UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

D.R., as a minor through parent and N/F, DAWN RICHARDSON, et al

Plaintiffs,

v

MICHIGAN DEPARTMENT OF EDUCATION, GENESEE INTERMEDIATE SCHOOL DISTRICT and FLINT COMMUNITY SCHOOLS,

Defendants.
_____/

CLASS ACTION

Honorable Arthur J. Tarnow
Magistrate Judge Anthony P. Patti
No. 16-13694

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GENESEE INTERMEDIATE SCHOOL DISTRICT'S MOTION (WITH INCORPORATED BRIEF) FOR JUDGMENT ON THE PLEADINGS PURSUANT TO FED. R. CIV. P. 12(C)

Statement Regarding Concurrence Under LR 7.1(a): On December 9, 2016 at approximately 4:30 pm, John Miller (71913) contacted Mr. Gregory Little and left a voicemail explaining the basis of this motion. Mr. Little returned the phone call, and after a discussion, regarding the legal arguments, Mr. Little denied concurrence.

QUESTION PRESENTED FOR REVIEW

ISSUE ONE: Under the Individuals with Disabilities Education Act, a Plaintiff must exhaust administrative remedies before maintaining a disability discrimination lawsuit. 20 U.S.C. § 1415(l). In this case, Plaintiffs have not exhausted their administrative remedies; as such, should Plaintiffs' lawsuit be dismissed?

ISSUE TWO: A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v Iqbal*, 129 S Ct 1937, 173 L Ed 2d 868 (2009). In this case, Plaintiffs' Complaint alleges "systemic violations" of the IDEA; however, Plaintiffs have done no more than indicate a handful of alleged violations of the IDEA—each varied and unique—among 30,000 children. Should Plaintiffs' claims of self-styled "systemic violations" be dismissed?

STATEMENT OF MOST CONTROLLING AUTHORITY

Most Controlling Authority for Issue One: *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 626 (6th Cir.2015)(explaining and reaffirming exhaustion requirement); *Zdrowski v Rieck*, 119 F Supp 3d 643, 663 (E.D. Mich. 2015)(recent decision from

this Court explaining that exhaustion applies to allegations that a school district violated the IDEA's child find obligations); *Crocker v. Tennessee Secondary School Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989)(explaining the important public policy behind requiring exhaustion of IDEA remedies); *S.E. v. Grant County Board of Education*, 544 F.3d 633 (6th Cir. 2008)(explaining that exhaustion is not futile "when a plaintiff has alleged injuries that could be addressed to ***any degree*** by the IDEA's administrative procedures and remedies, exhaustion of those remedies is required")(emphasis added); 20 U.S.C. § 1415(i)(2)(A)(statutorily requiring exhaustion).

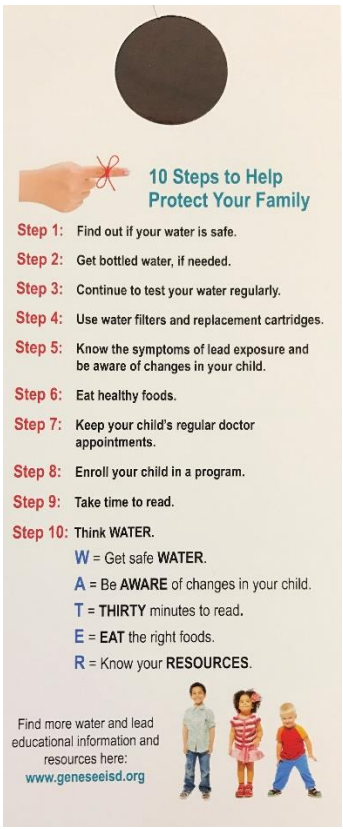
Most Controlling Authority for Issue Two: *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 555, 570, 127 S. Ct. 1955, 1974 (2007).

INTRODUCTION

Purporting to represent a putative class, fifteen individual students have filed this suit alleging that the Michigan Department of Education, the Genesee Intermediate School District ("GISD"), and Flint Community Schools have "systemically" violated the Individuals with Disabilities Act ("IDEA").

Plaintiffs' Complaint alleges that the Genesee Intermediate School District has been indifferent to the Flint water crisis by shirking its obligation to seek out

students who may need additional services. This presentation ignores reality. To assist *every* family in Flint, GISD has gone—*literally*—door-to-door to homes in Flint. One small component of these efforts has been to place the following door hangers on homes:



As the Court can see, GISD is offering (despite no legal requirement to do so) free preschool and family support services for kids aged 0-5. Despite the above programs, Plaintiffs argue that GISD is not proactive in its child find obligations and asks the Court to Order GISD to provide a service it already provides. Because plaintiff has not pled any facts that support a claim of "systemic violations" of the

IDEA, this matter should be dismissed.

Additionally, the IDEA requires that, before any lawsuit is filed, a plaintiff must exhaust administrative remedies. 20 U.S.C. § 1415(i)(2)(A)(statutorily requiring exhaustion). This is not a desultory process. Rather, the Sixth Circuit has explained the importance of this procedure as follows:

> Federal courts--generalists with no expertise in the educational needs of handicapped students--are given the benefit of expert fact finding by a state agency devoted to this very purpose. Such a mechanism is necessary to give effect to a fundamental policy underlying the [IDEA]: 'that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education." Were federal courts to set themselves up as the initial arbiters of handicapped children's educational needs before the administrative process is used, they would endanger not only the procedural but also the substantive purposes of the Act. . . .

Crocker v. Tennessee Secondary School Athletic Ass'n, 873 F.2d 933, 935 (6th Cir. 1989)(internal citations omitted). IDEA administrative procedures provide aggrieved students and their families with an enormous benefit, namely an expedited and cheaper manner to resolve injuries arising from educational disputes. In this matter, Plaintiffs have not exhausted their administrative remedies set forth in the IDEA and, as such, this matter should be dismissed.

FACTS

1. THE IDEA AND THE PROVISION OF SPECIAL EDUCATION SERVICES

In passing the IDEA, Congress "intended to open the door of public education to all qualified children and required participating States to educate handicapped children with nonhandicapped children whenever possible." *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 78, 119 S.Ct. 992, 143 L.Ed.2d 154 (1999) (citations and internal markings omitted). The statute "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) (citation omitted).

"[T]he core of the statute . . . is the cooperative process that it establishes between parents and schools." *Id.* The "central vehicle" for this procedure is the Individual[1] Education Plan ("IEP") process set out in section 1414 of the statute, which establishes a framework for parents and educators to work together to identify, evaluate, and plan the education of disabled children. *See id.* at 53-54, 126 S.Ct. 528. Importantly, an evaluation cannot occur without the parents' consent

[1] While Plaintiffs are bringing this action as a putative class, the reality is that, under state and federal law, every student must be treated as an *individual* based upon his/her own unique abilities, disabilities, and circumstances.

and approval. 20 U.S.C. § 1414(a)(1)(D). **Parents are an integral part of this process.** Evaluations and services cannot be compelled by a school district.

The IDEA does impose obligations upon states and school districts. Relevant to this action, is a requirement that states and school districts create administrative procedures to review decisions regarding the "identification, evaluation, . . . educational placement, or the provision of free appropriate education." 20 U.S.C. § 1415(b)(1)(E). Michigan has implemented these requirements through the Michigan Mandatory Special Education Act ("MMSEA"), Michigan Compiled Laws § 380.1701. Michigan regulations provide that state agencies are also bound by federal IDEA regulations. *See* Mich. Admin. Code R. § 340.1851. The corollary to the above requirement is that parents are required to exhaust such administrative procedures before seeking review in court. 20 U.S.C. § 1415(l).

Another component of the IDEA central to Plaintiffs' Complaint is the Child Find mandate. 20 U.S.C. 1412(a)(3). Child Find requires all school districts to identify, locate and evaluate all children with disabilities, regardless of the severity of their disabilities. This obligation to identify all children who may need special education services exists even if the school is not providing special education services to the child.

A district violates the IDEA 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. V. L.M.*., 478 F.3d 307, 313 (6th Cir 2007). And, in reviewing a school district's compliance with the IDEA, the Supreme Court has cautioned:

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. . . . In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories. . . .

Bd. of Educ. v. Rowley, 458 U.S. 176, 207-208 (1982).

2. THE GENESEE INTERMEDIATE SCHOOL DISTRICT'S CHILD FIND PLAN & DUE PROCESS NOTICE

The Genesee Intermediate School District—in conjunction with the County's local districts—has created a "Special Education Mandatory Plan," which is filed with the Department Education. (**Exhibit A**.) Under State Law, this Plan must provide a "description of the activities and outreach methods that are used to ensure that all citizens are aware of the availability of special education programs and services." GISD's Plan does just that, as follows:

> The GISD Director of Special Education, GISD principal of the Early Childhood Programs and Services (ECPS), and/or other designee shall be appointed as the person(s) responsible for coordinating child find activities within the GISD. The ECPS principal will work in cooperation with the Early On Genesee County Interagency Coordinating Council (ICC) to insure uniform informational items are disseminated throughout the county. Examples of materials and communication items include radio, television, newspaper advertisements, organizational presentations, and other public awareness activities.
>
> Upon request, the PAC may develop a parent in-service program to be presented to local parent groups. The program may include information on identification techniques, interagency coordination, total program information and awareness/outreach activities.
>
> Anyone wishing to take advantage of these programs and services may call, walk in or write their LEA/PSA or the GISD. The addresses and phone numbers for contact persons in each district are located in Appendix A. Upon request, this information shall be made available in the families' native language.
>
> LEA/PSA superintendents or administrators will designate a person in each district who will advise and inform persons with disabilities, their parents and other members of the community as to special education opportunities required under the laws, and the obligation of local and intermediate school district to provide such programs.
>
> Infants who have special needs or delays in development may be referred to Early On (Part C) for screening. A determination of a suspected disability will result in a referral to special education. (**Exhibit A**.)[2]

The GISD also publishes on its webpage the Department of Education's Procedural Due Process Manual, which explains the procedural rights and administrative remedies available if a parent believes a child is not being provided appropriate

[2] *Available at http://www.geneseeisd.org/DocumentCenter/Home/View/424.*

services; in addition to being posted, this manual is provided to every student referred for an evaluation. (**Exhibit B**).[3]

3. GISD'S RESPONSE TO THE FLINT WATER SITUATION

Despite its length, Plaintiffs' 133-page Complaint makes no effort to address the County wide efforts the GISD has undertaken to address the water situation in Flint. To place this Lawsuit into perspective, GISD will briefly address its efforts (which exceed its legal obligations) to service students and families impacted by Flint's water situation.

While Plaintiffs opine that GISD has not been proactive in performing its Child Find obligations, the reality is that GISD placed a door hanger on every home in Flint providing a phone number to call for help.[4] (**Exhibit C).** This door hanger told families to go to geneseeisd.org **"to connect to free preschool and family support services for your children 0-5 years of age."** (**Id**.) This door hanger then provided "10 steps to help protect your family." (**Id.**)

Because of GISD's recruitment efforts, it has seen an approximately 50% increase of students in its Early-On program, which offers free early intervention services for children ages 0-3 who have disabilities or developmental delays.

[3] *available at:* https://www.michigan.gov/documents/mde/May09-ProceduralSafeguardsNotice_278611_7.pdf

[4] This recruitment campaign also included billboards, radio, TV, and presentations in the community.

(**Exhibit D at 5.**) To accommodate the workload, the GISD has hired more than 35 new employees. (**Id. At 3**.)

The GISD has also provided training to staff, families, and local school districts. An example of such training is attached as **Exhibit E**. These presentations addressed topics such as:

- How to receive safe water and filters;
- Warning signs and symptoms parents and teachers should look for;
- Discussed four ways to help redress harm, which included: doctors' visits, healthful eating, being aware of developmental delays, and enrolling in early childhood programs offered by GISD.

The GISD also sent letters to parents in Genesee County explaining additional actions GISD is taking to "enhance special needs and home based services, as well as to make sure that children and families have access to: extended instruction during the summer; increased Early On support for children aged 0-3; nutritional support; parent support opportunities for education and information; and supply centers for water and filters." (**Exhibit F**.)[5] These letters reminded parents to look for changes in their children's behavior and seek help immediately if any changes are noticed. **(Id.)** Lastly, **Exhibit G** highlights many of the other efforts undertaken

[5] Letters *available at* *http://www.geneseeisd.org/index.aspx?NID=802*.

by GISD in response to the Flint water situation.

4. PLAINTIFFS' LAWSUIT

Fed. R. Civ. P. 8 requires "a short and plain statement of [a] claim showing that the pleader is entitled to relief." Plaintiff's Complaint is neither short nor plain and, in GISD's opinion, fails to show any entitlement to relief. Plaintiffs' 133-page Complaint is summarized by Plaintiffs as follows:

> This is a class action civil rights lawsuit for declaratory and injunctive relief, brought pursuant to federal and state law, to vindicate the rights of approximately 30,000 school-age residing in Flint who currently have, or who have placed been at risk of developing, a disability due to elevated levels of lead in the drinking water over an extended time period of at least eighteen months. *As a result of this prolonged exposure, these children require community-wide early screening; timely referral for, and performance of, evaluations to determine whether they have a qualifying disability which makes them eligible for special education and related services; provision of special education and related services in the least restrictive environment; and procedural safeguards to ensure that they are not subject to disciplinary measures for disability-related behaviors*, in compliance with the mandates of the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S. § 1400 et seq.; § 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794; Title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. § 12131 et seq.; and Michigan law. [Compl. ¶ 10.]

While Plaintiff's 133-page Complaint alleges that the Michigan Department of Education, the Genesee Intermediate School District, and Flint Community Schools are engaging in "systemic" violations of the IDEA, Plaintiff's Complaint

makes no more than passing reference to GISD. In fact, in 133 pages, Plaintiffs do no more than to vaguely suggest that GISD failed to properly accommodate 2-3 students in different and varied ways.

Absent from Plaintiffs' lengthy Complaint is any allegation that they exhausted their administrative remedies under IDEA. As is discussed below, this is a bar to this lawsuit.

STANDARD OF REVIEW

Federal courts review motions for judgment on the pleadings brought pursuant to Federal Rule of Civil Procedure 12(c) using the standards applicable to motions filed under Rule 12(b)(6). *Wee Care Child Ctr., Inc. v. Lumpkin*, 680 F.3d 841, 846 (6th Cir. 2012). Though litigants employ these procedural mechanisms at different stages of the proceedings, the purpose of both motions is to test the legal sufficiency of a plaintiff's pleadings. Thus, as with Rule 12(b)(6) motions, a Rule 12(c) motion allows a court to make an assessment as to whether a plaintiff has stated a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained

therein. *See Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir.2001). Public records and government documents are generally considered "not to be subject to reasonable dispute." *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir.1999), *overruled in part on other grounds, Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508–14, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). Public records and government documents available from reliable sources on the Internet also qualify under the above rule. *U.S. ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 972 (W.D.Mich. 2003).

As articulated by the Supreme Court of the United States, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 555, 570, 127 S. Ct. 1955, 1974 (2007)). This facial plausibility standard requires claimants to put forth "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of" the requisite elements of their claims. *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1965. Even though a complaint need not contain "detailed" factual allegations, its "factual allegations must be enough to raise a right to relief above the speculative level." *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007) (citing *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965) (internal citations omitted).

While courts are required to accept the factual allegations in a complaint as true, *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965, the presumption of truth does not apply to a claimant's legal conclusions, *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949. Therefore, to survive a motion to dismiss, a plaintiff's pleading for relief must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Ass'n of Cleveland Fire Fighters*, 502 F.3d at 548 (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964-65) (internal citations and quotations omitted).

LEGAL ARGUMENT

1. PLAINTIFF HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES AND THIS LAWSUIT SHOULD BE DISMISSED

Section 1415(a) of the IDEA mandates that states and school districts "establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. § 1415. The extensive administrative framework of the IDEA allows parents to present complaints **"**with respect to <u>any matter relating to</u> the identification, evaluation, or placement of a child, or the provision of a free appropriate public education to such child.**"** 20 U.S.C. § 1415(b)(6)(A)(emphasis added). The above language requires the creation of administrative remedies by the states, and the exhaustion of these remedies by parents and students. *See Zdrowski v Rieck*, 119 F Supp 3d 643 (E.D. Mich. 2015);

Sharbowski v. Utica Community Schools, 2012 U.S. Dist. LEXIS 54472,*6 (Feb. 16, 2012, E.D. Mich)(Judge Michelson); *Amidon v. State of Michigan*, No. 04-75003, 2008 U.S. Dist. LEXIS 20625, at * 15 (E.D. Mich. March 17, 2008)(Judge Rosen); *Crocker v. Tennessee Secondary School Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989).

As this Court has observed, the State of Michigan has promulgated comprehensive regulations detailing such administrative remedies, and the Michigan Department of Education has published several brochures outlining the procedures for parents and children. *See Sharbowski, at* *6 (citing Mich. Admin. Code R. § 340.1701 *et seq; see also* http://www.michigan.gove/mde). Within these regulations, parents and children have several options with respect to resolving disputes regarding a disabled student's education. *Id*. Among these options, a parent may file a due process complaint with the Michigan Department of Education. *Id*.

Next—and of particular relevance here—the IDEA provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 . . . , title V of the Rehabilitation Act of 1973 . . . , or other Federal laws protecting the rights of children with disabilities, **except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter**.

20 U.S.C. § 1415(l)(emphasis added). A due process complaint may be filed by an organization or an individual on behalf of "a specific child" or other children. 34 C.F.R. §303.434(a), (b)(4). The Sixth Circuit recently described how this procedure works in Michigan:

> Within 15 days of receiving notice of a child's parents' complaint, the local educational agency must hold a "preliminary meeting" with the parents and other members of the IEP team to give the local educational agency "the opportunity to resolve the complaint." If the local educational agency has not resolved the dispute within 30 days of receiving the complaint, the timeline for a "due process hearing" begins. This process must conclude—with the local or state educational agency issuing a written decision to the parties—within 45 days. If the local agency conducted the hearing, the decision can be appealed to the state educational agency, which conducts an impartial review and issues a decision within 30 days. These deadlines are of course not entirely set in stone, but in the abstract a dispute about an IEP should go through a resolution meeting, a local agency determination, and a state agency determination within 105 days of the initial complaint. Only at this point may either party take the dispute to court, and the court then receives "the records of the administrative proceedings."

Fry v. Napoleon Cmty. Sch., 788 F.3d 622, 626 (6th Cir.2015) (citing 20 U.S.C. § 1415; 34 C.F.R. § 300.515). As such, if a parent chooses to file a lawsuit challenging the services provided to a disabled student, a parent must first exhaust their administrative remedies under the IDEA. *B.H. v. Portage Pub. Sch. Bd. of Educ.*, 2009 U.S. Dist. LEXIS 7604 (E.D. Mich. 2009)(holding that "a plaintiff must exhaust the same remedies under the IDEA as a prerequisite to bringing an action under *any* federal civil rights statute, including a claim under section 504, as long

as plaintiff is seeking relief available under the IDEA)(emphasis in original). "Every court that has considered the question has read this statutory scheme as a requirement for the exhaustion of administrative remedies." *Amidon v. Michigan*, 2008 U.S. Dist. LEXIS 20625 (E.D. Mich. Mar. 17, 2008)(citing cases).

Exhaustion of administrative remedies furthers important policy goals, such as:

> . . . . Federal courts--generalists with no expertise in the educational needs of handicapped students--are given the benefit of expert fact finding by a state agency devoted to this very purpose. Such a mechanism is necessary to give effect to a fundamental policy underlying the [IDEA]: 'that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education." Were federal courts to set themselves up as the initial arbiters of handicapped children's educational needs before the administrative process is used, they would endanger not only the procedural but also the substantive purposes of the Act. . . .

Crocker v. Tennessee Secondary School Athletic Ass'n, 873 F.2d 933, 935 (6th Cir. 1989)(internal citations omitted). The IDEA administrative procedures provide aggrieved students and their families with an enormous benefit, namely an expedited and cheaper manner to resolve injuries arising from educational disputes. Disputes regarding an IEP accommodation could be resolved within 105 days of the initial complaint, with a fully developed factual record, which a court can subsequently rely upon. 34 C.F.R. §510(b). Per one study, the average duration of due process proceedings filed between 2000 and 2006 lasted only 52 days. Perry

Zirkel et al., *Creeping Judicialization in Special Education Hearings? An Exploratory Study*, 27 J. Nat'l Ass'n Admin. L. Judiciary 27, 39 (Spring 2007). Far from penalizing disabled students, §1415(l) provides a fast, efficient way to redress such injuries as an alternative to civil litigation, which may drag on for years. So long as plaintiffs exhaust their IDEA remedies, nothing prevents them from subsequently bringing civil claims based upon violations of constitutional or statutory rights.

In this case, the gravamen of Plaintiff's Complaint is that the GISD has failed in its child find obligations or failed to properly follow the IDEA. (Compl. ¶ 10.) In that regard, this court has specifically held that a plaintiff is required to utilize the IDEA's administrative procedure to redress complaints regarding a school district's child find obligations. *See B.H. v. Portage Pub. Sch. Bd. of Educ.*, 2009 U.S. Dist. LEXIS 7604, ** 21-22 (E.D. Mich. 2009)(holding that "child find" failures are subject to exhaustion.) As Judge Michelson just recently held:

> Indeed, disputes regarding these child-find obligations are "precisely the types of fact-intensive inquiries that the administrative process was designed to address" and are "completely educational."

Zdrowski v Rieck, 119 F Supp 3d 643, 663 (E.D. Mich. 2015). Likewise, purported IEP deficiencies and discipline issues must be exhausted. *Zdrowski*, 119 F. Supp. 3d. at 663-64, citing *Sabin v. Greenville Public Schools,* No. 1:99–cv–287, 1999

U.S. Dist. LEXIS 19469, at *26 (W.D. Mich. Dec. 15, 1999); see also 20 U.S.C. 1415(k).

In this case, Plaintiffs have pled no facts to suggest that they have exhausted their administrative remedies. As such, this matter should be dismissed.

a. Plaintiffs Have Not Pled Any Exception to the Exhaustion Requirement Either

The Sixth Circuit recognizes *only two* exceptions to IDEA's exhaustion requirement. Plaintiffs do not have to exhaust their administrative remedies under IDEA under the following narrow circumstances: 1) If exhaustion would be futile; and 2) If Plaintiffs were not given notice of their procedural rights. *Honig v. Doe*, 484 US 305, 327; 98 L. Ed 2d 686; 108 S Ct. 592 (1988). Neither of these recognized exceptions apply. As this Court has acknowledged, the standard for establishing these exceptions is "very high," and plaintiffs bear the burden of establishing an exception to the statutory exhaustion requirement. *Ruecker v. Sommer*, 567 F. Supp. 2d 1276, 1291 (E.D. Ore. 2008); accord *Gean v. Hattaway*, 330 F.3d 758, 773-74 (6th Cir. 2003); *B.H. v. Portage Pub. Sch. Bd. of Educ*., 2009 U.S. Dist. LEXIS 7604 (E.D. Mich. 2009).

Futility does not apply here because Plaintiffs are seeking "precisely the kind of relief that the state administrative process is equipped to afford." *Covington v. Knox County Sch. Sys*., 205 F.3d 912, 917-918 (6th Cir. 2000). Futility usually only applies in cases "in which the injured child has already graduated from the

special education school, [and] his injuries are wholly in the past, and therefore money damages are the only remedy that can make him whole." *Covington*, 205 F.3d at 917-18. That is not the case here, as Plaintiffs are seeking only declaratory and injunctive relief—which is the exact same relief available through the administrative process. Here, every remedy sought by Plaintiffs relates to evaluation for, or provision of, special education services and falls squarely within the rubric of the IDEA's administrative process.

2. PLAINTIFF'S STATE LAW CLAIMS ARE SUBJECT TO EXHAUSTION

Michigan Courts have uniformly held that where the claim was based upon a denial of educational opportunities of persons with disabilities, the more specific directives of the Michigan Special Education Act ("MSEA"), Mich. Comp. Laws § 380.1701 et seq., controlled, and the plaintiffs were limited to their remedies under the MSEA. For example, in *Woolcott v. State Bd. of Educ*., 134 Mich. App. 555, 563; 351 N.W.2d 601 (1984), a hearing impaired student's parents filed a lawsuit under the PWDCRA and § 504 of the Rehabilitation Act when the school district failed to provide the student with aides required under the student's IEP. *Id.* at 558-561. The Court found that MSEA preempted the PWDCRA and dismissed the claim.

Similarly, in *Jenkins v. Carney-Nadeau Public School*, 201 Mich. App. 142; 505 N.W.2d 893 (1993), the court held that a student could not circumvent the

MSEA by filing a claim under the PWDCRA. *Id.* at 144. "Pursuant to the MSEA, regulations have been promulgated controlling the preparation, content, and appeal of IEPs." *Id*. As a result, the court held that a handicapped student was limited to the administrative remedies provided for in the MSEA to contest the district's failure to allow her to use a motorized wheelchair on school grounds. *Id*. (emphasis added.) Moreover, the Court in *Jenkins* found that the exhaustion requirements of the IDEA have been incorporated into the MMSEA. *Id. citing* Mich. Admin R 340.1721–340.1725e and 20 U.S.C. §1415(e)(2). For the reasons stated above, Plaintiff's state law claims should be dismissed.

3. Plaintiffs Have Failed to State a Cause of Action Against the GISD

Plaintiffs' Count I (IDEA) alleges that Defendants committed "systemic violations" of the IDEA. While courts are required to accept the factual allegations in a complaint as true, *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965, the presumption of truth does not apply to a claimant's legal conclusions, *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949. Therefore, to survive a motion to dismiss, a plaintiff's pleading for relief must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Ass'n of Cleveland Fire Fighters*, 502 F.3d at 548 (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964-65) (internal citations and quotations omitted).

Beyond labels and conclusions, Plaintiffs have failed to allege any "systemic violation" of the IDEA by GISD. At most, Plaintiffs have suggested that, out of 30,000 school aged children, (Compl. ¶ 8), three parents have disagreed with some manner in which their child received services from the GISD. Additionally, "[c]ourts may take judicial notice of publicly filed documents," and may do so under Rule 12(b)(6) to deem an allegation false if it is directly negated by a judicially noticeable document." *U.S. ex rel. Osheroff v. Humana Inc*., 776 F.3d 805, 812 n. 4 (11th Cir. 2015). The fact that Plaintiff alleged that GISD has not "provide[d] early screening, timely referrals for evaluations for Flint three-and four-year olds to identify the existence of a qualifying disability and eligibility for special education and related services, or appropriate early intervention services, including universal, high quality preschool education," is belied by the public record. As discussed above, GISD is aggressively marketing free preschool and other services for the County's students. *See also* http://www.geneseeisd.org/DocumentCenter/View/5155. Additionally, Plaintiff has not alleged the District's special education policies are insufficient in any manner.

Because Plaintiff has failed to plead a systemic violation under the IDEA, this matter should be summarily dismissed as to GISD.

Regarding Plaintiff's ADA and § 504 claims (Counts II and III), in educational-disability discrimination lawsuits such as this, plaintiffs must ultimately prove that the defendant's failure to provide him with a "free appropriate public education" was discriminatory. As the Sixth Circuit has explained, surmounting that evidentiary hurdle requires "*either bad faith or gross misjudgment.*" *Campbell v. Bd. of Educ. of the Centerline Sch. Dist.*, 58 Fed. Appx. 162, 166-167 (6th Cir. 2003)(establishing legal standard of "bad faith or gross misjudgment"); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207-208 (1982)(the Supreme Court holding that "it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories.")

Plaintiff's Complaint fails to plead any facts suggesting that GISD acted in bad faith or committed gross misjudgment when providing services to its students. As such, this matter should be dismissed.

4. PLAINTIFF'S STATE LAW CLAIM IS BARRED BECAUSE MICHIGAN DOES NOT RECOGNIZE CLAIMS THAT SOUND IN EDUCATIONAL MALPRACTICE

Michigan does not recognize claims of educational malpractice. *Page v. Klein Tools*, 461 Mich. 703, 713-714 (2000).

In *Lemson v Michigan State University*, 2002 Mich. App. LEXIS 1528 (Mich. Ct. App. Nov. 1, 2002), the plaintiff argued that the university was grossly negligent by failing to properly monitor her progress and refusing to accommodate her needs pursuant to the PWDCRA and ADA—claims very similar to those made

in this action. In affirming the dismissal of the plaintiff's lawsuit, the court held that the "articulated theory sounds in educational malpractice, which is not a recognized claim in Michigan." (citing *Page v Klein Tools, Inc*, 461 Mich. 703, 713; 610 N.W.2d 900 (2000); *see also Johnson v Clark*, 165 Mich. App. 366, 367; 418 N.W.2d 466 (1987)(affirming the trial court's grant of summary disposition in favor of the defendants on the ground that there was no common-law duty requiring teachers to properly test and evaluate special education students); *Nalepa v Plymouth-Canton Community School Dist*, 207 Mich. App. 580, 583; 525 N.W.2d 897 (1994)(holding that "allegations that teachers and faculty used improper materials and techniques to teach children amount to claims of teacher malpractice.").

5. CONCURRENCE IN AND INCORPORATION OF REASONS FOR DISMISSAL ARTICULATED IN THE MOTIONS FILED BY FLINT COMMUNITY SCHOOLS AND THE DEPARTMENT OF EDUCATION

In addition to the arguments set forth above, Defendant GISD incorporates the legal arguments discussing why this case is not properly justiciable set forth by Flint Community Schools and the Department of Education.

CONCLUSION

GISD did not create the Flint water crisis. When the crisis became known, GISD immediately assisted families and children throughout Genesee County—and continues to do so. Plaintiffs have not stated any viable claims. And, if they

had, they were required to exhaust available administrative remedies designed to address those claims. Given this failure, this matter should be dismissed.

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DATED: December 15, 2016

CERTIFICATE OF ELECTRONIC SERVICE

TIMOTHY J. MULLINS states that on December 15, 2016, he did serve a copy of **Genesee Intermediate School District's Motion (with Incorporated Brief) for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(C)** via the United States District Court electronic transmission on the aforementioned date.

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