement serves a vital and critical function in the IDEA's overall scheme. *Ellenberg*, 478 F.3d at 1275–76. It allows a state to apply its expertise in a way that meets the needs of disabled children primarily "by having the parents and [LEAs] work together." *Doe v. Smith*, 879 F.2d 1340, 1343–44 (6th Cir. 1989) (citation omitted). It also "prevents courts from undermining the administrative process and permits an agency to bring its expertise to bear on a problem as well as to correct its own mistakes." *Heldman v. Sobol*, 962 F.2d 148, 159 (2d Cir. 1992) (citing *McKart v. United States*, 395 U.S. 185, 193–95 (1969)) (other citation omitted). To achieve this overarching goal, the IDEA "wisely gives educational professionals, well-versed in a child's educational needs and the range of educational services that could ably meet those needs, 'at least the first crack at formulating a plan to overcome the consequences of educational shortfalls.'" *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1065 (10th Cir. 2002) (citation omitted).

**2. Plaintiffs fail to allege that they have exhausted the IDEA's administrative review process.**

Here, the exhaustion requirement applies both to Plaintiffs' IDEA claims and to Plaintiffs' additional claims under the ADA and the Rehabilitation Act, because "the injuries alleged can be remedied through IDEA procedures" and "relate to the specific substantive protections of the IDEA." *Fry*, 788 F.3d at 625 (citation omitted). Yet the Complaint does not allege compliance with the IDEA's statutory or regulatory provisions detailing due process complaint procedures and exhaustion requirements. Thus, the Court must dismiss unless an exception to the exhaustion doctrine is shown.

Not only does the filing of a state complaint (as opposed to a due process complaint) *not* fulfill the exhaustion requirement, *Ass'n for Cmty. Living v. Romer*, 992 F.2d 1040, 1045 (10th Cir. 1993), but Plaintiffs' complaint alleges that only one plaintiff filed a state complaint and the Department required corrective action. (Dkt. No. 1; Compl. ¶ 225; Pg ID 81.) This pleading's admission directly refutes Plaintiffs' general and conclusory allegations that the Department "failed to appropriately monitor." (Dkt. No. 1; Compl. ¶¶ 365, 371, 381, 384; Pg. ID 119–125.) Moreover, the Complaint fails to allege any facts establishing that Plaintiffs filed a due process complaint based on the alleged system-wide violations by FCS, GISD, or the Department. A state educational agency "must be afforded some procedural due process protection"—i.e., proper notice the local school district is

not complying with the IDEA—before a party may bring a civil action asserting violations of the IDEA. *B.H. v. Southington Bd. of Educ.*, 273 F. Supp. 2d 194, 201 (D. Conn. 2003). As a result, absent an applicable excuse, which is not supported by the facts here, the exhaustion doctrine applies to bar this Complaint. *Zdrowski* 119 F. Supp. 3d at 664.

**3. Plaintiffs fail to allege a factual basis to excuse exhaustion.**

Plaintiffs bear the burden to show a basis to excuse exhaustion. *Covington*, 205 F.3d at 917. A plaintiff must demonstrate an entitlement to "bypass the administrative procedures." *Covington*, 205 F.3d at 917 (citing *Honig v. Doe*, 484 U.S. 305, 327 (1988)). Here, the Complaint, taken as true, fails to state any specific facts excusing exhaustion.

The existing exceptions to the general rule that a party asserting a violation of the IDEA must exhaust administrative remedies are narrow. *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989). The two principle "narrow exceptions" to exhaustion are: (1) where "it would be futile or inadequate to protect the plaintiff's rights[;]" or (2) where "plaintiffs were not given full notice of their procedural rights under the IDEA." *Covington*, 205 F.3d at 917 (citation omitted); *Zdrowski*, 119 F. Supp. 3d at 664.

Some courts have applied a third exception to the exhaustion requirement derived from legislative history – where "an agency has adopted a policy or

pursued a practice of general applicability that is contrary to the law." *Romer*, 992 F.2d at 1044 (citing H.R. Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)); *Covington*, 205 F.3d at 917; *Jackie S. v. Connelly*, 442 F. Supp. 2d 503, 518 (S.D. Ohio 2006) (citing *Romer*); *see also J.B. v. Avilla R-XIII Sch. Dist.*, 721 F.3d 588, 594 (8th Cir. 2013). This exception may apply "if the alleged violations raise only questions of law," as opposed to individual questions requiring administrative expertise, and the plaintiff can show "that the underlying purposes of exhaustion would not be served." *Romer*, 992 F.2d at 1044 (citations omitted).[9]

When considering the futility exception in the context of the IDEA's exhaustion requirement, courts have developed subcategories or labels. *See, e.g.*, *Baldessarre v. Monroe-Woodbury Ctr. Sch. Dist.*, 496 F. App'x 131, 134 (2d Cir. 2012) (stating it has "accepted arguments of futility where parents were not informed of administrative remedies . . . where the state agency was itself acting contrary to law . . . where the case involves 'systemic violations that could not be remedied by local or state administrative agencies,' or where 'an emergency situation exists'"). The courts evaluate these various subcategories to determine if exhaustion is futile because of the presence of one or more of the other exceptions.

[9] The Tenth Circuit has stated that it has "never excused a party's failure to exhaust its IDEA administrative remedies under the general-applicability exception." *McQueen ex rel. McQueen v. Colorado Springs Sch. Dist. No. 11*, 488 F.3d 868, 875 n. 1 (10th Cir. 2007) (citations omitted).

*E.g.*, *M.O. v. Indiana Dep't of Educ.*, *No.2:08-CV-175-TS*, 2008 U.S. Dist. Lexis 66632, at *25-32 (N.D. Ind. Aug. 29, 2008) (citations omitted) (Ex. 6).

Applying this framework here, and beginning with the second exception, it is inapplicable because, although Count I of the Complaint asserts "Systemic Violation[s]," Plaintiffs do not assert that they lacked notice or were prevented from pursuing their administrative remedies. (Dkt. No. 1; Compl. ¶¶ 349-384; Pg. ID 113–125.) And the conclusory assertion of systemic violations is also insufficient because the allegations pertain only to a single district that may be appropriately remedied through the current due process hearing procedures.

Turning to the first exception, Plaintiffs have not met the high standard for establishing futility. *Ruecker v. Sommer*, 567 F. Supp. 2d 1276, 1291 (D. Or. 2008) (noting the high standard). In the Sixth Circuit, exhaustion is excused as futile or inadequate where the alleged injuries "do not relate to the provision of a FAPE" and "cannot be remedied" through the IDEA's administrative process. *Fry*, 788 F.3d at 627 (citation and quotation marks omitted). Exhaustion may also be futile or inadequate where an appropriate defendant is alleged to have engaged in a "policy or practice" contrary to the IDEA, such as "locking children in [a] time-out room," *Covington*, 205 F.3d at 917, or where the "plaintiffs allege 'structural or systemic failure and seek system wide reform[.]'" *Jackie S.*, 442 F. Supp. 2d at 518 (citations omitted).

Although the Sixth Circuit has not expressly determined the parameters of a futility exception to exhaustion for "systemic" reasons, the Ninth Circuit has defined a "systemic" claim as involving system-wide issues requiring wholescale structural reform. *Doe v. Arizona Dep't of Educ.*, 111 F.3d 678, 682 (9th Cir. 1997). "[A] claim is 'systemic' if it implicates the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act[.]*" Id.* Other Circuits agree with and apply this definition. *J.T. v. Dumont Pub. Schs.*, 533 F. App'x 44, 54 (3rd Cir. 2013) ("Exhaustion may be excused when plaintiffs 'allege systemic legal deficiencies and, correspondingly, request *system-wide relief* that cannot be provided (or even addressed) through the administrative process.'") (citation omitted) (emphasis added). These systemic deficiencies excusing exhaustion generally relate to the impartiality of the administrative process or the structure of the system itself. For example, the Second Circuit excused exhaustion on futility grounds where the plaintiff alleged the method of assigning IDEA hearing officers impacted the impartiality of all hearings in the state, thus presenting a systemic issue not resolved through the very process being challenged. *Heldman*, 962 F.2d at 151-153, 158-159; *see also Beth V. by Yvonne V. v. Carroll*, 87 F.3d 80, 83 (3d Cir. 1996) (remanding for consideration of whether futility excused exhaustion where plaintiffs alleged that state complaint

decisions were "inadequately and tardily processed," failed to address issues raised, and failed to order or enforce corrective action statewide).

On the other hand, a claim "is not 'systemic' if it involves only a substantive claim having to do with limited components of a program, and if the administrative process is capable of correcting the problem." *Arizona Dep't of Educ.*, 111 F.3d at 682 (holding that allegations that juveniles in one jail failed to receive services was not a system-wide and did not excuse exhaustion); *Canton Bd. of Educ. v. N.B.*, 343 F. Supp. 2d 123, 128 (D. Conn. 2004) (holding that to show systemic violation, the plaintiff needed to allege that lack of training rendered the handling of IDEA claims non-compliant with due process hearing in a substantial number of *other* proceedings).

Likewise, a challenge limited to a local district's placement decision is not systemic because the "challenge really is to the *substantive determinations* reached by the" local district and "not to the *structure* of the system under which the identification was made." *Mrs. M. v. Bridgeport Bd. of Educ.*, 96 F. Supp. 2d 124, 133 (D. Conn. 2000) (requiring exhaustion by class action plaintiffs) (emphasis in original); *see also Romer*, 992 F.2d at 1044-45 (allegations by a class of plaintiffs that a statewide policy predetermining the duration of extended school days were not the type of systemic issues that excused exhaustion, and noting that the SEA should have the first opportunity to consider and correct the alleged violations); *Cf. Heldman*, 962 F.2d at 151–53, 158–59.

Here, Plaintiffs do not properly allege any systemic failure. A party cannot "simply assert that their allegations are systemic in order to survive the exhaustion requirement." *M.O.*, 2008 U.S. Dist. Lexis 66632, at *25-32. The Complaint does not identify a failure to implement IDEA on a statewide basis or an improper policy or procedure applicable to all disabled children in Michigan. It simply alleges that the Department "failed to appropriately monitor" Defendants GISD and FCS. (*E.g.* Dkt. No. 1; Compl. ¶¶ 365; Pg. ID 119.)

As was true in *Arizona Department of Education*, *Romer*, and similar cases, Plaintiffs' Complaint here does not support excusing exhaustion for systemic issues. In Count I, Plaintiffs assert four purported types of "[s]ystemic [v]iolations" that relate to the IDEA.[10] These "systemic" failures are premised on the Department's alleged failure to "appropriately monitor" the other defendants or to ensure equal access of Flint's children and parents to programs. (Dkt. No. 1; Compl. ¶¶ 365, 371, 381, 384; Pg. ID 119–125.) These conclusory allegations do not state with specificity the nature of the systemic violation of the IDEA and therefore are not sufficient to excuse exhaustion or differentiate how each

[10] Count I alleges four separate sub-counts that the Department "failed to appropriately monitor" the other defendants' "child-find" procedures ("Systemic Violation 1"), provision of applicable services per a student's IEP in the LRE ("Systemic Violation 2"), disciplinary procedures and related procedural safeguards ("Systemic Violation 3"), and the availability of services and programs as non-disabled students ("Systemic Violation 4").

defendant otherwise acted improperly. These allegations do not remotely suggest that the asserted violations occur in all other districts in Michigan or are applicable to all identified disabled children living in Michigan.

Notably, at least one court has rejected Plaintiffs' "Systemic Violation 1," holding that "[t]here is no such thing as a 'systemic' failure to find and refer" potentially disabled children absent "significant" proof of unlawful policies. *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 498 (7th Cir. 2012) (reversing class certification for failure to exhaust). Here, Plaintiffs do not specify any unlawful policy by the Department specific to Flint or related to statewide child find procedures, let alone provide any "significant" proof in their Complaint of such policy. Similarly, the allegations in support of the other asserted "[s]ystemic [v]iolations" also fail as they relate only to the Department's alleged failure to monitor violations by FCS or GISD and not other districts throughout the state. These allegations therefore are not truly "systemic" in nature and do not excuse the exhaustion requirement. Moreover, there is an adequate administrative remedy if such violations actually exist.

With respect to the third exception, the Sixth Circuit has not expressly adopted the exception but to the extent this Court considers that exception, it is not applicable here either. Plaintiffs do not allege specific facts indicating state-wide failures in the Department's monitoring process or due process procedures. Rather, the Complaint focuses on purported local violations within a single school

district. Where a plaintiff challenges the general applicability of local policies as being contrary to the IDEA, as opposed to state-wide polices, the administrative hearing process provides states with the opportunity to "fulfill[ ] their oversight responsibilities." *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1307 (9th Cir. 1992). "Circumventing this scheme where local policies are challenged undermines the IDEA's enforcement structure." *Id*. Moreover, the claims for relief demonstrate that the Complaint seeks to remedy issues relating specifically to FCS and children in Flint. Plaintiffs' "challenge really is to the *substantive determinations* reached by the [FCS] concerning certain children, not to the *structure* of the [State's] system" under which the identification or other decisions were made. *Mrs. M.*, 96 2d F. Supp. at 133 (emphasis in original).

Plaintiffs' allegations fall short of overcoming the high threshold to excuse exhaustion because of a systemic violation by the Department. There are no allegations that the Department received information that its state plan failed to comply with the "child-find" requirement or was non-compliant in other areas on a systemwide basis. *Contrast D.L. v. D.C.*, 450 F. Supp. 2d 11, 18-19 (D.D.C. 2006) (U.S. Department of Education warned defendants numerous times of non-compliance and repeated failures to implement). Nor are there specific allegations demonstrating that districts other than FCS fail to identify and evaluate disabled children, or improperly place or fail to provide disabled children FAPE in the least restrictive environment such "that the entire special education system in

[Michigan] is deficient." *Cf. New Jersey Prot. & Advocacy, Inc. v. New Jersey Dep't of Educ.*, 563 F. Supp. 2d 474, 487 (D. N.J. 2008) (finding that allegations that the SEA's policies caused "systematic and wide-spread violations" that may require restructuring of "New Jersey's education system" to alleviate the alleged conflicts with the IDEA). In short, there is no factual support to excuse exhaustion due to systemic concerns.

Unlike those cases finding exhaustion excused as futile, Plaintiffs do not identify specific factual issues with the Department's implementation of the IDEA requiring systemwide structural changes applicable to *all* districts and *all* students throughout the state. Instead, the Complaint is limited to purported local violations within one school district, which may be adequately remedied through administrative procedures. And the relief requested by Plaintiffs would apply only to one LEA, not to all students throughout Michigan. (Dkt. No. 1; Compl. ¶ 395.B – 395.K; Pg. ID 128-131.) Because the Complaint on its face shows that Plaintiffs failed to exhaust their administrative remedies, and because the Complaint does not demonstrate any factual basis to excuse exhaustion, the Court must dismiss the Complaint as to the Department. *See W.R. v. Ohio Health Dep't*, 651 F. App'x 514, 520 (6th Cir. 2016) (dismissing claims where plaintiff failed to exhaust administrative remedies under the IDEA); *Zdrowski*, 119 F. Supp. 3d at 664 (same).

### B. Plaintiffs lack standing to bring claims under the IDEA, Title II of the ADA, and Section 504 of the Rehabilitation Act.

"In order for a federal court to exercise jurisdiction over a matter, the party seeking relief must have standing to sue." *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996). Under the three-part test for standing, a plaintiff who seeks judicial relief must show (1) an injury-in-fact that is concrete and particularized, and actual or imminent rather than conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged conduct of the defendant; and (3) that the injury is redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs cannot meet this test as to their claims against the Department under the IDEA, Title II of the ADA, or Section 504 of the Rehabilitation Act.

#### 1. Plaintiffs lack standing to bring their claims under the IDEA.

As to their claim against the Department under the IDEA, Plaintiffs cannot establish an injury in fact, causation, or redressability.

Federal courts have held that alleged procedural violations of the IDEA alone are insufficient to invoke standing—"[a] procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits." *D.S. v Bayonne Bd. of Educ.*, 602 F.3d 553,

565 (3d Cir. 2010) (citing *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26 (2007)); *J.T.*, 533 F. App'x. at 49 (affirming the district court's dismissal based on standing because "purely procedural claims are not actionable under IDEA").

Here, Plaintiffs' claims against the Department are merely procedural. Indeed, Plaintiffs concede that the Department's responsibility is to provide oversight to school districts such as Defendant FCS, and that it is Defendant FCS that is responsible for providing special education programs and services under the IDEA. (Dkt. No. 1; Compl. ¶¶ 35, 37; Pg. ID 17-18.) Consistent with this, Plaintiffs allege that the *local* Defendants have failed to provide the named Plaintiffs with the special education services required by the IDEA. (Dkt. No. 1; Compl. ¶¶ 364, 370, 381; Pg. ID 119, 121, 124.) On the other hand, Plaintiffs claim the Department failed to provide proper monitoring, oversight, resources, and expertise required to comply with the IDEA—in other words, they claim the Department lacked the proper procedures to ensure compliance with the IDEA. (Dkt. No. 1; Compl. ¶¶ 365, 371, 381; Pg. ID 119, 121, 124-125.) The allegations against the Department are insufficient to establish standing because they are purely procedural in nature. *See D.S.*, 602 F.3d at 565; *J.T.*, 533 F. App'x. at 49. Nor do Plaintiffs allege any injury related to the administrative process available to redress these alleged failures.

Additionally, the alleged procedural injury is not concrete and palpable. The U.S. Supreme Court has "repeatedly refused to recognize a generalized grievance

against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *U.S. v. Hays*, 515 U.S. 737, 743 (1995). Instead, there must be a "real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 221 (1974). Where that need does not exist, allowing courts to oversee legislative or executive action "would significantly alter the allocation of power . . . away from a democratic form of government[.]" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). (quotation mark and citation omitted).

Here, Plaintiffs have not demonstrated that such a need exists. Although they repeatedly argue that the Department's monitoring and oversight of local Defendants is insufficient, they fail to specify *why* it is insufficient. They do not particularize what the Department failed to do that it is required to do under the IDEA; they simply state that the Department provided improper oversight. Nor, as noted above, do they assert a failure of the available administrative process to address their claims—indeed, they do not even allege an attempt to utilize that hearing process. Accordingly, their grievances are merely generalized and therefore are insufficient for standing purposes. *See Hays*, 515 U.S. at 743.

Plaintiffs' IDEA claim also lacks causation. "The causation requirement of the constitutional standing doctrine exists to eliminate those cases in which a third party and not a party before the court causes the injury." *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 543 (6th Cir. 2004). Standing is

more difficult to establish when the injury is indirect. *Parsons v U.S. Dep't of Justice*, 801 F.3d 701, 713 (6th Cir. 2015).

Here, Plaintiffs admit that the Department did not directly cause Plaintiffs' alleged injury under the IDEA; indeed, by Plaintiffs' own admission, the specific injuries alleged here were caused by the asserted failures of the local Defendants. (Dkt. No. 1; Compl. ¶¶ 364, 370, 381; Pg. ID 119, 121, 124.) The Department's alleged failure to properly monitor is too indirect to satisfy causation and does not otherwise establish a separate, redressable injury.

It is merely speculative that Plaintiffs' proposed remedy will redress Plaintiffs' alleged IDEA injury. Injury is not redressable unless the court can provide "substantial and meaningful relief." *Parsons*, 801 F.3d at 715 ( And redressability is difficult to establish "where the prospective benefit to the plaintiff depends on the actions of independent actors." *Id.* Here, the redressability element is not met because Plaintiffs' requested relief is dependent on actors other than the Department, including the local Defendants and parents.

### 2. Plaintiffs lack standing to bring claims under Title II of the ADA and § 504 of the Rehabilitation Act.

Plaintiffs similarly lack standing to bring claims under Title II of the ADA and § 504 of the Rehabilitation Act. To have standing under Title II of the ADA, Plaintiffs must allege "how they have been excluded from participation in or denied the benefits of a service, program or activity[.]" *Ross v. City of Gatlinburg*,

327 F. Supp. 2d 834, 842 (E.D. Tenn. 2003). And Plaintiffs must allege they were denied benefits because of a disability or their association with disabled individuals. *Wendrow v. Mich. Dep't of Human Servs.*, No 08-14324 2012 U.S. Dist. LEXIS, 41543, at*5-*6 (E.D. Mich. Mar 27, 2012) (Ex. 7). Title II and Section 504 "share the same substantive standard[.]" *Jones v. Potter*, 488 F.3d 397, 403 (6th Cir. 2007).

Plaintiffs have failed to allege an injury under Title II or § 504 because they have not alleged an invasion of a legally protected interest under either of these provisions. They admit that proposed class members are not necessarily eligible for services under the ADA and Rehabilitation Act but "may be eligible" for such benefits. (Dkt. No. 1; Compl. ¶ 38; Pg. ID 18.) Further, they acknowledge that while proposed class members are "at risk of developing a disability," they do not necessarily have a disability. (Dkt. No. 1; Compl. ¶ 17; Pg. ID 11.) Rather, Plaintiffs ADA and § 504 claims are premised on a failure to identify children as disabled, not because they have been identified as disabled. Accordingly, any injury to these proposed class members based on Title II and § 504 is hypothetical and constitutes a generalized grievance against the Department's governmental conduct – which is insufficient to establish standing. *See Whitmore v Arkansas*, 495 U.S 149, 155 (1990); *Hays*, 515 U.S. at 743.

Like their IDEA claim, Plaintiffs' Title II and Section 504 claims also fail under the causation and redressability elements of standing. Plaintiffs concede that

local Defendants are the direct cause of any hypothetical injury, whereas the Department allegedly failed to provide proper oversight. (Dkt. No. 1, Compl. ¶¶ 365, 371, 381, 383, Pg. ID 119–25.) And Plaintiffs' relief depends on the actions of local Defendants and parents. Accordingly, Plaintiffs lack standing to bring these claims. *See Am. Canoe Ass'n,* 389 F.3d at 543; *Parsons*, 801 F.3d at 715.

### C. The Eleventh Amendment bars Plaintiffs' ADA Title II claim.

The Eleventh Amendment, U.S. Const. Amend. 11, bars suits against a state and its agencies, unless the state has consented to be sued or immunity has been abrogated by Congress. *Pennhurst State Sch.l & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984); *Seminole Tribe v. Florida,* 517 U.S. 44, 55 (1996). "This jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst,* 465 at 100.

Congress may abrogate the states' sovereign immunity if it unequivocally expresses its intent to do so and has acted pursuant to a valid exercise of power. *Seminole Tribe,* 517 U.S. at 55. Here, Congress has explicitly abrogated Eleventh Amendment immunity under § 504 of the Rehabilitation Act, 42 U.S.C § 2000d-7, and the IDEA, 20 U.S.C § 1403. And although Congress has expressed a desire to abrogate state Eleventh Amendment immunity in cases brought under the ADA, 42 U.S.C. § 12202, both the Supreme Court and the Sixth Circuit have held that the

attempted abrogation of Eleventh Amendment immunity with respect to ADA Title II claims is only valid in limited circumstances.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity[.]" 42 U.S.C. § 12132. The Supreme Court analyzed Eleventh Amendment immunity within the Title II context in *Tennessee v. Lane*, 541 U.S. 509 (2004).

In *Lane*, plaintiffs claimed they were denied physical access to the state courts by reason of their disability. *Lane*, 541 U.S. at 513-14. The Supreme Court held that Title II constitutes a valid exercise of Congress' authority because the denial of the access to courts directly implicates the Due Process Clause of the Fourteenth Amendment. *Id.* at 509, 533. The Supreme Court further stated that the remedy requested, a structural change to the building, was a "reasonable prophylactic measure, reasonably targeted to a legitimate end." *Id.* at 533. But, the Court also stated that Title II only requires "'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service." *Id.* at 532.

The Supreme Court again examined Eleventh Amendment immunity in the context of a Title II ADA claim in *United States v. Georgia*, 546 U.S. 151, 159 (2006). In *Georgia*, the Supreme Court held that Title II of the ADA validly

abrogates state sovereign immunity for conduct that actually violates the Fourteenth Amendment. *Georgia* set forth a three-part analysis to determine whether the Eleventh Amendment proscribes a Title II claim:

> [D]etermine . . . on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid. *Id* at 159.

The Sixth Circuit considers the *Georgia* test to be "required" when analyzing whether a State has sovereign immunity in Title II cases. *Mingus v. Butler,* 591 F.3d 474, 482 (6th Cir. 2010).

Under the first prong of *Georgia*, the Plaintiffs must identify conduct that violates the ADA. *Babcock v. Michigan*, 812 F.3d 531, 538 (2016). Here, Plaintiffs have failed to do that. Plaintiffs assert generally that Defendants violated Title II by "denying [Plaintiffs and similarly situated children] access to essential services and programming that is available to non-disabled students solely on account of their disabilities and/or behaviors[.]" Dkt. No. 1; Compl. ¶ 390; Pg. ID 127.) However, a review of the Complaint demonstrates that 8 out of the 15 named Plaintiffs requested and received IEPs. (Dkt. No. 1; Compl. ¶¶ 91-188, 206-274; Pg. ID 43-71,75-95) For those individuals, it is not that they were denied *access* to services administered by the Department; rather, they disagree with their IEPs as to the type or level of services needed to provide them the required FAPE.

The remainder of the Plaintiffs have been determined not eligible for special education services or have not yet even been identified as disabled and thus entitled to services under the ADA. In addition, and for the reasons stated in Argument II(B), Plaintiffs have failed to plead sufficient facts necessary to state a claim under Title II of the ADA.

Because Plaintiffs have failed to show that they were denied access to services, programs, or activities, and failed to allege the necessary elements of a Title II claim, Plaintiffs cannot show that the Department's alleged conduct violated Title II of the ADA under the *Georgia* test. Accordingly, Plaintiffs' claim under Title II of the ADA is barred by the Eleventh Amendment. *Babcock,* 812 F.3d at 539.

Moreover, Plaintiffs' requests for relief are "not reasonably targeted to a legitimate end." *Lane*, 541 U.S. at 533. Plaintiffs ask this Court to order the Department address the public health crisis in Flint through a variety of costly measures, including: regularly testing the water supply for lead levels, creating an electronic medical record database within each school, implementing universal preschool for all children ages 3-5, and testing of all children ages 3-5 and "all those attending, or who may attend, FCS for elevated blood lead levels and a determination as to whether the child is eligible for special education services." (Compl. ¶ 395.D, Pg. ID 128-129.) The relief requested by Plaintiffs is outside the Department's authority (testing the water, requiring blood tests, and creating a

medical database within each school—which also implicates HIPPA protections). Additionally, the relief requested is duplicative of the work being performed by other government agencies and would "impose an undue financial or administrative burden" on the Department when the named Plaintiffs who have not been identified as disabled and putative class members may not even be eligible for special education and related services under Title II. *Lane*, 541 U.S. at 532; (Compl. ¶ 38, Pg. ID 18). The remedies sought by Plaintiffs are unreasonable under Title II, as they are not tailored to address violations related to the delivery of special education services.

Thus, the Eleventh Amendment bars the Plaintiffs' ADA claims because disagreement over the level of services provided to a disabled child under an IEP does not constitute denial of services based on disability, and Plaintiffs have not otherwise alleged conduct that violates Title II. And the remedies sought in this suit are unreasonable because they seek to address Flint water problems rather than individual access to general education programs.

## II. Plaintiffs fail to state a claim against the Department.

Although Rule 12(b)(6) requires the Court to accept all well-pleaded factual allegations as true, the Court need not accept all legal conclusions as true. *Iqbal*, 556 U.S. at 678-679. The factual content of a complaint must contain a plausible basis for relief, *id*. at 663, a formulaic recitation of the elements of a legal action is

insufficient, *id*. at 678, and "[c]onclusorily stating . . . that [a] Defendant . . . violated [Plaintiffs'] rights under a laundry list of federal statutes is insufficient to establish a claim for relief," *Fernanders v. Mich. Dep't of Military & Veterans Affairs*, No. 12-11752, 2012 U.S. Dist. LEXIS 111872, at *7 (E.D. Mich. Aug. 9, 2012) (Ex. 8). Here, Plaintiffs' claims are conclusory and do not demonstrate a plausible basis for relief.

### A. Plaintiffs fail to state a claim against the Department under the IDEA.

As discussed in Section I(A), the Complaint on its face shows that none of the named Plaintiffs or purported class members have exhausted their administrative remedies by filing a due process complaint. To the extent that is an appropriate 12(b)(6) argument, it is preserved here.[11] Count I also fails to state a claim on which relief can be granted because Plaintiffs' allegations do not meet *Iqbal*'s pleading standard.

Plaintiffs assert four purported "Systemic Violations" in Count I. But their Complaint alleges in only broad, conclusory terms that the Department "failed to appropriately monitor" the other Defendants' compliance and did not provide sufficient resources. This recital of the legal elements of a claim under the IDEA is insufficient. Similarly, Plaintiffs assert that the "defendants" systemically failed

[11] *See* Footnote 8, p. 19 above.

to ensure access to programs and services. (Dkt. No. 1; Compl. ¶¶ 363, 365, 371, 381, 384; Pg ID 119-25.) But Plaintiffs fail to allege any specific instance where the Department failed to monitor the other Defendants or facts demonstrating a statewide failure of disabled students to have access to programs and services. Rather than identifying specific instances where the Department failed to meet its statutory duty, the Complaint lumps all of the defendants together. But simply asserting that the Department "acted wrongfully" does not meet the pleading standard, and it also does nothing to show that this wrong cannot be corrected through the "means provided by the state [due process hearing]." *Donoho v. Smith Cnty. Bd. of Educ.*, 21 F. App'x 293, 298 (6th Cir. 2001); (Compl. ¶¶ 365, 371, 381, 384; Pg ID 119-25.) Plaintiffs' allegations in Count I against the Department are therefore "conclusory and not entitled to be assumed true." *Iqbal*, 556 U.S. at 681; *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 460 (6th Cir. 2007).

Count I also alleges violations by only one school district and that the Department failed to monitor this *one* school district. This is insufficient to allege a "systematic violation." *See Arizona Dep't of Educ.*, 111 F.3d at 682.

Because Plaintiffs' allegations are nothing more than "bare assertions" that are insufficient to state a claim for relief and fail to demonstrate a "systematic violation," Count I should be dismissed. *Iqbal*, 556 U.S. at 681.

### B. Plaintiffs fail to state a claim against the Department under Title II of the ADA and Section 504 of the Rehabilitation Act.

Count III of the Complaint alleges violations of Title II of the ADA, 42 U.S.C. § 12101 *et seq.* Similar to their IDEA claim, Plaintiffs lump all Defendants together and make the bare assertion that they have denied Plaintiffs "access to essential services and programming that is available to non-disabled students[.]" (Dkt. No. 1; Compl. ¶ 390; Pg. ID 127.) These conclusory allegations that fail to specify individual acts of each defendant fail to meet the *Iqbal* pleading standard.

Further, Title II of the ADA addresses public services provided by governmental entities:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.42 U.S.C. § 12132.

To establish a violation of Title II, a Plaintiff has the burden to demonstrate that 1) he or she is disabled; 2) that he or she is otherwise qualified; and 3) that he or she was excluded from participation in, denied benefits of, or subjected to discrimination under a program because of his or her disability. *Anderson v. City of Blue Ash*, 798 F.3d 338, 357 (6th Cir. 2015). Additionally, Plaintiffs must allege and show that the Department "took action because of [Plaintiffs'] disability, i.e., the [p]laintiff must present evidence that animus against the

protected group was a significant factor in the position taken [by defendants.]" *Id.* (quotation marks and citations omitted)

Here, Plaintiffs' Complaint fails to allege the necessary elements of a Title II claim against the Department. Plaintiffs admit that their proposed class may not be determined disabled or otherwise qualified. (Dkt. No. 1; Compl. ¶ 17; Pg. ID 11.) They also admit that they were not necessarily eligible for services under Title II or Section 504. (Dkt. No. 1; Compl. ¶ 38; Pg. ID 18.) As for the 15 named Plaintiffs, Plaintiffs admit that eight of them requested and received IEPs; accordingly, they do not allege that these Plaintiffs have been denied access to services due to disability but rather that they disagree with the type or level of services provided, which is insufficient to state a claim under Title II. (Dkt. No. 1; Compl. ¶¶ 91-188,206-274; Pg. ID 43-71,75-95). And Plaintiffs fail to properly plead any discriminatory animus on the part of the Department, which is fatal to their claim under Title II. Thus, Plaintiffs' allegations that all Defendants denied them access to services and programming "solely on account of their disabilities and/or behaviors related to these disabilities," (Dkt. No. 1; Compl. ¶ 390; Pg. ID 127), is belied by their own allegations as well as this vague and conclusory statement. They are therefore insufficient to state a claim under Title II. *See Iqbal*, 556 U.S. at 678-681. And Plaintiffs' failure to provide a factual basis sufficient to establish a Title II claim against the Department or to provide facts demonstrating a discriminatory animus, is fatal to their claim. *Darwich v City of Dearborn*, No. 10-

14073, 2011 U.S. Dist. LEXIS 49724, at *7 (E.D. Mich. May 10, 2011) (Ex. 9); *Anderson*, 798 F.3d at 357.[12]

In Count II of the Complaint, Plaintiffs allege violations of § 504 of the Rehabilitation Act, 29 U.S.C. § 794 *et seq*. Claims brought under Title II and § 504 are often analyzed in the same fashion because they require similar elements. *Gohl v. Livonia Pub. Schs.*, 134 F. Supp. 3d 1066, 1074 (E.D. Mich. 2015) (citing *S.S. v. E. Ky. Univ.*, 532 F. 3d 445, 452-453 (6th Cir. 2008)); *see also Anderson*, 798 F.3d at 357 (describing the elements of a claim under Title II of the ADA). Thus, for the same reasons Plaintiffs failed to state a claim against the Department under Title II, their claims against the Department under § 504 also fail.

To state a claim under Section 504, Plaintiffs must allege facts showing that the alleged wrongful conduct was *solely* based on disabilities. A mixed motive is insufficient to establish a claim under the Rehabilitation Act. *Rumburg v. Sec'y of the Army*, No. 10-11670, 2011 U.S. Dist. LEXIS 45240, at *18-*19 (E.D. Mich. Apr. 27, 2011) (Ex. 10).

But here, Plaintiffs allege only that the Department violated § 504 when it allegedly "failed to comply with its general supervisory responsibilities by failing

[12] In ¶ 57 of the Complaint, without citing any authority, Plaintiffs provide a four-part test by which "[q]ualified students with disabilities can demonstrate that their SEA [the Department] discriminated against them[.]" Plaintiffs' test fails to include any mention of discriminatory animus, despite the Sixth Circuit's ruling in *Anderson*.

to adequately oversee and supervise [local Defendants.]" (Dkt. No. 1; Compl. ¶ 388; Pg. ID 126.) And the premise of this § 504 claim is the failure to identify disabilities, not discrimination based on identified disabilities—clearly inapposite to the Section's purpose. In other words, the Plaintiff children are allegedly being discriminated against by FCS because they are not being identified as disabled—*not* because of an identified disability. Plaintiffs do not, and cannot, claim that the Department failed to provide proper supervision and oversight of local Defendants *solely* because Plaintiffs are disabled. Accordingly, the requisite discriminatory animus does not exist, and this claim fails as a matter of law.

Additionally, Plaintiffs have not stated a claim under Title II or § 504 because they must exhaust their administrative remedies under the IDEA first. Plaintiffs cannot escape the exhaustion requirement by cloaking their IDEA claims under the guise of Title II or § 504. *Zdrowski*, 119 F. Supp. 3d at 662–63 (citing *S.E.*, 544 F.3d at 642).

## CONCLUSION AND RELIEF REQUESTED

Plaintiffs' claims fail as a matter of law. This Court lacks jurisdiction because Plaintiffs have not exhausted their administrative remedies for alleged systemic violations of the IDEA, they lack standing to bring any of their claims, and the Eleventh Amendment bars their ADA claim. On the merits, Plaintiffs have not demonstrated statewide systemic violations of the IDEA, much less that the

law provides them with any legal recourse against the Department in this Court. And Plaintiffs have not alleged the necessary elements of either an ADA Title II claim or a § 504 Rehabilitation Act claim against the Department. The remedy for any special education services that are needed as a result of lead-levels in Flint is not Plaintiffs' favored changes to delivery of special education in Michigan. And the IDEA already provides procedures for resolving any disputes when parents and school districts disagree about the identification, evaluation, placement, and provision of special education and related services for an individual child.

WHEREFORE, Defendant Department of Education respectfully requests that this Court dismiss all claims against it.

Respectfully submitted,

State of Michigan Department of Attorney General

/s/Timothy J. Haynes
Assistant Attorney General
Timothy J. Haynes
Travis M. Comstock
Katherine J. Bennett
Assistant Attorneys General
Attorneys for Michigan Department of Education
Health, Education & Family Services
P.O. Box 30758
Lansing, MI 48909
(517)-373-7700
HaynesT3@michigan.gov
ComstockT@michigan.gov
BennettK1@michigan.gov
P41196
P72025
P75913

Dated: December 8, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on December 8, 2016, I electronically filed the above document with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Timothy J. Haynes
Assistant Attorney General
Attorney for Defendant Michigan Department of Education
Health, Education & Family Services Division
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700
HaynesT3@michigan.gov
P41196