IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BLAKE J. ROBBINS, et al.,	:	Civil Action
	:	
Plaintiffs	:	No. 10-665
	:	
v.	:	Hon. Jan E. DuBois
	:	
LOWER MERION SCHOOL DISTRICT, et al.,	:	
	:	
Defendants	:	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR ENTRY OF PERMANENT EQUITABLE RELIEF

Date: July 16, 2010

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Defendants, Lower Merion School District, the Board of Directors of the Lower Merion School District, and Christopher W. McGinley (collectively, the "District"), respectfully submit this memorandum in opposition to Plaintiffs' Motion for Class Certification and in support of the District's Cross-Motion for Entry of Permanent Equitable Relief.

I. INTRODUCTION

Class certification is unnecessary and unwarranted. The pending equitable claims can be fully resolved simply by making permanent the interim relief that the Court has already entered, and that the District has already put into effect in any event. This would achieve – at minimal further expense and burden to the parties and the Court – precisely the same benefit for the putative class that plaintiffs propose to attain through class certification and yet-to-be-commenced work by the parties to negotiate, and by the Court to review and approve, a class action settlement. Thus, proceeding on a class basis would run counter to the parties' long-running efforts to reach an expeditious and cost-efficient resolution that benefits all District parents, students, and taxpayers.

Plaintiffs' claims arise from the District's remote monitoring of laptop computers that the District issued to its high school students ("Student Laptops"). On behalf of themselves and a putative class consisting of District high school students and their families, the complaint seeks damages and unspecified declaratory and injunctive relief. Plaintiffs also filed a motion for a temporary restraining order and permanent injunction barring the District from remotely activating webcams embedded in Student Laptops.

The District promptly agreed, among other things, that it would not remotely capture webcam photographs or screenshots from Student Laptops, thus obviating the need for the requested TRO. Subsequently, working with plaintiffs' counsel and counsel for the proposed intervenors, the District agreed to additional, detailed equitable relief, including: (i) a protective

order governing the dissemination of images remotely obtained by the District from Student Laptops; (ii) limitations on the District's use and purchase of theft tracking technology for Student Laptops; (iii) requirements that the District adopt official policies and regulations governing the use of student laptops, the privacy of student data, and training for technology personnel; and (iv) a requirement that the District provide affected students and parents an opportunity to view images remotely captured from Student Laptops. And the District has taken substantial measures – both pursuant to this Court's orders and completely independently of this litigation – to ensure that the conduct that gave rise to this action never happens again.

Plaintiffs now seek to resolve their purported equitable claims on a class-wide basis while preserving their purported individual damages claims for subsequent litigation. Thus, in their motion for class certification they have asked the Court to certify an equitable class pursuant to Rule 23(b)(2) consisting of District high school students who were issued Student Laptops, "together with their direct family members living at home."

Putting aside that this proposed class definition fails to protect future students and their families, as it should, there is nothing left to be resolved and no risk of future harm to even a properly defined class. Just this week, the Third Circuit made clear in its precedential opinion in Sullivan v. DB Investments, Inc., __ F.3d __, 2010 WL 2736947, at *16 (3d Cir. 2010) (emphasis added), that a class should not be certified in these circumstances: "***If the harm against which injunctive relief is sought dissipates during the course of the litigation, the basis for class certification likewise dissolves***." For this reason alone, certification should be denied.

This action also is unfit for certification because plaintiffs do not and cannot satisfy the Third Circuit's "rigorous" standard for certification. Plaintiffs must establish each of the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure by a preponderance of the

evidence; they may not rely on mere allegations. Yet, plaintiffs' motion only cursorily addresses plaintiffs' allegations and is devoid of evidence showing either that: (i) plaintiffs' claims are typical of the claims of the class; (ii) there are questions of law or fact common to the class; or (iii) plaintiffs can adequately represent the class. To the contrary, the record demonstrates a lack of typicality, commonality, and adequacy.

Accordingly, the Court should deny plaintiffs' motion and instead grant the District's cross-motion and enter the interim equitable relief on a permanent basis.

II. BACKGROUND

A. The District's Remote Monitoring of Student Laptops

The District launched its One-to-One laptop program at the beginning of the 2008-2009 school year at Harriton High School ("HHS") and at the beginning of the 2009-2010 school year at Lower Merion High School ("LMHS"). (*See* Report of Independent Investigation Regarding Remote Monitoring of Student Laptop Computers by the Lower Merion School District ("Investigation Report"), dated May 3, 2010, at 1, 22.[1]) Pursuant to the program, the District issues to each of its approximately 2,300 high school students an Apple MacBook laptop for use during the school year. (Id.) The laptops have integrated webcams in the bezels of their screens. (Id. at 2.) Like other computers used throughout the District by administrators, teachers, and students, the One-to-One program laptops ran the LANrev computer management software, which enabled them to communicate with the District's LANrev server when connected to the Internet. (Id. at 2, 18-19.)

[1] The Report is attached hereto as Exhibit A. Both the Report and its voluminous Appendix, which contains supporting documents, are available at the District's website at http://www.lmsd.org/sections/laptops/default.php?&id=1258.

LANrev included a feature called "TheftTrack," which, when activated for a particular computer, was capable of recording at a set interval: (i) the Internet Protocol ("IP") address at which the computer was connected to the Internet; (ii) a photograph taken by the computer's Web camera ("webcam") of whatever was in front of the webcam; and (iii) an image reflecting whatever was on the computer's screen (a "screenshot"). (Id. at 1, 19-20.)

The District did not disclose the existence or capabilities of TheftTrack when it issued Student Laptops. (*See* Compl. ¶ 22; Investig. Rept. at 2, 25, 36.) Nor did it adopt official policies or regulations governing the use of TheftTrack by the District's Information Services ("IS") personnel. (*See* Investig. Rept. at 2, 42-48.) The informal procedures that IS personnel used varied over time and were not followed consistently. (*See* id. at 2, 42-48.)

As shown by the forensic data and other evidence reviewed and analyzed by the District's counsel and computer forensic specialist, IS personnel activated the image-capturing features of TheftTrack (*i.e.*, the webcam photograph and screenshot capabilities) 76 times on Student Laptops during the 2008-2009 and 2009-2010 school years. (Id. at 52-60; *see also* Lower Merion School District Forensics Analysis, Initial LANrev System Findings, dated May 2010, prepared by L-3 Services, Inc. ("L-3 Report"), at 22-36.[2]) As a result of the activations that could have resulted in the collection of images from Student Laptops, electronic copies of a total of approximately 58,000 webcam photographs and screenshots existed in the District's computer systems as of February 23, 2010, when the District shut down the LANrev server. (*See* Investig. Rept. at 52-60, L-3 Rept. at 22-36.)

[2] The L-3 Report is attached hereto as Exhibit B, and is available publicly as Tab 1 of the Appendix to the Investigation Report.

These TheftTrack activations can be grouped into six general categories: (i) stolen laptops; (ii) laptops not returned by students who withdrew from school; (iii) missing laptops; (iv) uninsured loaner laptop brought off campus; (v) mistaken activations; and (vi) reason for activation unknown. (Investig. Rept. at 52-60.[3])

Image-tracking was activated on only one Student Laptop that was uninsured and brought off campus: a loaner laptop issued to plaintiff Blake J. Robbins, a student at HHS. (*See* id. at 56-58.) On October 20, 2009, Mr. Robbins brought his Student Laptop to the IS help desk with a broken screen and was issued a loaner laptop. (*See* E-mails dated Oct. 20, 2009, Investig. Rept. App. Tabs 60-61.) After certain District personnel conferred and agreed that the loaner laptop should not have been issued in light of outstanding insurance fees, IS personnel activated TheftTrack. (*See* id.) There is a conflicting evidence in the record about how and why the District activated TheftTrack in this instance. In any event, tracking was deactivated when Mr. Robbins returned the loaner laptop on November 4, 2009. (*See* Investig. Rept. at 57.)

A member of the District's IS Department testified that he observed a screenshot captured from Mr. Robbins's laptop while TheftTrack was activated, and that the screenshot included an on-line chat that concerned him.[4] He then set up a folder in the District's network home directory of HHS Principal Steve Kline and HHS Assistant Principal Lindy Matsko to

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[3] The bulk of these activations were for Student Laptops reported stolen or missing. Documents evidencing those activations are at the following Tabs of the Appendix to the Investigation Report: 46-47, 73-75, 99, 101, 103, 108-110, 112-113, 115, 119, 120, 128, 129, 131-132, 141-142, 144-147, 149-157, 164, 166-168, 170, 172, 174, 176, 181-182, 184-188, 190-192. Documents evidencing the activations for laptops that were not returned by students who withdrew from school and mistaken activations are at Appendix Tabs 70-72, 100, 104, 125, 161, 170, and 175.

[4] Given the nature of the deposition testimony referenced in this paragraph, the District has not filed the transcripts herewith to protect plaintiffs' privacy.

enable them to view the images captured from the laptop issued to Mr. Robbins. (*See* E-mails dated Oct. 30, 2009, Rept. App. Tab 63). Ms. Matsko testified that she ultimately decided that it was appropriate to discuss certain seemingly troubling images with Mr. Robbins and/or his parents. Plaintiffs allege that they learned on November 11, 2009 that the District had remotely monitored Mr. Robbins's laptop when Ms. Matsko "informed minor Plaintiff that the School District was of the belief that minor Plaintiff was engaged in improper behavior in his home, and cited as evidence a photograph from the webcam embedded in minor Plaintiff's personal laptop issued by the School District." (Compl. [Doc. No. 1], ¶ 23.) There is no evidence that any District personnel ever discussed any images captured by TheftTrack with any other members of the putative class.

B. This Action and the Agreed-Upon Equitable Relief Already in Place

Plaintiffs filed their complaint on February 16, 2010 purportedly on behalf of a putative class "consisting of Plaintiffs and all other students, together with their parents and families . . . who have been issued a personal laptop computer equipped with a web camera ('webcam') by the Lower Merion School District." (Compl. ¶ 1.) The complaint asserts claims for invasion of privacy, violation of plaintiffs' Fourth Amendment rights, violation of Section 1983 of the Civil Rights Act, and violations of four state and federal statutes. (Compl. ¶¶ 27-77.) It primarily seeks compensatory, punitive, and liquidated damages and attorneys' fees, and also seeks "declaratory and injunctive relief." (Compl., Prayer for Relief.)

Promptly after learning of the complaint on the morning of February 18, 2010, the District discontinued use of TheftTrack. (*See* Letter from District Superintendent Christopher W. McGinley to District Parents/Guardians, dated Feb. 19, 2010, Rept. App. Tab 27; *see also* Rept. at 8-9.) The District also removed the permissions required to activate TheftTrack from the two IS staff members who had those permissions. (*See* id.)

On February 19, 2010, Plaintiffs filed a motion for a TRO to enjoin the District from remotely activating webcams on Student Laptops, contacting members of the proposed class, and taking possession of or altering Student Laptops, and requiring the District to preserve pertinent evidence. (*See* Doc. No. 2.)

Three days later, the District entered into a stipulated order pursuant to which it agreed that it would, *inter alia*: (i) not remotely activate webcams on, or remotely capture screenshots from, Student Laptops; (ii) not contact members of the putative class about the lawsuit; and (iii) preserve pertinent evidence. (Order, entered Feb. 23, 2010 [Doc. No. 11], ¶ 1.) Accordingly, plaintiffs' motion for TRO was marked "withdrawn without prejudice." (Order, entered Feb. 23, 2010 [Doc. No. 14].)

Also on February 22 and 23, 2010, L-3, the District's computer forensic specialist, powered down and took physical custody of the servers through which TheftTrack was administered for review and analysis. (*See* L-3 Rept. at 3.)

In the ensuing months, with the approval of the Court, the parties sought to litigate this case so as to resolve it as efficiently as possible. (*See, e.g.*, Stipulated Order, entered March 11, 2010, Docket No. 19 (extending the time for the District to respond to the complaint while the parties sought to enable "an expeditious and cost effective resolution").) In the absence of formal discovery requests, the District voluntarily provided plaintiffs' counsel with thousands of pages of documents, plaintiffs' counsel took five depositions, and the District's computer forensic consultant shared information about its investigation with plaintiffs' computer forensic consultant. (Pls. Mem. at 8-9.)

Meanwhile, two groups of proposed intervenors sought to join this action. A group of six parents of District high school students filed a motion to intervene in March 2010.

(Motion of Colleen and Kenneth Wortley, Frances and David McComb, and Christopher and Lorena Chambers (the "Wortley Intervenors") for Intervention, filed March 18, 2010 ("Wortley Intervention Motion"), [Doc. No. 21].) Their proposed complaint – which is not a class action complaint – seeks only equitable relief, including an order: (i) prohibiting the District from remotely activating webcams on student laptops; (ii) prohibiting the District from using laptop tracking technology that can compromise students' and families' privacy; and (iii) requiring the District to create and implement policies and practices for the District's administration of student laptops. (Proposed Complaint in Intervention, attached to Wortley Intervention Motion ("Wortley Complaint"), at 11-12.) The motion was supported by a very substantial percentage of the putative class: 460 parents of between 500 and 600 District high school students. (Decl. of Michael J. Boni, attached to Wortley Intervention Motion ("Boni Decl."), ¶ 4.)

In addition, an HHS student and his parents filed a motion to intervene in April 2010. (Emergency Motion of the Neill Family (the "Neill Intervenors") to Intervene and for a Protective Order, filed April 5, 2010 ("Neill Intervention Motion") [Doc. No. 36].) Their proposed complaint – which is not a class action complaint – seeks only equitable relief: namely, an injunction permanently prohibiting the District from remotely accessing laptops "in a manner that constitutes an unreasonable search of students and their families," and a declaration restricting the dissemination of images captured by TheftTrack. (Proposed Complaint in Intervention, attached to Neill Intervention Motion as Ex. A, at 16.)

In light of the Neill Intervention Motion, the District conferred with counsel for the Neill Intervenors and agreed with plaintiffs that any photographs and screenshots obtained through means of the LANrev software, except for those from the laptops issued to Mr. Robbins

or his sister, would not be disclosed to persons other than counsel for defendants. (*See* Order, entered April 15, 2010 [Doc. No. 43], ¶ 1.)

Then, as proposed by the District, the Court ordered counsel for the parties to meet and confer with counsel for all of the proposed intervenors "in an effort to reach agreement on the form of order which will ensure that . . . equitable relief to which the parties may agree as part of a resolution of this action addresses the concerns of all the proposed interveners." (Order, entered April 15, 2010 [Doc. No. 43], at 2.) The comprehensive equitable relief order that the Court entered on May 14, 2010 arose from a series of discussions with counsel for the proposed intervenors. In fact, the starting point for the order the parties proposed to the Court was the prayer for relief in the Wortley Intervenors' proposed complaint. (*See* Wortley Compl. at 11-12.) The May 14, 2010 Order also includes a number of specific, additional provisions suggested by counsel for each group of proposed intervenors. (*See* District's Resp. to Wortley Intervention Mot. & Neill Intervention Mot., filed May 11, 2010 [Doc. No. 62], at 1-2.)

By agreement of the parties, the May 14, 2010 Order:

(i) enjoins the District from remotely activating webcams on Student Laptops;

(ii) enjoins the District from purchasing technology that allows for the remote activation of webcams on Student Laptops, with certain defined exceptions;

(iii) enjoins the District from remotely capturing screenshots from Student Laptops, with certain defined exceptions;

(iv) imposes specific, detailed requirements for any theft tracking technology the District may use for Student Laptops;

(v) enjoins the District from accessing or reviewing any student-created files contained on Student Laptops, except in specifically defined circumstances;

(vi) requires the District to adopt official policies and regulations before the start of the 2010-2011 school year governing Student

Laptops, the privacy of student data in such laptops, the training of District IS personnel with respect to Student Laptops and privacy, and the administration, oversight, and enforcement of such policies and regulations;

(vii) imposes numerous, specific requirements for the policies and procedures to be adopted pursuant to the Order;

(viii) requires the District – to the extent LMSD is in possession of webcam photographs or screenshots from certain student laptops resulting from the District's use of TheftTrack – to provide the students who possessed those laptops while tracking was activated, and/or their parents or guardians consistent with the terms of the process described herein, an opportunity to view such images pursuant to a process to be developed under the auspices of, and supervised and approved by, this Court and Chief Magistrate Judge Thomas J. Rueter (*see also* Order, entered by Judge Rueter on May 14, 2010 [Doc. No. 67] (establishing viewing process));

(ix) requires that all images referred to in (viii) shall be permanently destroyed by a date to be established by further order of the Court after the viewing process is completed and no pending governmental investigation or litigation requires the preservation of such images; and

(x) enjoins the District from otherwise disseminating or permitting access to any webcam photographs or screenshots, or any information contained therein, that the District obtained remotely from student laptops.

(Order, entered May 14, 2010 [Doc. No. 68], ¶¶ 2-9.) The Order explicitly provides that it "shall be enforceable by any persons adversely affected by any violations of [the] Order, including parents or guardians of adversely affected individual who is then a minor." (Id. ¶ 10.)

As noted, the District promptly disabled LANrev upon learning of plaintiffs' allegations, and has not restarted it. Moreover, even before the Court entered the May 14, 2010 Order, the District accepted the findings of the Investigation Report and had begun taking steps to ensure that anything like the conduct that gave rise to this action would not happen again, including:

(i) beginning the process to engage a firm with expertise in technology and privacy to develop a comprehensive plan for the District's information technology governance and policy development, including an audit of then-existing policies, administrative regulations, and procedures (such a firm has since been engaged and has made substantial progress with this work); and

(ii) expanding the District's Technology Advisory Council (consisting of teachers, parents, students, community members, and administrators) to focus on program evaluation and improvement.

(*See* "Letter to Community from Dr. McGinley regarding laptop report and next steps," dated and posted on the District's website on May 5, 2010, Ex. C hereto; *see also* "Volunteers sought for LMSD Technology Advisory Council," dated and posted on the District's website on May 10, 2010, Ex. D hereto.[5])

In addition, the District has devoted substantial effort to developing new policies and regulations, including those required by the May 14, 2010 Order, and the new policies and regulations will be in place before the District issues any Student Laptops for the 2010-2011 school year. The Policy Committee of the District's Board of School Directors has been working on the policies, including in a meeting the week before the date of this Memorandum. It addressed acceptable use policies for Student Laptops and the District's computer network, laptop security procedures and training, a remote access policy, monitoring and tracking procedures, and a policy governing the care of District property. The Board also is developing, among other things, letters for parents and guardians concerning their rights and responsibilities with respect to Student Laptops and related agreements to be signed by students and parents. Because the full Board is expected to consider these matters at its July 19, 2010 meeting, with

[5] These documents are available on the District's website at: http://www.lmsd.org/sections/laptops/.

the Court's approval, the District will supplement this Memorandum with a detailed summary of the measures now in place or soon to be adopted promptly after the upcoming Board meeting. As with all District policies, new policies will be adopted by the Board at a public meeting and published on the District's website.[6]

In addition, the image viewing process, which has been conducted under the supervision of Chief Magistrate Judge Rueter, is nearly complete.

C. Plaintiffs' Motion for Class Certification

Plaintiffs seek to represent a proposed class seeking injunctive relief pursuant to Rule 23(b)(2). (Pls. Mot. ¶ 1; Pls. Mem. at 2, 10-11.) They define their proposed class as follows:

> Beginning in the 2008-2009 school year to present, Plaintiffs and all other students of Harriton High School and Lower Merion High School who have been issued a laptop computer by the School District equipped with a webcam, together with their direct family members living at home.

(Pls. Mot. at 1; Pls. Mem. at 2.) Thus, as further discussed in Section III(C), below, the proposed class includes only students who were District high school students in the 2008-2009 and 2009-2010 school years; it does not include any students who will become high school students in the upcoming school year or any future school year.[7]

Notwithstanding that plaintiffs admittedly received extensive discovery from the District and a nonparty (*see* Pls. Mem. at 8, 9 (stating that their counsel reviewed "tens of

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[6] District policies are available on the Policies page of the District's website at: http://www.lmsd.org/sections/about/default.php?t=board&p=board_policy&menu=board.

[7] The proposed class definition also does not make sense because it includes LMHS students from 2008-2009; as noted above, in Section II(A), the District did not roll out the One-to-One laptop program at LMHS until 2009-2010.

thousands of pages" of such documents)), their motion cites no factual evidence in support of the requisite elements of certification. The only supporting materials included with their motion are attorney certifications offered in support of plaintiffs' request that the Court appoint their counsel as class counsel. (Pls. Mem. at 11 and Ex. A thereto.)

Moreover, contrary to the undisputed evidence, plaintiffs repeatedly suggest when arguing that they can demonstrate commonality and typicality for purposes of Rule 23(a) that the District activated image-based tracking on laptops issued to ***all*** members of the proposed class. For example, plaintiffs state that they brought this action on behalf of "a class of students and parents whose school issued laptop computers were remotely activated without their knowledge and/or approval, such that the School District obtained photographs and screenshots in violation of their reasonable expectation of privacy." (Pls. Mem. at 2; *see also* id. (suggesting that in the absence of certification, "***all proposed class members*** would have to show that the School District's remote activation of a webcam violated their reasonable expectation of privacy"), id. at 7 (similar).) As discussed in Section II(A), above, however, the evidence shows that the District activated image-based tracking 76 times in the last two school years – and less than half of those activations resulted in images recovered by L-3 in the District's investigation – while it issued laptops to nearly 3,100 students during that period. Thus, plaintiffs' arguments in favor of certification are inconsistent with the scope of the proposed class.

III. ARGUMENT

A. Plaintiffs Must Satisfy Stringent Requirements To Maintain a Class Action

"To obtain class certification, plaintiffs must establish all four elements of Rule 23(a) along with one provision of Rule 23(b)." Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178 (3d Cir. 2001). The elements of Rule 23(a) are:

(i) the class is so numerous that joinder of all members is impracticable;

(ii) there are questions of law or fact common to the class;

(iii) the claims of the representative parties are typical of the claims of the class; and

(iv) the representative parties will fairly and adequately protect the interests of the class

Fed. R. Civ. P. 23(a). And Rule 23(b)(2), pursuant to which plaintiffs seek certification here, provides that a class action may be maintained if:

> The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole

Fed. R. Civ. P. 23(b)(2).

In the Third Circuit, class certification is appropriate "only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 309 (3d Cir. 2008) (quoting Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982)). The burden to prove that the Rule 23 prerequisites are met "rests with the movant." Hydrogen Peroxide, 552 F.3d at 316, n. 14. Moreover, rather than take plaintiffs' allegations at face value, "the district court must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties . . . even if they overlap with the merits – including disputes touching on elements of the cause of action." Id. at 307. And, all factual determinations must be made by a preponderance of the evidence, *i.e.*, the evidence must "more likely than not establish[] each fact necessary to meet the requirements of Rule 23." Id. at 307, 320. While plaintiffs suggest that the Court should err on the side of certifying a class, the Third Circuit in Hydrogen Peroxide stated unequivocally that

"proper discretion does not soften the rule: a class may not be certified without a finding that each Rule 23 requirement is met."[8] Id. at 310.

B. The Proposed Class Cannot Be Certified Under Rule 23(b)(2)

1. The Harm Against Which Injunctive Relief Is Sought Has Dissipated

Plaintiffs correctly note that a Rule 23(b)(2) injunctive relief class is appropriate when defendants' conduct harms the class as a whole (Pls. Mem. at 10), but they miss the fundamental point that there is no basis to proceed if the class is unlikely to suffer harm ***in the future***. To be sure, the proposed class here will not suffer the alleged harm that gave rise to this action in the future in light of the extensive actions already taken by the District.

In a precedential opinion issued three days before the date of this Memorandum, the Third Circuit ruled in no uncertain terms that a class may not be certified under Rule 23(b)(2) in these circumstances.

> As with any claim for injunctive relief, the ***plaintiffs may not base a demand for an injunction solely upon past harm that they have suffered. The plaintiffs must demonstrate that, regardless of their past harm, they are likely to suffer harm in the future***. *See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 14 (1st Cir. 2008) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." (alteration in original) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974))). ***If the harm against which injunctive relief is sought dissipates during the course of the litigation, the basis for class certification likewise dissolves, and the class must be decertified***. *Id.* at 14-16 (vacating certification of a Rule 23(b)(2) class to enjoin cross-border arbitrage in the market for new automobiles, because, following commencement of the action, the exchange rate between the U.S. dollar and the Canadian dollar fell,

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[8] Plaintiffs' suggestion that the Court should err on the side of certification draws on the Third Circuit's 1985 opinion in Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985), in which the court quoted a 1970 Third Circuit opinion, which had in turn quoted an earlier Tenth Circuit opinion, to state that ***in the context of a securities law claim***, class actions are "particularly appropriate and desirable."

> undercutting the economic viability of future anticompetitive arbitrage opportunities).

Sullivan, 2010 WL 2736947, at *16.

In Sullivan, the plaintiffs alleged that De Beers and associated entities had fixed the prices of gem-quality diamonds throughout the 20th Century, and sought certification of a class pursuant to, *inter alia*, Rule 23(b)(2). *See* 2010 WL 2736947, at *1-3. In granting certification, the District Court did not address an objector's contention that Rule 23(b)(2) certification was inappropriate "because the market for rough diamonds became competitive during the pendency of [the] litigation," thus rendering injunctive relief unnecessary. Id. at *4-5 5. The Third Circuit, however, vacated the certification on that ground. Noting that the District Court has an "independent obligation to ensure that the facts of the underlying case adequately establish a basis for liability" even though the defendants did not contest certification, the Third Circuit found that the evidence showed increased competition in the industry and thus obviated the need for further class-wide, injunctive proceedings.[9] Id. at *11, *17.

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[9] In Sullivan, the Third Circuit rejected the contention that the pro-competitive trend in the diamond industry was the result of an injunction that the District Court had entered in 2006. *See* Sullivan, 2010 WL 2736947, at *17. In this case, as set forth above in Section II(B), the District has taken various actions to ensure that unauthorized remote monitoring of Student Laptops does not happen again. In that regard, this Court's decision in Mosley v. White, No. 90-1156, 1991 WL 67742 (E.D. Pa. Apr. 26, 1991) (DuBois, J.), which is discussed further below in this Section, is apt. There, the plaintiffs filed a putative class action under Section 1983 of the Civil Rights Act against the Pennsylvania Department of Public Welfare ("DPW") challenging its policy that required new residents to prove that they were not receiving welfare from another state before receiving benefits in Pennsylvania. *See* 1991 WL 67742, at *1. After the lawsuit was filed, the DPW ceased the allegedly wrongful practice and revised its policies and procedures accordingly. *See* id. at *1, *2. Thus, the plaintiffs received the relief they sought from the Court. *See* id. at *3. As a result, the Court dismissed the action as moot. *See* id. Here, likewise, the District has ceased the conduct at issue and the plaintiffs have received the equitable relief they seek from the Court.

Other courts have likewise held that a class may not be certified – or must be decertified – in the absence of possible prospective harm. In Smith v. University of Washington School of Law, 233 F.3d 1188, 1191 (9th Cir. 2000), the plaintiffs brought a putative class action under Section 1983 and other federal civil rights statutes seeking to enjoin the defendant law school from factoring race into its admissions decisions. After the District Court certified a class pursuant to Rule 23(b)(2), the State of Washington passed a statute forbidding discrimination in education, and the law school issued a directive eliminating use of race in admissions. *See* id. at 1192. The District Court then decertified the class. *See* id. Although the plaintiffs argued that the law was vague and subject to uncertain interpretation, the Court affirmed decertification on mootness grounds, noting that, even if the policy change "has some tinge of voluntary cessation . . . , it is still highly unlikely that the Law School" would return to its former practice. Id. at 1194.

The Fifth Circuit reached a similar conclusion in Bolin v. Sears, Roebuck & Co., 231 F.3d 970 (5th Cir. 2000). There, the plaintiffs challenged post-bankruptcy debt collection practices by Sears. *See* id. at 972. In reversing the District Court's certification of a Rule 23(b)(2) class, the court noted that the proposed class consisted of "individuals who do not face further harm from Sears's action," thus rendering certification inappropriate. Id. at 978. Similarly, in Boudrais v. City of New Orleans, No. 99-1434, 1999 WL 729249, at *1 (E.D. La. Sept. 15, 1999), the plaintiffs sought an certification of an injunctive relief class to enjoin defendants from engaging in discriminatory employment practices. In rejecting their motion, the Court explained that "the raison d'etre for bringing this as a class action, to obtain declaratory and injunctive relief on liability issues, is basically a moot point" because the City had ended the allegedly unconstitutional practice. Id. at *4.

As a general matter, the mootness doctrine ensures that "an actual controversy [is] extant at all stages of review, not merely at the time the complaint is filed." Alvarez v. Smith, 558 U.S. ___, 130 S. Ct. 576, 580 (2009) (quoting Preiser v. Newkirk, 422 U.S. 395, 401 (1975)). As the Supreme Court has explained, a case may become moot when, after filing, "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting United States v. Concentrated Phosphate Export Ass'n, 329 U.S. 199, 203 (U.S. 1968)). Thus, when the plaintiffs in Alvarez no longer disputed the state's treatment of seized property that formed the basis of a Constitutional claim for injunctive relief, the controversy became moot. *See* 130 S. Ct. at 580.

Applying these principles, the Third Circuit has held that when circumstances or the alleged wrongdoers have rectified an allegedly unconstitutional practice, a request for injunctive relief becomes moot. *See* Sutton v. Rasheed, 323 F.3d 236 (3d Cir. 2003). The plaintiffs in Sutton, who were Pennsylvania Department of Corrections ("DOC") inmates, filed suit alleging under Section 1983 that a DOC policy denying them access to literature published by the Nation of Islam violated their First Amendment rights. *See* id. at 244. The DOC then amended its policy to allow prisoners to read the previously proscribed materials. *See* id. at 249. Finding the request for injunctive relief moot, the Court concluded that based on the defendants' representations, the offending policy had been irrevocably rescinded and plaintiffs lacked a "justiciable claim for . . . injunctive relief." Id. at 249-50; *see also* Warren v. Pa., No. 06-504, 2009 WL 1181249, at *3 (W.D. Pa. April 30, 2009) ("Since under the new regulation the plaintiff's requested relief has been granted, his pursuit of injunctive relief here, is moot.").

Although not in the context of class certification, as set forth above in note 9, this Court applied the mootness doctrine to dismiss an action in circumstances analogous to those presented here – *i.e.*, the DPW stopped the offending conduct and changed its policies to prevent such conduct from recurring. *See* Mosley, 1991 WL 67742 at *1, *2. The Court stated that "[i]f the issues presented have been resolved, then a suit presents no such case or controversy, and is properly dismissed as moot." Id. at *2. A voluntary cessation of the allegedly wrongful practice, the Court further stated, "moots a case if (1) there is no reasonable likelihood that the alleged wrong will recur, and (2) the party seeking relief has been made whole." Id.

The District's extensive actions – both purely voluntary and pursuant to agreed-upon orders – will prevent a recurrence of the conduct at issue here. (*See* Section II(B), *supra*.) Indeed, in plaintiffs' counsel's own words, with the agreed-upon equitable relief orders, "I think we've really reached the pinnacle of what it is we needed to reach to put this to rest." (Judge Bans Webcam Spying on Students, Assoc. Press, May 14, 2010, Ex. E hereto, available at http://abclocal.go.com/wpvi/story?section=news/local&id=7442146&pt=print; *see also* Pls. Mem. at 9 (stating that the agreed-upon measures by the District "assure that there can be no future use of similar technology in the Lower Merion School District without disclosure and strict guidelines"), 8 (stating that the "injunctive relief . . . ensured that the LANrev software which was used to take web cam pictures and images of students in their home [sic] was disabled and any reactivation strictly prohibited without further order of Court").) Through its Cross-Motion, the District asks the Court to make the previously entered equitable relief permanent. In any event, the District's actions, both completed and underway, to prevent a recurrence of unauthorized remote monitoring of Student Laptops render class certification inappropriate.

2. Certification Is Not in the Interest of the Proposed Class

While as a legal matter certification is unwarranted, as a practical matter certification would not be in the best interest of the members of the proposed class.

Although plaintiffs have suggested that certification would allow the parties to "move forward to settle the equitable Class" claims (Letter from M. Haltzman to Court, dated July 6, 2010 [Doc. No. 78]), certification would in fact be just the first of several potentially burdensome and expensive steps. The parties also would have to negotiate a proposed settlement agreement and submit such agreement for Court approval, and the Court would have to review the proposed settlement and rule on a motion to approve it.

The District proposes a simpler and more efficient alternative. Its proposed order would make the existing equitable relief permanent. The benefits of this proposal would inure to all District constituents without the additional steps that certification would trigger. Then, in the absence of certification, plaintiffs could pursue their individual damages claims as they see fit, and plaintiffs' counsel, if they so desire, could file a fee petition with respect to any benefits obtained on behalf of this class in this action.

C. Plaintiffs' Proposed Class Definition Is Improper

Although the District thus opposes the certification of any class, if the Court nevertheless deems certification appropriate it should not certify the class proposed by plaintiffs because it: (i) does not include future District high school students and their families; and (ii) includes some students who were never issued Student Laptops. (*See* § II(C), *supra*.) A more appropriate class definition would protect all past and present District high school students who are issued Student Laptops, and their families, as does the Court's May 14, 2010 Order providing equitable relief, and the permanent equitable relief order proposed by the District. (*See* § II(B), *supra*.)

D. The Proposed Class Cannot Satisfy All of the Elements of Rule 23(a)

Certification should be denied because plaintiffs have not shown that the prerequisites set forth in Rule 23(a) are satisfied.

1. Plaintiffs' Claims Are Not Typical of Those of the Class

With respect to typicality, the Court must assess:

> the similarity of the legal theory and legal claims; the similarity of those individual circumstances on which those theories and claims are based; and the extent to which the proposed representative may face significant unique or atypical defenses to her claims.

In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 597-98 (3d Cir. 2009). Class certification is inappropriate if plaintiffs cannot show their individual claims satisfy all three of these conditions. Id. at 599.

Ignoring the Third Circuit's mandate in Hydrogen Peroxide, plaintiffs offer no evidence to support their contention that their claims are typical of those of the proposed class. They would be unable to do so. Plaintiffs argue that "with respect to the constitutional claims of Plaintiffs and members of the Equitable Class, all will have to establish the exact same elements to prove their Fourth Amendment claims: (1) that each had a reasonable expectation of privacy with respect to the webcam embedded in their school issued laptops, and (2) that the School District's remote activation of the webcams without their knowledge and/or approval violated their reasonable expectation of privacy." (Pls. Mem. at 7.) Plaintiffs further argue that "with respect to their state law claims of intrusion upon seclusion in that all [class members] will have to prove: (1) that the School District intruded, physically or otherwise, upon their solitude or seclusion, and (2) that the intrusion was highly offensive to a reasonable person." (Id.)

In fact, however, plaintiffs' claims arise from completely different facts than those that any member of the proposed class would have. (*See* § I(A), *supra* (stating that Mr.

Robbins is the only student who used a laptop on which the image-tracking features of TheftTrack were activated in the context of the non-payment of insurance fees, and that Mr. Robbins and his parents are the only putative class members with whom District personnel allegedly discussed the contents of TheftTrack images).)

In addition, according to public statements, the viewing of images from his computer has affected Mr. Robbins in ways that do not apply to any member of the proposed class. For example, in an interview aired on *Good Morning America* on April 17, 2010, Mr. Robbins described his interactions with Ms. Matsko as "a little awkward" in light of her having seen images captured from his laptop.

And, plaintiffs' claims give rise to atypical defenses. A party lacks a reasonable expectation of privacy in what he or she makes public. *See*, *e.g.*, U.S. v. Borowy, 595 F.3d 1045, 1048 (9th Cir. 2010) (holding that there is no reasonable expectation of privacy in computer files "entirely exposed to public view"). Prior to this litigation, only a small number of District employees had seen any images captured from Mr. Robbins's laptop. (*See* Investig. Rept. at 56-58). During the litigation, however, plaintiffs and/or their counsel provided copies of certain images captured from Mr. Robbins's laptop to a number of different press outlets. (*See, e.g.*, John P. Martin, 1,000s of Web Cam Images, Suit Says, Phila. Inquirer, Apr. 16, 2010, Ex. F hereto, available with photograph at http://www.philly.com/philly/news/homepage/91010604.html.)

Accordingly, the record contradicts plaintiffs' assertion that plaintiffs' claims "arise from the same practices, policies and course of events" and thus satisfy the typicality requirement. They do not.

2. The Proposed Class Members Do Not Share Any Common Legal or Factual Questions

The record likewise undermines plaintiffs' contention (Pls. Mem. at 6) that "Plaintiffs and all class members raise common questions of law and assert the same claims as a result of unlawful remote activation of webcams by the School District." As discussed above, there is no issue of disputed fact or law that remains to be resolved with respect to claims for injunctive relief.

In any event, "courts have been unwilling to find commonality where the resolution of 'common issues' depends on factual determinations that will be different for each class plaintiff." Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D. Pa. 1995) (citations omitted). Indeed, "if proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." Hydrogen Peroxide, 552 F.3d at 311 (citation omitted). The record here demonstrates that proof of the proposed class's Section 1983 and state law privacy claims – *i.e.*, the only purported class claims for which plaintiffs seek certification (*see* Pls. Mem. at 7) – would require individual treatment.

As the Supreme Court explained in litigation involving the government's use of an electronic tracking device to monitor illicit materials, "potential, as opposed to actual, invasions of privacy" do not violate the Fourth Amendment. U.S. v. Karo, 468 U.S. 705, 712 (1984). Rather, it "is the exploitation of technology that implicates the Fourth Amendment, not the mere existence." Id. Similarly, a cause of action for invasion of privacy arises when the defendant "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another . . . if the intrusion would be highly offensive to a reasonable person." Restatement

(Second) of Torts § 652(B) (1977).[10] Thus, both causes of action require plaintiffs to show actual, as opposed to potential, invasions of their rights.

Only a small fraction of the proposed class, however, experienced actual violations: the District activated the image-capturing features of TheftTrack 76 times, but there are nearly 3,100 students who were issued laptops in the proposed class. (*See* § I(A), *supra*; Investig. Rept. at 2, 52-60.)

Moreover, the circumstances of each activation varied. In fact, no other student was treated in the same or even a remotely similar manner as the proposed class representative, Mr. Robbins. (*See* § II(A), *supra*.) And, even within each of the small groups of students whose laptops were tracked for certain reasons, the documents evidencing those activations demonstrate that the circumstances surrounding each activation and deactivation – or, more importantly, the failure to deactivate that resulted in the capturing of webcam photographs of students and screenshots from their computers – were different. (*See* id.; *see also* Boni Decl. ¶ 7 ("Unlike Robbins, [the Wortley] Intervenors' children – like the overwhelming majority of LMSD high school students – do not possess laptops that were reported lost or stolen, nor did they borrow a laptop, improperly remove it from the school, or fail to pay insurance.").)

Accordingly, plaintiffs fail to demonstrate commonality.

3. Plaintiffs Are Not Adequate Class Representatives

Finally, plaintiffs cannot adequately represent the interests of the proposed class. To do so, there must not be any conflicts of interest between plaintiffs and the proposed class members. *See* Schering Plough, 589 F.3d at 602. Again ignoring their evidentiary burden under

[10] Pennsylvania has adopted the Second Restatement of Torts with respect to invasion of privacy claims. *See* Burger v. Blair Med. Assocs., Inc., 964 A.2d 374, 376-78 (Pa. 2009).

Hydrogen Peroxide, plaintiffs simply assert that they "have no interests antagonistic to those of the Equitable Class." (Pls. Mem. at 9.) The record suggests otherwise.

The Wortley Intervenors, backed by the support of ***more than 460*** parent members of the proposed class, moved to intervene in this action specifically on the grounds that plaintiffs cannot adequately represent their interests, and they now ***oppose class certification***. (*See* Letter from Neill W. Clark to Court, dated July 13, 2010 [Doc. No. 80] (seeking leave to file an *amicus* brief in opposition to class certification).) Indeed, one basis for their proposed intervention is their desire to avoid "protracted litigation" that will "increase litigation costs ultimately to be borne by the parents of LMSD high school[] [students] and other taxpayers of Lower Merion Township." (Wortley Intervention Compl. ¶ 9.) Notably, while the Wortley Intervenors seek injunctive relief, they propose to do so through an individual action, not a class action. (*See* Wortley Proposed Compl.) And, they have expressed dissatisfaction with the manner in which plaintiffs and their counsel have prosecuted this action. (*See* Letter from Counsel for Wortley Intervenors to Court, dated April 23, 2010, available at http://www.lmsdparents.org; *see also* April 20, 2010 Update to Parents at http://www.lmsdparents.org/Site/Welcome.html ("[O]ne of our aims is to see this case resolved with the least cost to the LMSD . . . .").)

Because the interests of plaintiffs and a large portion of the class diverge, plaintiffs cannot adequately represent the proposed class.

IV. CONCLUSION

Class certification is unnecessary, unwarranted, and would be counterproductive. For these and all the foregoing reasons, the Court should deny plaintiffs' motion and grant the District's cross-motion. The District respectfully requests oral argument on these motions, and if

the Court deems it appropriate to reach the elements of Rule 23(a), a hearing in accordance with the standards set forth in Hydrogen Peroxide.

Respectfully submitted,

Date: July 16, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused a true and correct copy of the foregoing Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification and Defendants' Cross-Motion for Entry of Permanent Equitable Relief to be served upon the below-listed counsel by the means indicated below:

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