

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>DL, et al.,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	<b>Civil Action No. 05-1437 (RCL)</b>
<b>v.</b>	)	
	)	
<b>DISTRICT OF COLUMBIA, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	
_____	)	

**DEFENDANTS’ SUPPLEMENTAL MEMORANDUM OF LAW  
IN SUPPORT OF THEIR MOTION TO DECERTIFY CLASS**

Defendants respectfully submit this supplemental memorandum of law, which is prompted by the June 20, 2011 decision by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. \_\_\_\_ (2011), addressing class certification under FED. R. CIV. P. 23(b). The class of Plaintiffs here was granted class certification under Rule 23(b)(2). Certification Order at 3. Specifically, as detailed herein, *Wal-Mart’s* holding on commonality under Rule 23 supports decertification of the class as a whole. In the alternative, *Wal-Mart’s* holding rejecting certification of claims for individualized, compensatory relief under Rule 23(b) mandates decertification of all of Plaintiffs’ claims for compensatory education and accompanying monetary damages.

**I. Plaintiffs’ claims sweep too broadly to establish commonality under Rule 23(a).**

“Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. That does not mean merely that they have all suffered a violation of the same provision of law.” *Wal-Mart*, Slip. Op. at 9 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)) (emphasis added). With their Complaint, Plaintiffs bundled

together multiple different allegations of a variety of different provisions of the IDEA, the Rehabilitation Act, and local District of Columbia law. *See, e.g.*, Motion for Class Certification [Dkt. No. 5-1] at 2-3 (identifying six different aspects of the Child Find requirement that they contended were components of the District's alleged noncompliance with the IDEA alone).

As Defendants originally argued in opposing class certification [Dkt. 16], Plaintiffs' complaint sweeps too broadly for purposes of commonality, encompassing a variety of obligations under the IDEA, the Rehabilitation Act, and local District of Columbia law, along with the multiple ways in which Defendants were alleged to have failed to comply with those obligations. Plaintiffs alleged failures by Defendants to "identify" eligible preschoolers, "locate" them, "evaluate" them, and "offer" them special education services. (Complaint at ¶ 1). The Complaint then goes on to multiply the factual allegations, including alleged failures to determine eligibility for special education services (Complaint at ¶ 79); failure to implement IEPs ("Individualized Educational Programs") (¶ 80); failure to propose appropriate placements (¶ 80); failure to conduct public awareness and outreach activities (¶ 85); failure to inform those caring for pre-schoolers about the availability of special education services (¶ 85); failure to distribute special education materials to the public (¶ 85); failure to screen or track potential participants in special education (¶ 86); failure to maintain an adequate intake and referral process (¶ 86); failure to evaluate in all areas (¶ 86); failure to convene timely IEP meetings and develop IEPs (¶ 89); and failure to offer appropriate placements (¶ 90).

Indeed, this amalgamation of a variety of provisions of a single statutory scheme was rejected by the Supreme Court as sufficient to establish commonality under Rule 23. *See Wal-Mart*, Slip. Op. at 9 (finding that violations of the same statute were insufficient, without more, to establish commonality).

“Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the party of the same supervisor. That contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”

*Id.* (emphasis added). This Court did not employ this rigorous level of scrutiny when it determined that Plaintiffs had satisfied the commonality requirement here. *Compare id.*, at 8-9 (“[The commonality language] is easy to misread, since any competently crafted class complaint literally raises common questions.” (quotations omitted)), *with* Order Granting Class Certification [Dkt. 57] at 5 (“Variations among the legal theories unpinning class of putative class members does not defeat the commonality requirement so long as a single aspect or feature of the claim is common to all proposed class members.”).

Employing the language of the Supreme Court, “[w]ithout some glue holding the alleged *reasons* for all [alleged noncompliance with the IDEA, the Rehabilitation Act, and local District of Columbia law] together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why [and how] was I [injured].*” *Wal-Mart*, Slip Op. at 12 (emphasis in original). Because so much variation exists among the nature of the alleged violations and among the causes of the alleged violations, Plaintiffs’ complaint sprawls too far for commonality to exist under Rule 23(a)(2).

**II. Class certification is inappropriate to resolve Plaintiffs’ compensatory education claims under Rule 23(b)(2) certification.**

In certifying the Plaintiff class, this Court concluded that compensatory education and the associated reimbursement of special education expenses, even though monetary, were an equitable remedy and thus appropriate for certification under Rule 23(b)(2). *See* Order Granting Certification [Dkt. 57] at 9 (“And, even if the reimbursement claims could fairly be construed as

claims for money damages, the class may nevertheless be certified so long as the damages request does not “predominate” over other forms of relief requested.”). In *Wal-Mart*, the Court unanimously rejected such an approach.

In *Wal-Mart*, the Plaintiffs argued that their backpay claims, although monetary, were nevertheless appropriate for (b)(2) certification because a back award was equitable in nature. The Court disagreed. “The [equitable nature of backpay] may be true, but it is irrelevant. The Rule does not speak of ‘equitable’ remedies generally but of injunctions and declaratory judgments.” *Wal-Mart*, Slip Op. at 25. “[C]laims for *individualized* relief ... do not satisfy the Rule. The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” *Id.*, Slip Op. at 20 (emphasis in original; quotations omitted).

Moreover, this Court’s alternative conclusion that (b)(2) certification was appropriate because those claims for compensatory damages did not “predominate” over other forms of requested relief was likewise rejected in *Wal-Mart*. “We fail to see why the Rule should be read to nullify [Rule 23(b)(3)’s procedural] protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a ‘predominating’ request—for an injunction.” *Id.*, Slip Op. at 24. “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.” *Wal-Mart*, Slip Op. at 20-21.

Thus, Plaintiffs' claims for compensatory relief were never appropriate for certification as part of a Rule 23(b)(2) class. Thus, should this Court conclude that Plaintiffs continue to satisfy Rule 23's commonality requirement post-*Wal-Mart*, the class should nevertheless be decertified for all compensatory education and monetary claims.

Respectfully submitted,

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