UNITED STATES DISTRICT COURT
FOR THE 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 throught 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, 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 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 and Flint Community Schools,

Defendants.

Case No. 16-CV-13694-AJT-APP
Hon. Arthur J. Tarnow

DEFENDANT FLINT COMMUNITY SCHOOLS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) AND (6)

MOTION

Defendant Flint Community Schools, by and through its attorneys, Butzel Long, for its Motion to Dismiss under Fed. R. Civ. P 12(b)(1) and (6) states the following.

1. Defendant Flint Community Schools ("FCS") moves to dismiss Counts I-IV of Plaintiffs' Complaint under Fed. R. 12(b)(6) because Plaintiffs have failed to exhaust their administrative remedies as required before filing suit.

2. FCS further moves to dismiss the following "declaratory" relief:

(a) The claim that FCS must institute universal preschool must be dismissed under Fed. R. 12(b)(6) because only the state legislature could create such a program.

(b) The request that unspecified defendants create a program for lead blood testing for all children must be dismissed under Fed. R. Civ. P. 12(b)(1) because the Genesee County Health Department ("GCHD") already provides this service free of charge; and, therefore there is no Article III case or controversy.

(c) The requests that FCS provide hearing and vision screening for some or all children must be dismissed under Rule 12(b)(1) because, again, these services are freely available through the GCHD and thus there is no case or controversy.

3. Despite reasonable efforts, including a conversation with counsel for Plaintiffs and a detailed voice message noting the nature of the motion and its legal basis, the movant was unable to obtain concurrence in the relief sought. Hence, the motion must be brought on for hearing.

WHEREFORE, Defendant FCS requests that the Court dismiss Plaintiffs' Complaint with prejudice and award costs and reasonable attorneys' fees necessitated by filing this motion.

Respectfully submitted,

BUTZEL LONG, a professional corporation

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BRIEF IN SUPPORT

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STATEMENT OF ISSUES PRESENTED

I. The statutes under which Plaintiffs have brought suit require exhaustion of administrative remedies. It is undisputed that Plaintiffs have failed to exhaust their administrative remedies as to the allegations in their Complaint. Must Plaintiffs' claims be dismissed for failure to exhaust?

Defendant FCS answers: Yes

Plaintiffs answer: No

II. Where the programs that a party seeks to have initiated by obtaining an order setting forth declaratory or injunctive relief are already available, there is no Article III case or controversy that would confer jurisdiction over those claims. It is undisputed that several of Plaintiffs' requested remedies are already available. Does this Court lack jurisdiction over those remedies?

Defendant FCS answers: Yes

Plaintiffs answer: No

STATEMENT OF CONTROLLING AUTHORITY

Defendant FCS relies on 20 U.S.C. § 1415(b)(6)-(7) and 1415(*l*); 20 C.F.R. 300.516(e); *Zdrowski v. Rieck*, 119 F. Supp. 3d 643, 660–62 (E.D. Mich. 2015) for the rule that any plaintiff bringing claims under the Individuals with Disabilities in Education Act (IDEA), Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act must first exhaust administrative remedies. The rule is that "by virtue of 20 U.S.C. § 1415(*l*), a plaintiff must exhaust the same remedies under the IDEA as a prerequisite to bringing an action under any federal civil rights statute ... as long as plaintiff is seeking relief available under the IDEA." *Zdrowski*, 119 F. Supp. 3d at 660, quoting *B.H. v. Portage Pub. Sch. Bd. of Educ.*, No. 1:08–CV–293, 2009 WL 277051, at *7 (W.D. Mich. Feb. 2, 2009). Further, the exhaustion requirement applies to the Michigan Mandatory Special Education Act ("MMSEA") as it is the state implementing statute for the IDEA. *Jenkins v. Carney-Nadeau Pub. Sch.*, 201 Mich. App. 142, 144–46, 505 N.W.2d 893, 894–95 (1993)("plaintiff was limited to the administrative remedies provided by the [M]MSEA . . . .").

Defendant relies on Article III, § 2 of the United States Constitution, which requires the existence of a case or controversy through all stages of federal judicial proceedings. "In order for a federal court to exercise jurisdiction over a matter, the party seeking relief must have standing to sue." *Zurich Ins. Co., v. Logitrans, Inc.*,

297 F.3d 528, 531 (6th Cir.2002) (quoting *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir.1996)). The rule is that throughout the litigation, Plaintiffs "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *McCrory v. Donnellon*, No. 2:16-CV-10137, 2016 WL 894576, at *1 (E.D. Mich. Mar. 9, 2016) *quoting Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). The rule, further, is that standing for a case or controversy must be established for each form of relief sought. *Monsanto Company v. Geerston Seed Farms*, 130 S. Ct. 2743, 2754 (2010) (plaintiffs must demonstrate standing to pursue each form of relief sought); *Davis v. Federal Election Commission*, 554 U.S. 724, 734 (2008*); City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

INTRODUCTION

Plaintiffs have brought suit, seeking declaratory and injunctive relief only, alleging that they have been denied access to a free appropriate public education ("FAPE")[1] based on, allegedly, disabilities caused by lead exposure. Plaintiffs' allegations are individual claims for 15 students — several of whom have never even attended Flint Community Schools ("FCS") — relating to whether they are receiving the level of special education that their parents desire.

The Individuals with Disabilities in Education Act ("IDEA"), Rehabilitation Act, Americans with Disabilities Act ("ADA"), and Michigan Mandatory Special Education Act ("MMSEA") all require a party alleging a denial of access to FAPE to exhaust their administrative remedies before proceeding further with their claims. The administrative process is set forth on the FCS website in a "Parent Handbook" and "Procedural Safeguards Notice" that are publicly available and of which the Court may take judicial notice in this motion. (Ex. A and Ex. B). The Procedural Safeguards Notice summarizes the law and procedures for the informal "state

[1] Free Appropriate Public Education ("FAPE") is a basic IDEA requirement which states that special education and related services are provided at public expense (free) for children with qualified disabilities; in conformity with an appropriately developed Individualized Education Program ("IEP"); under public supervision and direction; and include preschool, elementary, and secondary education that meets education standards, regulations, and administrative policies and procedures issued by the State Department of Education. (Ex. A at 30).

complaint" and formal "due process" complaint procedures available to parents and students. As the Sixth Circuit has noted, "[t]hese procedural requirements are meant to give '[f]ederal courts – generalists with no expertise in the educational needs of handicapped students –... the benefit of expert fact-finding by a state agency devoted to this very purpose.'" *Zdrowski v. Rieck*, 119 F. Supp. 3d 643, 659–60 (E.D. Mich. 2015), quoting *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).

Not only is the administrative process designed for review by educational and disability experts, it is extremely streamlined. The FCS Procedural Safeguards Notice provides that a state complaint would be completed within a 60-day timeline. (Ex. B at 17). A due process complaint should take no more than 105 days and "[o]nly at this point may either party take the dispute to court . . . ." *Fry*, 788 F.3d at 626.

It is, however, undisputed that Plaintiffs have not utilized the administrative exhaustion requirements required by the relevant statutes before bringing this action. Rather than seek the expertise of and fast processing through an administrative process, Plaintiffs have filed the instant lawsuit. Their claims must be dismissed under Fed. R. Civ. P. 12(b)(6) based on Plaintiffs' failure to exhaust their administrative remedies.

While all of Plaintiffs' underlying claims relate to "the same questions that

would have determined the outcome of the IDEA procedures, had they been used to resolve the dispute" and therefore should have been exhausted, Plaintiffs have nonetheless tacked on requests for "declaratory" or "injunctive" relief for FCS to create entirely new programs. For instance, Plaintiffs allege that their IDEA, ADA, and Rehabilitation Act claims warrant the remedy of (1) institution of an FCS universal preschool, (2) lead blood testing for all children, and (3) hearing and vision screening for some or all children. Universal preschool, however, is not part of any of the statutes under which Plaintiffs have sued and such a program is the sole province of the legislature to create and therefore must be dismissed under Rule 12(b)(6). In addition, blood testing and hearing and vision screening are already offered, **free**, to Flint residents through the Genesee County Health Department ("GCHD"). Walk-in blood lead screening for children is available at GCHD five days per week.[2] Likewise, hearing and vision screenings already are provided by the GCHD at schools and walk-ins are available on Fridays.[3] Therefore, there is no remedy for this court to fashion, since the programs sought are already available. Therefore, these claims must be dismissed under Rule 12(b)(1) because there is no

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[2] See Exhibit C, also publicly available at http://gchd.us/services/health-problems/lead-testing/. Under Fed. R. 12(d), facts from outside the pleadings may be utilized in addressing issues raised under Rule 12(b)(1) and as such Exhibits C and D to this motion may be considered as to FCS's 12(b)(1) arguments.

[3] See Exhibit D, also available at http://gchd.us/get-help/hearing-and-vision/

case or controversy under Article III of the U.S. Constitution.

Given that Plaintiffs could have utilized an expeditious administrative process by a state agency devoted to the exact concerns raised in their Complaint, and because Plaintiffs' remaining remedies are already freely available to Flint residents, their case should be dismissed as against FCS under Rules 12(b)(1) and 12(b)(6).

STATEMENT OF FACTS

I. Background

Defendant Flint Community Schools provides public school education in Flint. In accordance with the Individuals with Disabilities Education Act, FCS has developed and implemented a practical method for determining which children with disabilities are receiving special education and related services and which children are not. (Ex. A, Parent Handbook; Ex. B, Procedural Safeguards; Ex. E, Child Find).[4]

The FCS website describes the district's "Child Find" procedures under IDEA noting that:

> Child Find services are offered through the Flint Community Schools for all students from birth to age 25 who are suspected of having a disability or who are in need of special education services. We adhere to all state and federal guidelines. We provide a full evaluation and a

[4] As noted, these documents are publicly available on the FCS website, http://www.flintschools.org/?DivisionID=11962&DepartmentID=12253. As set forth in the Argument section of this Brief, this Court may take judicial notice of these documents.

continuum of special education services to eligible students.

(Ex. E at 1).

In the FCS "Parent Handbook," the Child Find procedure is further defined and sets forth various services provided, such as "[r]eferrals to and consultation with community agencies, preschools, and day care centers." (Ex. A at 4). As noted above, in Flint, one community agency, the Genesee County Department of Health, offers certain screening services such as free lead blood screening and hearing and vision tests. (Ex. C and Ex. D).

In addition to Child Find, the FCS Parent Handbook also describes the evaluation process for students. FCS can create Individualized Education Program ("IEP") for students with disabilities. (Ex. A, e.g. at 6-9). The Handbook describes the IDEA definition of "disability" that includes "lead poisoning" under the definition of "other health conditions" ("OHI")[5] when it "adversely affects a child's educational performance." (Ex. A at 18). The Handbook outlines procedures for helping students with disabilities, including lead poisoning, through the IEP process.

[5] Other Health Impairment ("OHI") is a qualified disability under IDEA to include students who have a physical challenge which adversely affects their ability to learn. Some students have "health impairments" which limit strength, vitality or alertness, due to chronic or acute health problems such as lead poisoning. If a student is identified as having an OHI, the conditions must adversely affect the student's academic performance in order to qualify for special education services. (Ex. A at 18).

The Handbook defines an IEP as a plan that: "outlines specific goals and objectives for a student on an individual basis. The IEP designates the instructional and support staff that will work with the student on the goals during a specific period of time." (Ex. A at 9).

In the event a parent is not satisfied with an evaluation, IEP, or provision of special education, the FCS website sets forth a detailed administrative procedure for addressing these concerns. (Ex. B, Procedural Safeguards Notice). The Notice describes the process that sets forth "separate procedures for State Complaints and for due process complaints and hearings." (Ex. B at 17). It explains that a parent "may file a due process complaint on any matter relating to a proposal or a refusal to initiate or change the identification, evaluation or educational placement of a child with a disability, or the provision of a FAPE to the child." (*Id.*). The Notice sets forth the timelines for this process explaining that "staff of the [Michigan Department of Education] MDE generally must resolve a State complaint within a 60-calendar-day timeline, unless the timeline is properly extended," and that in a due process compliant an ALJ must "issue a written decision within 45-calendar days after the end of the resolution period." (*Id.*). The Notice explains in detail each step of the State and due process complaints, provides a link to the Michigan model forms for filing complaints, sets forth other relevant time lines, and describes rights at a hearing. (Ex. B at 17-28). The Notice then defines a parent/student's rights after a

hearing, noting that a student "may appeal the decision by bringing a civil action." (Ex. B, at 29). The Notice also explains that "you may have remedies available under other laws that overlap with those available under the IDEA, but in general, to obtain relief under those other laws, you must first use the available administrative remedies under the IDEA (i.e., the due process complaint, resolution meeting, and impartial due process hearing procedures) before going directly into court." (Ex. B at 30).

As set forth in more detail below, each Plaintiff has alleged issues relating to "the identification, evaluation or educational placement of a child with a disability, or the provision of a FAPE to the child" that are addressed in the administrative process. (Ex. B at 17). It is, however, undisputed that none of the Plaintiffs utilized the administrative process to address the allegations raised in their Complaint.

II. Facts Applicable to Each Plaintiff as Pleaded

FCS disputes the facts as stated in Plaintiffs' Complaint. Set forth below, however, are the allegations asserted in the Complaint with respect to each Plaintiff that are relevant to this Motion.

Plaintiff D.R. ("D.R.")

D.R. is a twelve-year-old resident of Flint, Genesee County, who previously attended Holmes 3-6 STEM Academy, an FCS school, through the 2015-16 school year. [Dkt. 1 ¶ 91]. He is not currently enrolled in FCS. D.R. had an IEP in place

since the 2011-12 school year and alleges he did not receive a proper reevaluation nor IEP review process during the 2012-13 school year. [Dkt. 1 ¶¶ 93-94]. D.R. has had a number of disciplinary issues in school and alleges that he also did not receive an MDR. D.R. acknowledges that a functional behavior assessment ("FBA")[6] and behavior intervention plan ("BIP")[7] was completed for him in June 2016; however, he also alleges that it was not helpful in correcting his misbehaviors. [Dkt. 1 ¶¶ 113-114]. D.R. has not alleged that he availed himself of the administrative remedies regarding his complaint afforded by governing federal and state law as well as FCS policy.

Plaintiff A.K. ("A.K.")

A.K. is a six-year-old who resides in Flint, Genesee County, where he formerly attended Durant-Tuuri-Mott Elementary School, an FCS school, during the

[6] Functional Behavior Assessment ("FBA") is a systematic process for defining problem behavior and gathering medical, environmental, social, and instructional information that can be used to hypothesize about the function of student behavior. (Ex. A at 30).

[7] Behavior Intervention Plan ("BIP") is a plan comprising practical and specific strategies designed to increase or reduce a definable behavior. These strategies address preventive techniques, teaching replacement behaviors, how to respond or resolve behaviors, and crisis management, if necessary. (Ex. A at 27). The requirement in 34 CFR § 300.530(f) that a child with a disability receive, as appropriate, an FBA and a BIP and modifications designed to address the child's behavior now only applies to students whose behavior is a manifestation of their disability as determined by the Local Education Agencies ("LEA"), the parent, and the relevant members of the child's IEP Team as defined under 34 CFR § 300.530(e).

2014-15 school year. [Dkt. 1 ¶¶ 118-121]. A.K. received an IEP from FCS and was provided with special education and related services. [Dkt. 1 ¶¶ 121-122]. A.K. alleges that his IEP was not properly followed by FCS. [Dkt. 1 ¶ 123]. All other information pertaining to A.K.'s complaint refers to his enrollment in Jack P. Haas Elementary, a Genesee Intermediate School District ("GISD") run school. [Dkt. 1 ¶¶ 127-134]. AK has not alleged that he availed himself of the administrative remedies regarding his complaint afforded by governing federal and state law as well as FCS policy.

Plaintiff C.D.M. ("C.D.M")

C.D.M. is an 8-year-old student in the third grade at Pierce Elementary School, an FCS school, who resides in Flint, Genesee County. [Dkt. 1 ¶ 135]. A.K. has an IEP which provides for special education and related services. [Dkt. 1 ¶ 136]. C.D.M. also acknowledges that he had a BIP in place to address his disability-related behaviors. [Dkt. 1 ¶ 136]. C.D.M. alleges that he was improperly restrained inconsistent with his BIP. [Dkt. 1 ¶140]. C.D.M. also alleges that he did not receive an MDR[8] and that he was not properly reevaluated to assess the potential effects of

[8] Manifestation Determination Review ("MDR") is a determination by the IEP team of whether or not the misconduct of a student with a disability was (1) a demonstration of the disability, that is, an inability to understand impact and consequences or an inability to control behavior; (2) the result of an inappropriate placement; and/or (3) the lack of provision of services consistent with the IEP and placement. (Ex. A at 31).

lead exposure. [Dkt. 1 ¶¶ 146, 150]. C.D.M. has not alleged that he availed himself of the administrative remedies regarding his complaint afforded by governing federal and state law as well as FCS policy.

Plaintiff C.M. ("C.M.")

C.M. is neither a current or former student of FCS. She has not alleged any facts applicable to Defendant FCS.

Plaintiff J.T. ("J.T.")

J.T. is a seven-year-old who resides in Flint, Genesee County, and is currently a student at Brownell K-2 STEM Academy, an FCS school. [Dkt. 1 ¶¶ 166, 185]. J.T. makes several allegations of violations of his right to receive FAPE, by International Academy, which is not a part of FCS and is not named as a defendant in this Complaint. [Dkt. 1 ¶¶ 167-184]. J.T. alleges that at Brownell K-2 STEM Academy, he was not provided with effective reading instruction and behavioral interventions in the least restrictive setting. [Dkt. 1 ¶¶ 187]. J.T. has not alleged that he availed himself of the administrative remedies regarding his complaint afforded by governing federal and state law as well as FCS policy.

Plaintiff N.S. ("N.S.")

N.S. is a seventeen-year-old who resided in Flint, Genesee County and who attended Northwestern High School, an FCS school, through the 2015-16 academic school year. [Dkt. 1 ¶ 189]. N.S. makes several allegations that the International

Academy of Flint violated IDEA. International Academy is not an FCS school and is not named as a Defendant in this Complaint. [Dkt. 1 ¶¶ 192-194]. N.S. also alleges that Southwestern High School, an FCS school, did not properly reevaluate her to determine her special education needs and made procedural errors during her IEP review. [Dkt. 1 ¶ 194]. N.S. now lives in Indiana and no longer attends public school in Michigan. N.S. has not alleged that she availed herself of the administrative remedies afforded by governing federal and state law as well as FCS policy.

Plaintiff J.W. ("J.W.")

J.W. is a fourteen-year-old who was expelled from all FCS schools during the 2015-16 school year and is currently incarcerated. [Dkt. 1 ¶ 206]. J.W. resides in Flint, Genesee County and formerly attended Doyle/Ryder Elementary School and Durant-Tuuri-Mott Elementary School, both FCS schools. [Dkt. 1 ¶206. J.W. alleges that he was not receiving any services for special education or related services at school despite his mother's alleged request. [Dkt. 1 ¶¶ 207, 211]. J.W. was evaluated and found not to be eligible for special education and related services in February 2012. [Dkt. 1 ¶ 216].

On April 25, 2016, J.W. reported that he "brought a knife [to school] and was expelled for the rest of the year." [Dkt. 1 ¶ 216]. School districts are required to

permanently expel any student who possesses a dangerous weapon. M.C.L. § 380.1311.

MDE alleged that FCS was not in compliance with its obligations under IDEA and its implementing regulation. [Dkt. 1 ¶ 224]. FCS subsequently performed an evaluation of J.W. and convened an IEP team to determine his eligibility for special education and related services. [Dkt. 1 ¶ 225]. At a July 28, 2016 meeting, the IEP Team found that all evaluations showed that J.W. was ineligible for special education services. [Dkt. 1 ¶ 230]. J.W. was not receiving special education services at any point in time. [Dkt. 1 ¶ 230]. J.W. was not entitled to nor did he received an MDR. J.W. has not alleged that he availed himself of the administrative remedies regarding his complaint afforded by governing federal and state law as well as FCS policy.

Plaintiff C.D. ("C.D.")

C.D. is a sixteen-year-old resident of Flint, Genesee County who was a tenth-grade student at Northwestern High School, an FCS school, until February 2016 when he was expelled. [Dkt. 1 ¶ 236]. C.D. was evaluated by FCS personnel and was determined to be eligible for special education and related services. [Dkt. 1 ¶ 238]. C.D. alleges that his IEP has not been updated or revised in the past two years and since exclusion from school. [Dkt. 1 ¶ 238]. C.D. also alleges that he is not receiving the services that are required under his IEP. [Dkt. 1 ¶ 242]. C.D. has been

involved in numerous fights and has been subjected to disciplinary measures. [Dkt. 1 ¶ 249]. C.D. alleges that he has not received an MDR or an FBA. [Dkt. 1 ¶ 253]. C.D. alleges that no special education or related services have been provided to C.D. at home during his expulsion. [Dkt. 1 ¶ 255]. C.D. has not alleged that he availed himself of the administrative remedies regarding his complaint afforded by governing federal and state law as well as FCS policy.

Plaintiff D.K. ("D.K.")

D.K. is a seven-year old student in the first grade at Eisenhower Elementary School, an FCS school, who resides in Flint, Genesee County. [Dkt. 1 ¶ 256]. D.K. alleges that he was denied FAPE by FCS. D.K. attended school for two weeks, and alleged that he was having problems with the classroom and his teacher and that an IEP meeting was subsequently convened to determine D.K.'s new placement. [Dkt. 1 ¶¶ 258, 260]. The IEP Team found that D.K. did not qualify for special education and related services. *Id.* [Dkt. 1 ¶ 260]. An independent reevaluation was conducted, which revealed that D.K. has sensory, expressive language, and motor needs and was provided an IEP on February 23, 2016. [Dkt. 1 ¶ 264]. D.K. further alleges that the IEP has not been properly implemented. [Dkt. 1 ¶ 266]. D.K. alleges that he has not been properly reevaluated since his lead exposure became known. [Dkt. 1 ¶ 270]. D.K. alleges that interventions listed in his BIP, which include "notes home" and "calls home[,]" were not being carried out consistently. [Dkt. 1 ¶ 270]. D.K.

acknowledges that his mother was called at home every day to calm him down. [Dkt. 1 ¶ 270]. D.K. alleges that he has not received an MDR. [Dkt. 1 ¶ 274]. D.K. has not alleged that he availed himself of the administrative remedies regarding his complaint afforded by governing federal and state law as well as FCS policy.

Plaintiff M.K. ("M.K.")

M.K. is neither a current or former student of FCS. She has not alleged any facts applicable to Defendant FCS.

Plaintiff O.N. ("O.N.")

O.N. is an eight-year-old student in the third grade at Doyle/Ryder Elementary School, an FCS school, who resides in Flint, Genesee County. [Dkt. 1 ¶ 284]. O.N. alleges that he was not properly evaluated for a qualifying disability. [Dkt. 1 ¶ 284]. O.N. does not allege any event that would trigger an evaluation per governing state or federal law. [Dkt. 1 ¶¶ 284-303]. O.N. was not receiving any special education or related services but alleges several IDEA violations. [Dkt. 1 ¶¶ 284-303]. O.N. has not alleged that he availed himself of the administrative remedies regarding his complaint afforded by governing federal and state law as well as FCS policy.

Plaintiff D.T. ("D.T.")

Plaintiff D.T. is a thirteen-year-old seventh grade student at Flint Southwestern Academy, an FCS school, who resides in Flint, Genesee County. D.T. alleges that FCS failed to conduct an evaluation to determine if she was eligible for

special education and related services. [Dkt. 1 ¶¶ 306-310]. D.T. has not alleged that he availed himself of the administrative remedies regarding his complaint afforded by governing federal and state law as well as FCS policy.

Plaintiff D.D. ("D.D.")

D.D. is a twelve-year-old seventh grade student who resides in Flint, Genesee County and previously attended Holmes 3-6 STEM Academy, an FCS school. [Dkt. 1 ¶ 313]. He is not currently enrolled in FCS. D.D. alleges that FCS failed to conduct an evaluation to determine if he was eligible for special education services despite perceived evidence to the contrary. [Dkt. 1 ¶¶313-317]. On July 28, 2016, the school did an evaluation and held an IEP meeting. [Dkt. 1 ¶ 322]. D.D. was found ineligible for special education and related services. [Dkt. 1 ¶ 322]. D.D. has not alleged that he availed himself of the administrative remedies regarding his complaint afforded by governing federal and state law as well as FCS policy.

Plaintiff C.W. ("C.W.")

C.W. is a four-year-old resident of Flint, Genesee County who attends the daycare and Head Start preschool program offered by GISD. [Dkt. 1 ¶ 323]. C.W. has not raised any allegation toward FCS and has never attended an FCS school. C.W. has not alleged any facts applicable to FCS.

Plaintiff J.B. ("J.B.")

J.B. is a five-year-old student in Kindergarten at Eisenhower Elementary Schools, an FCS school, who resides in Flint, Genesee County. [Dkt. 1 ¶ 330]. J.B. alleges that FCS failed to conduct an evaluation to determine if he was eligible for special education services despite his mother's alleged request. [Dkt. 1 ¶¶ 331-333]. J.B. acknowledges, however, that it was only on September 26, 2016, that J.B.'s mother gave written consent to have J.B. evaluated. [Dkt. 1 ¶ 333]. J.B. has not alleged that he availed himself of the administrative remedies regarding his complaint afforded by governing federal and state law as well as FCS policy.

ARGUMENT

STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 12(b)(6), a party may move to dismiss a case when a plaintiff has failed to state a claim upon which relief can be granted. In ruling on a motion to dismiss, a court must construe the complaint in a light most favorable to the plaintiff and accept all well-pleaded factual allegations as true. *Bishop v. Lucent Tech., Inc*., 520 F.3d 516, 519 (6th Cir. 2008). Moreover, while in the Sixth Circuit failure to exhaust is an affirmative defense, it can be attacked in a 12(b)(6) motion. The rule is that "when the complaint on its face shows that there is no possibility that it could be amended to allege facts that, if true, would demonstrate that the plaintiff satisfied the exhaustion requirement, failure to exhaust is a proper ground

for a motion to dismiss." *Levine v. Greece Cent. Sch. Dist.*, 353 F. App'x 461, 463 (2d Cir. 2009)(finding that the complaint conceded lack of exhaustion and upholding dismissal of complaint for lack of exhaustion) citing *Mosely v. Bd. of Educ.*, 434 F.3d 527, 533 (7th Cir.2006) (describing this "short-cut"); *cf. United States v. Moreno–Rivera*, 472 F.3d 49, 50 n. 2 (2d Cir.2006) (per curiam). It is undisputed that Plaintiffs did not exhaust.

A motion under Fed. R. Civ. P. 12(b)(1) may be used to challenge Plaintiffs' claims as barred for lack of subject matter jurisdiction, including when there is no Article III case or controversy. *Damnjanovic v. United States Dep't of Air Force*, 135 F. Supp. 3d 601, 606 (E.D. Mich. 2015), citing *Fieger v. Michigan Supreme Court*, 553 F.3d 955, 961 (6th Cir.2009). Documents outside the pleadings may be used to support a 12(b)(1) motion. Fed. R. Civ. P 12(d); *see also Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014).

I. PLAINTIFFS' CLAIMS MUST BE DISMISSED AS PLAINTIFFS HAVE FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.

Plaintiffs must exhaust their administrative remedies in order to state a claim upon which relief can be granted under Rule 12(b)(6). This rule, set forth in the IDEA, applies to Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Michigan Mandatory Special Education Act and it is undisputed that Plaintiffs have not exhausted their remedies. In addition, Plaintiffs

have not alleged any facts that would meet their burden to prove that utilizing the administrative exhaustion procedures would be futile. Therefore, Plaintiffs' claims must be dismissed under Rule 12(b)(6).

A. Plaintiffs Have Failed to Exhaust Their Administrative Remedies and Therefore Cannot State a Claim Upon Which Relief May be Granted.

All of the counts upon which Plaintiffs have brought suit require exhaustion of remedies through the processes and procedures set forth in the IDEA before filing a lawsuit. 20 U.S.C. § 1415(b)(6)-(7) and 1415(*l*); 20 C.F.R. 300.516(e); *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 626 (6th Cir.2015) *cert. granted*, 136 S. Ct. 2540 (2016); *Zdrowski v. Rieck*, 119 F. Supp. 3d 643, 660–62 (E.D. Mich. 2015). "[B]y virtue of 20 U.S.C. § 1415(*l*), a plaintiff must exhaust the same remedies under the IDEA as a prerequisite to bringing an action under any federal civil rights statute ... as long as plaintiff is seeking relief available under the IDEA." *Zdrowski*, 119 F. Supp. 3d. at 660, quoting *B.H.*, 2009 WL 277051, at *7 (Ex. F); *see also Kalliope R. ex rel. Irene D. v. N.Y. State Dep't of Educ.*, 827 F. Supp. 2d 130, 137 (E.D.N.Y. 2010) *citing* 20 U.S.C. § 1415(*l*) ["the IDEA statute requires Plaintiffs with *any* claims related to the education of disabled children, whether brought under IDEA or another statute (e.g., the Rehabilitation Act), to exhaust the administrative remedies available under IDEA prior to initiating a federal lawsuit."]. The exhaustion requirement extends to claims brought under the MMSEA "[p]ursuant to the [M]MSEA, regulations have been promulgated controlling the preparation, content,

and appeal of IEPs." *Miller ex rel. Miller v. Lord*, 262 Mich. App. 640, 645, 686 N.W.2d 800, 802 (2004), quoting *id.* Moreover, the Court in *In Jenkins v. Carney-Nadeau Pub. Sch.*, 201 Mich. App. 142, 144–46, 505 N.W.2d 893, 894–95 (1993), 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).[9]

When a parent disagrees with an IEP, there are two procedural avenues available. The first is an informal complaint process (also known as a state

[9] The requirement to exhaust administrative remedies under the IDEA, ADA Rehabilitation Act, and MMSEA also applies to class action lawsuits. See, *Hoeft v. Tucson Unified School Dist*, 967 F.2d 1298 (9th Cir. 1992)(Parents were required to exhaust administrative remedies before maintaining class action that challenged local school district policies as violative of IDEA, as opposed to challenging their children's individualized education programs formulated pursuant to those policies.); *Lemon v. District of Columbia, D.D.C.1996*, 920 F.Supp. 8, remanded 124 F.3d 1309, 326 U.S.App.D.C. 337 (Public school children with disabilities failed to exhaust administrative remedies and, therefore, could not bring class action under IDEA against District of Columbia; according to students' own papers, students had either received appropriate placements or were in process of having their placements evaluated and changed.); *Jackson by Jackson v. Fort Stanton Hosp. and Training School*, 757 F.Supp. 1243 (D.N.M.1990) reversed in part on other grounds 964 F.2d 980(All individual class members were required to exhaust administrative remedies under Education of the Handicapped Act before class action challenging placement of mentally handicapped individuals at state-sponsored institutions could be challenged under Act, where exercise of Act's procedural safeguards would have given defendants opportunity to exercise administrative reforms addressing class members' complaints.); *M.R. v. Milwaukee Public Schools*, 584 F.Supp. 767 (E.D.Wis.1984), (Disabled children were not entitled to bypass the administrative appeal process of this chapter on ground that their class was large in number, allegedly consisting of more than 200 children.).

complaint). *See* 20 U.S.C. § 1415(b)(6); Mich. Admin. Code § 340.1851. The second is a formal administrative hearing process (also known as a due process complaint). *See* 20 U.S.C. § 1415(b)(7); 34 C.F.R. § 300.508; Mich. Admin. R 340.1724f; *Zdrowski*, 119 F. Supp. 3d. at 659-60. The Sixth Circuit recently described the expeditious steps that this procedure involves 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."

Zdrowski, 119 F. Supp. at 659–60, quoting *Fry*, 788 F.3d at 626 (citing 20 U.S.C. § 1415; 34 C.F.R. § 300.515).

These procedural requirements are meant to give "[f]ederal courts — generalists with no expertise in the educational needs of handicapped students —... the benefit of expert fact-finding by a state agency devoted to this very purpose." *Id.*

quoting *Fry*, 788 F.3d at 626, *cert. granted*, 136 S. Ct. 2540 (2016)[10] *citing* 20 U.S.C. § 1415; 34 C.F.R. § 300.515).

In addition, it is undisputed that the allegations set forth in Plaintiffs' Complaint are subject to exhaustion. For instance, alleged violations of "child find" are "precisely the types of fact-intensive inquiries that the administrative process was designed to address" and are "completely educational." *Zdrowski*, 119 F. Supp. 3d. at 663, quoting *B.H.*, 2009 WL 277051, at *9 (Ex. F). Further, alleged denial of "manifestation hearings" or MDRs (cited throughout Plaintiffs' Complaint), are subject to IDEA exhaustion requirements. *Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 209 (2d Cir.2007) (citing 20 U.S.C. § 1415(k)). 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 the instant case, Plaintiffs' allegations relate to child find, disagreement with IEPs, or alleged denials of MDRs or other disciplinary allegations. Thus, these

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[10] *Fry* is currently pending before the Supreme Court. The issue there is whether the Handicapped Children's Protection Act of 1986 commands exhaustion in a suit brought under the ADA and the Rehabilitation Act that ***seeks damages***--a remedy that is not available under the Individuals with Disabilities Education Act. In the instant case, no damages are sought, only equitable relief. Therefore, so the Supreme Court decision, when issued, should not impact the present case.

complaints must be exhausted prior to filing suit.[11] In fact, every Plaintiff has set forth allegations that fall under these detailed rubrics. For instance, Plaintiff D.R. alleges that he is dissatisfied with his IEP [Dkt. 1 at ¶¶ 96, 98, 100-101] and that he did not receive an MDR or BIP despite behavioral problems. [Dkt. 1 at ¶¶ 110-114]. Plaintiff A.K. claims dissatisfaction with his IEP. [Dkt. 1 at ¶ 123]. Plaintiff C.D.M. claims lack of reevaluation for his IEP, lack of FBA, and lack of MDR. [Dkt. 1 at ¶¶ 140-148, 154]. Plaintiff J.T., who did not begin attending FCS until September 2016, is apparently unsatisfied with his IEP and claims behavioral issues. [Dkt. 1. at ¶¶ 166, 176, 185-187]. Likewise, N.S. alleges dissatisfaction with her IEP. [Dkt. 1 ¶¶ 194-195, 199, 202]. Plaintiff J.W. disagrees with his IEP, alleged a lack of MDR, and Review of Existing Evaluation Data ("REED") evaluation.[12] [Dkt. 1 at ¶¶ 219, 222, 226, 229-30, 234]. Plaintiff C.D. claims he is unhappy with his IEP and alleges that he should have received an MDR, FBA, or BIP. [Dkt. 1 at ¶¶ 242, 253, 255]. Plaintiff D.K. claims his IEP "has not been properly implemented" and alleges that he should have received an MDR. [Dkt. 1 at ¶¶ 266, 274]. Plaintiff O.N. claims

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[11] As noted in the Facts section of this Brief, according to the Complaint, Plaintiffs C.M., M.K, and C.W. never attended FCS and thus no allegations exist against FCS as to these Plaintiffs. [Dkt. 1 ¶¶ 156, 276, 323].

[12] Review of Existing Evaluation Data ("REED"). Planning for a future evaluation by reviewing current data (existing evaluation data, teacher and related service provider observations, and parent information) and determining what additional data, if any, is needed. (Ex. A at 33).

denial of IEP, MDR, FBA, and BIP. [Dkt. 1 at ¶¶ 297-99]. Likewise, Plaintiff D.T. claims no evaluation was given and thus an IEP deficiency. [Dkt. 1 at ¶¶ 311-12]. Plaintiff D.D. disagrees with the IEP given. [Dkt. 1 at ¶ 322]. Finally, Plaintiff J.B. disagreed with the evaluation and REED. [Dkt. 1 at ¶¶ 338-39, 346].

It is undisputed that Plaintiffs did not exhaust as to the allegations in their Complaint. In fact, only one Plaintiff, J.W., utilized any administrative remedy as to his previous concerns regarding child find (obtaining an evaluation), but it is undisputed that he did not exhaust his remedies regarding the alleged unsatisfactory IEP and lack of an MDR that are at issue in this case. [Dkt 1, ¶¶ 226, 233-35].[13]

B. Because of Their Failure to Exhaust, Plaintiffs Cannot Amend to State a Claim Upon Which Relief May be Granted.

Plaintiffs have not pleaded any facts explaining why they have not sought to exhaust remedies as required. It is undisputed that Plaintiffs must utilize the exhaustion process set out by the IDEA. To avoid the IDEA's exhaustion requirements, Plaintiffs would have to prove that exhaustion would be futile. "Exhaustion is not required if it would be futile or inadequate to protect the

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[13] Under 20 U.S.C. 1415(i)(2)(A), a plaintiff only has "the right to bring a civil action with respect to the complaint presented pursuant to this section . . . ." Further, "Plaintiffs may not seek to litigate claims in court that arose subsequent to the time period at issue in the underlying administrative proceeding." *Metro. Bd. of Public Educ. v. Guest*, 193 F.3d 457, 463 (6th Cir. 1999) (court exceeded its jurisdiction to the extent it ruled on later proposed IEP issues for subsequent school years not at issue in administrative proceeding). Here, J.W,'s claims accrue after his alleged MDE complaint and therefore must be exhausted.

plaintiff's rights. Nor is exhaustion required if the plaintiffs were not given full notice of their procedural rights under the IDEA." *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000); *see also* 20 U.S.C. § 1415(f), (g), (i)(2)(A). Plaintiff has "the burden of demonstrating futility or inadequacy" as she "seek[s] to bypass the administrative procedures." *Id.* And "parents may not avoid the state administrative process through 'the unilateral act of removing their child from a public school.'" *Id.* at 918 (citing *Doe v. Smith*, 879 F.2d 1340 (6th Cir.1989)). Finally, mere speculation at the futility or procedural deficiencies of a proposed administrative proceeding is not enough to satisfy this burden. *Bishop v. Oakstone Acad.*, 477 F. Supp. 2d 876, 883 (S.D. Ohio 2007), *citing M.T.V. v. Dekalb County Sch. Dist.*, 446 F.3d 1153, 1159 (11th Cir.2006).

Although Plaintiffs have not pleaded any facts that explain why they failed to exhaust remedies, publicly available records demonstrate that the Plaintiffs are on notice of their due process procedural safeguards and that it would not be futile to exhaust their remedies. "A court may consider public records and matters of which a court may take judicial notice without converting a motion to dismiss into a motion for summary judgment." *Total Benefits Planning Agency Inc. v. Anthem Blue Cross & Blue Shield*, 630 F. Supp. 2d 842, 849 (S.D. Ohio 2007), *aff'd*, 552 F.3d 430 (6th Cir. 2008) *citing Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir.1997). Rule 201 of the Federal Rules of Evidence permits a court to take judicial notice of

facts that are not subject to reasonable dispute in that they are either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). 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. *U.S. ex rel. Dingle v. BioPort Corp.,* 270 F.Supp.2d 968, 972 (W.D.Mich. 2003), *citing Grimes v. Navigant Consulting, Inc.,* 185 F.Supp.2d 906, 913 (N.D.Ill. 2002) (taking judicial notice of stock prices posted on a website); *Cali v. E. Coast Aviation Servs., Ltd.,* 178 F.Supp.2d 276, 287 (E.D.N.Y. 2001) (taking judicial notice of documents from Pennsylvania state agencies and Federal Aviation Administration); see also *U.S. ex rel. Osheroff v. Humana Inc*., 776 F.3d 805, 812 n. 4 (11th Cir. 2015) ("Courts 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"*); Long v. Slaton*, 508 F.3d 576, 578 n. 3 (11th Cir. 2007) (recognizing a judge is not always limited to the four corners of the complaint at the Federal Rule of Civil Procedure 12(b)(6) stage and taking judicial notice of facts contained in a report from a state agency).

Moreover, documents that are incorporated by reference in a complaint may also be considered in weighing a motion to dismiss even if not attached to the pleadings. *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007) (holding that court must consider, on 12(b)(6) motion, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"), citing 5B Wright & Miller § 1357 (3d ed. 2004 and Supp. 2007)).

The FCS website contains information regarding the policies and procedures for all issues addressed in Plaintiffs' Complaint, including Child Find, Procedural Safeguards setting forth the administrative exhaustion process, and the Parent Handbook that addresses all aspects of special education for Flint children. (*See* Ex. A, Ex. B, and Ex. E).[14]

Consequently, it is undisputed that parents are on notice of the administrative process. This Court may take judicial notice of the publicly available "Procedural Safeguards Notice" set forth on FCS's website. (Ex. B). For instance, the State Complaint process begins at page 17 of the Notice and sets forth the regulations and processes involved. The due process complaint procedures begin at page 21 and explain the process, rights, and timelines attendant to a due process complaint. (Ex. B at 21). Therefore, it is undisputed that Plaintiffs are on notice of their due process

[14] These documents are publicly available: http://www.flintschools.org/?DivisionID=11962&DepartmentID=12253

rights and thus are not excused from their failure to exhaust their administrative remedies.

In addition, as explained above, it would not be futile to require Plaintiffs to exhaust their remedies. Plaintiffs' allegations all relate to their IEPs, MDRs, or other disciplinary issues relating to their individual allegations relating to FAPE. These allegations relate to "precisely the types of fact-intensive inquiries that the administrative process was designed to address" and are "completely educational." *Zdrowski*, 119 F. Supp. 3d. at 663, quoting *B.H.*, 2009 WL 277051 at *9 (Ex. F).

Plaintiffs, however, characterize the individual plaintiffs' claims as "systemic" in an attempt to end-run their exhaustion requirements. This tactic was discussed and rejected in *Bishop v. Oakstone Acad.*, 477 F. Supp. 2d 876 (S.D. Ohio 2007). In that case an autistic minor child and a non-profit brought suit alleging dissatisfaction with his IEP and his expulsion from school. *Id*. at 881. The plaintiffs admitted that they had not exhausted their remedies but, instead, argued they were seeking a structural change to the educational system. The court granted the defendant's motion to dismiss for failure to state a claim regarding the disability claims. The court reasoned:

> Plaintiffs argue, without citing any authority, that since they are seeking "structural, systemic" reform, they are not required to exhaust their administrative remedies under the IDEA. In *J.S. v. Attica Cent. Schs.*, 386 F.3d 107, 113 (2d Cir.2004), the court reviewed several cases in which the court held that it was proper to excuse "exhaustion of administrative remedies in cases that include allegations of systemic

> violations." Each case, however, involved allegations of systemic violations of the IDEA or structural concerns with the educational system. This case involves neither. Plaintiffs are suing Defendants because of a particularized concern regarding the alleged mishandling of Minor Plaintiff's individualized IEP, not because of some systemic or structural concern with the education of handicapped children in the state. Plaintiffs request relief that is specific to Minor Plaintiff and not consistent with Plaintiffs' assertion that they are seeking systemic reform. As such, Plaintiffs' argument that they should be exempted from the IDEA's exhaustion requirement because they are seeking structural reform fails.

Id. at 885.

Here, as in *Bishop*, Plaintiffs are suing based on their individual concerns. Plaintiffs have not pointed to any structural deficiency or specific policy they are attacking. Instead, Plaintiffs bring a series of individual complaints and allege that they demonstrate an alleged pattern of failing to utilize existing policies to provide FAPE. To the contrary, however, their allegations demonstrate exactly the purpose of the exhaustion requirement. Exhaustion of administrative remedies "allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." *Id*., *citing Attica,* 386 F.3d at 112. Thus, **exhaustion of remedies "is a very important requirement of the IDEA."** *Id*.

Based on the foregoing, Plaintiffs cannot meet their burden to show futility. Futility applies when "the injuries alleged by the plaintiffs do not 'relate to the provision of a FAPE [free appropriate public education]' as defined by the IDEA, and when they cannot 'be remedied through the administrative process' created by that statute." *Fry*, 788 F.3d at 627, quoting *F.H. ex rel. Hall v. Memphis City Sch*., 764 F.3d 638, 644 (6th Cir. 2014). Here, every remedy sought by the Plaintiffs relates to evaluation for, or provision of, special education services. The mere fact that Plaintiffs have characterized to the experiences of the individual Plaintiffs as "systemic violations" does not excuse their failure to exhaust their remedies. Plaintiffs' claims are precisely the remedies available in the administrative process. For this same reason, the *Bishop* court dismissed the disability counts for failure to exhaust and noted that the plaintiffs could "refile for a due process hearing within the applicable statute of limitations." *Id*. Likewise, Plaintiffs must seek to address their concerns through a due process hearing.

Finally, Plaintiffs set forth an additional claim upon which no relief can be granted. Namely, Plaintiffs allege that Defendants must provide "universal, high-quality preschool education." Complaint ¶12. However, no legal requirement exists in any of the statutes under which Plaintiffs have brought suit that would mandate the creating of preschools within FCS. In fact, such an action would solely be the province of the legislature. Under Article 8, Section 2 of the Michigan Constitution,

"[t]he legislature shall maintain and support a system of free public elementary and secondary schools as defined by law." "While courts will review the constitutionality of congressional action, courts have traditionally refused to review the accuracy and wisdom of legislative decisions made pursuant to a constitutionally valid exercise of Congress' authority." *Derryberry v. Tennessee Valley Auth*., 182 F.3d 916 (6th Cir. 1999), citing *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 519, 558 (1978); *Oklahoma v. Atkinson*, 313 U.S. 508, 534 (1941). Further, "courts have remained reluctant to review decisions of Congress on whether to appropriate funds for specified projects. Because those decisions concern issues of policy, such as the wisdom, effectiveness, and need of a particular project, they are better left to the legislature, not the judiciary." *Derryberry*, 182 F.3d 916, citing *Atkinson*, 313 U.S. at 527. "[T]he administration of the public schools of the state is best left to the legislative and executive branches of government." *Leandro v. State*, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997). Plaintiffs' request for universal preschool education goes well beyond the scope of IDEA, Rehabilitation Act, and ADA. The IDEA and Rehabilitation Act apply to programs receiving federal funding. There is no requirement to create new programs such as universal preschool. In this regard, Plaintiffs' Complaint constitutes a wish-list for the legislature — not a claim upon which relief can be granted — and should therefore be dismissed under Rule 12(b)(6).

II. THIS COURT LACKS JURISDICTION UNDER RULE 12(B)(1) OVER PLAINTIFF'S REMAINING CLAIMS AS THERE IS NO CASE OR CONTROVERSY REGARDING HEARING, VISION, OR LEAD BLOOD SCREENINGS THAT ALREADY ARE PROVIDED THROUGH THE PUBLIC HEALTH DEPARTMENT.

Article III, § 2 of the United States Constitution requires the existence of a case or controversy through all stages of federal judicial proceedings. "In order for a federal court to exercise jurisdiction over a matter, the party seeking relief must have standing to sue." *Zurich Ins. Co., v. Logitrans, Inc*., 297 F.3d 528, 531 (6th Cir.2002) (quoting *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir.1996)). The "irreducible constitutional minimum of standing" comprises three requirements: injury in fact, causation, and redressability. *Alston v. Advanced Brands & Importing Co*., 494 F.3d 562, 564 (6th Cir. 2007), quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). To meet the last prong, redressability, plaintiffs must demonstrate "a likelihood that the requested relief will redress the alleged injury." *Nader v. Blackwell*, 545 F.3d 459, 471 (6th Cir.2008) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). "In essence, standing concerns only whether a plaintiff has a viable claim that a defendant's unlawful conduct 'was occurring at the time the complaint was filed[.]'" *Cleveland Branch, N.A.A.C.P. v. City of Parma, OH*, 263 F.3d 513, 525 (6th Cir. 2001), quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*., 528 U.S. 167, 184,

120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Put differently, this means that, throughout the litigation, Plaintiffs "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *McCrory v. Donnellon*, No. 2:16-CV-10137, 2016 WL 894576, at *1 (E.D. Mich. Mar. 9, 2016) *quoting Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). Moreover, standing must be established for each form of relief sought. *Monsanto Company v. Geerston Seed Farms*, 130 S. Ct. 2743, 2754 (2010) (plaintiffs must demonstrate standing to pursue each form of relief sought); *Davis v. Federal Election Commission*, 554 U.S. 724, 734 (2008*); City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

Plaintiffs assert that FCS has failed to administer routine vision and hearing screenings (see, e.g., Dkt. 1 ¶¶ 116, 134, 232, 241, 296, 317, 340), and request that "all children living in Flint who are attending or may attend FCS receive appropriate enhanced educational screening to identify any physical (including hearing and vision), social, emotional, learning, and behavioral needs." (Dkt. 1 ¶ 395 E.) However, the Genesee County Health Department offers walk-in blood lead screening for children five days per week (Ex. C), *as well as* walk-in hearing and vision screening on selected Fridays (Ex. D). Further, the GCHD's website expressly states that "[s]chool-age screenings are conducted in schools during the school year by appointment and on a walk-in basis year round," and that "[a]ll

students in kindergarten are screened for vision and hearing either at pre-school, kindergarten round-ups or during the school year." (Ex. D). Following kindergarten, "[d]uring the school year, students are screened for vision in grades 1, 3, and 5 at their school's location" and "[h]earing screening is conducted in grades kindergarten, 2 and 4." (Ex. D).

Plaintiffs do not have a viable claim that any unlawful conduct was occurring at the time the Complaint was filed because all of these services offered by the GCHD are mandated by the Michigan Public Health Code (MCL § 333.9301), which meets the "full individual evaluation" requirements under the IDEA (20 U.S.C. § 1414; 34 C.F.R. § 300.304(c)(4); 34 C.F.R. § 300.301(a)). As such, given that the relief Plaintiffs are seeking already exists, they cannot claim to seek a remedy that would "be redressed by a favorable judicial decision." *Lewis*, 494 U.S. at 477. Therefore, Plaintiffs' declaratory and injunctive request seeking hearing, vision, and lead blood testing that is already freely available must be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.

CONCLUSION

There is an administrative process that provides review by experts in the education and disability field and can be completed in mere weeks. Furthermore, hearing and vision screenings as well as lead testing are public services available through the Genesee County Public Health Department. It is undisputed that the

Plaintiffs have, inexplicably, refused to utilize these processes. Instead, Plaintiffs instigated a possibly lengthy lawsuit seeking relief that is either already publicly available through the health department or available through a far more streamlined administrative process. Plaintiffs' Complaint, therefore, must be dismissed, and Plaintiffs must exhaust their administrative remedies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2016, I caused the electronic filing of the foregoing paper with the Court using the Court's ECF system, which will send notification of such filing to all attorneys of record.

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