

No. 21-2286

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

G.T., by his parents MICHELLE and JAMIE T., on behalf of himself and all similarly situated individuals; K.M., by his parents DANIELLE and STEVEN M., on behalf of themselves and all similarly situated individuals;

THE ARC OF WEST VIRGINIA,

Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,

Defendant-Appellant,

and

KANAWHA COUNTY SCHOOLS; RON DUERRING, Superintendent,
Kanawha County Schools, in his official capacity,

Defendants.

On Appeal from the United States District Court for the
Southern District of West Virginia, No. 2:20-cv-00057

Hon. Irene C. Berger

**BRIEF OF FORMER U.S. DEPARTMENT OF EDUCATION OFFICIALS
AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS-APPELLEES AND AFFIRMANCE**

AARON M. PANNER

GAVAN W. DUFFY GIDEON

MARK P. HIRSCHBOECK

ALEX P. TREIGER

KELLOGG, HANSEN, TODD,

FIGEL & FREDERICK, P.L.L.C.

1615 M Street, N.W., Suite 400

Washington, D.C. 20036

(202) 326-7900

apanner@kellogghansen.com

March 7, 2022

Counsel for Amici Curiae

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IDENTITY AND INTEREST OF *AMICI CURIAE*¹

Dr. Thomas Hehir is the Silvana and Christopher Pascucci Professor of Practice in Learning Differences at the Harvard Graduate School of Education. Dr. Hehir served as the Director of the U.S. Department of Education's Office of Special Education Programs from 1993 to 1999 under President William J. Clinton. Dr. Hehir has extensive experience implementing school district-level special education plans, serving as associate superintendent for Chicago Public Schools, where he was responsible for special education and student support services, and as director of special education for the Boston Public School system.

Dr. Robert Pasternack currently serves as the Chief Executive Officer for Ensenar Educational Services, Inc. providing consultation to school districts, state departments of education, and an array of companies serving students with disabilities across the country. Dr. Pasternack served as the Assistant Secretary for the Office of Special Education and Rehabilitative Services under President George W. Bush, and in that capacity worked on the 2004 Reauthorization of the Individuals with Disabilities Education Act. He served on the President's Commission on Excellence in Special Education; the President's Mental Health

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no counsel for a party authored this brief in whole or in part, and no party or party's counsel made a monetary contribution intended to fund its preparation or submission. No person other than *amici*, its members, and its counsel made a contribution intended to fund the preparation or submission of this brief.

Commission; and led the Federal Interagency Coordinating Committee during his tenure. During his 50 years in education, Dr. Pasternack has been a classroom teacher, Superintendent, and State Director of Special Education. As the guardian for his brother with Down syndrome, he has been an advocate for improving outcomes and results for students with disabilities and their families. Dr. Pasternack is a Nationally Certified School Psychologist, certified teacher, administrator, and educational diagnostician.

Dr. Alexa Posny has almost four decades of experience in education, from classroom teacher to Chief State School Officer to an Assistant Secretary in the U.S. Department of Education. Dr. Posny served as Assistant Secretary of the Office of Special Education and Rehabilitative Services in the U.S. Department of Education from 2009 to 2012 under President Barack Obama. In this position, she played a pivotal role in policy and management issues affecting special education and rehabilitative services across the country. She also served as the principal adviser to the U.S. Secretary of Education on all matters related to special education. Dr. Posny previously served as the Commissioner of Education for the Kansas State Department of Education (“KSDE”) (2007-2009), Director of the Office of Special Education Programs for the U.S. Department of Education (2006-2007) under President George W. Bush, Deputy Commissioner of Education at KSDE (2001-2006), State Director of Special Education at KSDE (1999-2001),

and the Director of Special Education for the Shawnee Mission School District in Overland Park, Kansas (1997-1999). Prior to that, she was the Director of the Curriculum and Instruction Specialty Option as part of the Title I Technical Assistance Center network across the United States and a Senior Research Associate at Research and Training Associates in Overland Park, Kansas. Dr. Posny has also served on the board of directors for the Chief State School Officers and the National Council for Learning Disabilities, and she chaired the National Assessment Governing Board's Special Education Task Force. Dr. Posny was most recently the Senior Vice President of State and Federal Programs for Renaissance Learning.

Madeleine Will served as the Assistant Secretary of the Office of Special Education and Rehabilitative Services under President Ronald Reagan. Ms. Will has more than 35 years of experience advocating for individuals with intellectual disabilities and their families and developing partnerships of parents and professionals involved in creating and expanding high-quality education and other opportunities for individuals with disabilities. Since her adult son, Jonathan, was born with Down syndrome, she has been involved in disability policy efforts at the local, state, and federal levels. Ms. Will founded the Collaboration to Promote Self-Determination, a network of national disability organizations pursuing modernization of services and supports for persons with intellectual and develop-

mental disabilities, so that they can become employed, live independently in an inclusive community, and rise out of poverty. She has also served as Vice President of the National Down Syndrome Society and Chair of the President's Committee for People with Intellectual Disabilities.

Michael Yudin served as both the Assistant Secretary of the Office of Special Education and Rehabilitative Services and the Acting Assistant Secretary of the Office of Elementary and Secondary Education under President Barack Obama. In these capacities, Mr. Yudin helped implement both the Individuals with Disabilities Education Act and the Elementary and Secondary Education Act of 1965, as amended. Prior to his work at the U.S. Department of Education, Mr. Yudin spent nine years in the United States Senate, where he worked for senior members of the Senate Health, Education, Labor, and Pensions Committee on education legislation, including the 2004 Reauthorization of IDEA and the No Child Left Behind Act of 2001. With more than 25 years of experience in the executive and legislative branches of the federal government, Mr. Yudin has dedicated his career to advocating on behalf of educationally disadvantaged students and individuals with disabilities.

Amici have devoted their professional lives to working for the interests of students with disabilities. In various capacities, they have been responsible for both enforcing and complying with the statutory rights and obligations enacted by

Congress for the benefit of students with disabilities and their families. Having been involved in the implementation of the federal statutes at issue in this case, and having led the U.S. Department of Education’s support of peer-reviewed research into effective approaches to educating students with disabilities, *amici* have a special interest in providing the Court with a perspective based on decades of practical experience.

INTRODUCTION

Part B of the Individuals with Disabilities Education Act (“IDEA”) requires school districts to support both the academic and behavioral needs of students with disabilities to ensure they receive a free appropriate public education in the least restrictive environment. Congress permanently authorized funding for Part B, underscoring its importance as a civil rights statute. Other federal statutes reinforce the IDEA’s mandate by requiring the integration of students with disabilities in the general education setting, with the goal of providing them opportunities to learn alongside their peers. Failing to take appropriate actions to avoid excluding students with disabilities from the classroom due to behavior that is a manifestation of their disability—whether through informal “send homes,” in-school and out-of-school suspension, or expulsion—is contrary to the goals of the IDEA.

Data collected by the U.S. Department of Education reveal that, at schools across the country and at Kanawha County Schools (“KCS”) in particular, students

with disabilities experience disciplinary removals at much higher rates than their peers. Decades of research confirms the harmful effects of punitive disciplinary practices, including lost educational opportunities and an increased risk of dropping out of school and becoming involved in the criminal justice system. Studies also indicate that high rates of disciplinary removals negatively affect school-wide academic achievement.

Amici write to highlight the availability of a concrete set of strategies that educational professionals agree help students who have behavioral challenges, thereby reducing the need to resort to disciplinary removals. Established research confirms *amici*'s experience that providing proactive, evidence-based behavioral supports results in improved academic and behavioral outcomes for students with disabilities. Such behavioral supports are most effective when implemented through school-wide and district-wide policies. Research has shown, for instance, that organizing behavioral supports through a school-wide multi-tiered system of supports leads to a reduction in disciplinary exclusions for all students, and students with disabilities in particular. Districts play a vital role in helping schools implement these behavioral supports with fidelity through quality monitoring, data collection, and teacher training.

ARGUMENT

I. Addressing the Educational Needs of Children with Disabilities That Manifest in Behavioral Problems Is Central to the Goals of the IDEA.

Concerns about students with behavioral disabilities—and the reality that disabilities can, in the absence of appropriate accommodations, manifest in behavioral problems—are deeply ingrained in the IDEA. In passing the Act, Congress found that public schools were failing to educate “millions of children with disabilities,” many of whom had been “excluded entirely from the public school system and from being educated with their peers.” 20 U.S.C. § 1400(c)(2)(B). Accordingly, Part B of the IDEA requires school districts to provide a “free appropriate public education” to students with disabilities, “including children with disabilities who have been suspended or expelled from school.” *Id.* § 1412(a)(1); *see id.* §§ 1401(3)(A)(i) (covered disabilities), 1413(a)(1) (local educational agency eligibility). A free appropriate public education consists of “special education and related services,” meaning both “specially designed instruction” and various “supportive services” as required for a student to benefit from that instruction. *Id.* §§ 1401(9), (26), (29).

Schools must provide a free appropriate public education in the “[l]east restrictive environment.” *Id.* § 1412(a)(5). That means a student with a disability must be included in a school’s general classes to “the maximum extent appropriate” using “supplementary aids and services.” *Id.* Consistent with the

IDEA’s status as a civil rights statute, Congress permanently authorized funding for Part B and declined to subject it to a sunset provision. *Id.* § 1411(i).

To provide a free appropriate public education, the IDEA requires school districts to formulate and implement an “individualized education program,” or “IEP,” for each eligible student. *Id.* §§ 1401(9), 1414(d). IEPs are developed by an “IEP Team” of teachers, district officials, and the student’s parents or guardians based on a “careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 999 (2017). The elements of an IEP vary, but, at a minimum, the document must contain “appropriately ambitious” goals and an educational plan “reasonably calculated” to help the student meet “challenging objectives.” *Id.* at 1000.

The IDEA also establishes general procedures for addressing the link between academic achievement and behavior. If a student’s behavior impedes their learning or the learning of others, the IEP Team must consider—and, when necessary, include in the IEP—“positive behavioral interventions and supports, and other strategies, to address that behavior.” 20 U.S.C. § 1414(d)(3)(B)(i); *see Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1029-30 (8th Cir. 2003) (school district failed to provide free appropriate public education by not addressing a student’s behavioral issues). Further, if a student experiences a series of

disciplinary removals that total more than ten school days, the IEP Team must determine whether the student's conduct "was caused by, or had a direct and substantial relationship to," the student's disability. 20 U.S.C.

§ 1415(k)(1)(E)(i)(I). If the IEP Team determines the behavior was a manifestation of the student's disability, then the school must "conduct a functional behavioral assessment, and implement a behavioral intervention plan," or modify any existing plan to address the behavior. *Id.* § 1415(k)(1)(F)(i).

The IDEA also requires school districts (1) to monitor IEPs for effectiveness, *id.* § 1414(d)(4)(A)(i)-(ii), and (2) to ensure that school personnel responsible for implementing the above procedures "are appropriately and adequately prepared and trained" to carry out the Act's mandates, *id.*

§ 1412(a)(14)(A).

Alongside the IDEA, other provisions of federal law provide additional, often overlapping protections for students with disabilities. Section 504 of the Rehabilitation Act bans discrimination against individuals with disabilities at institutions receiving federal funding. 29 U.S.C. § 794. Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, extends the same prohibition against discrimination to all state and local government services, programs, and activities (including public schools), regardless of their size or whether they receive any federal funding, *see id.* § 12132. Both statutes require reasonable

accommodations for individuals with disabilities. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017).

II. Students with Disabilities Are Disproportionately Subjected to Harmful Disciplinary Removals.

Despite the IDEA's requirement that schools attend to the behavioral needs of students with disabilities, data on school discipline show that students with disabilities are disproportionately suspended and expelled from school. Extensive research and practical experience also show that punitive school policies not only can have severe and life-long consequences for the affected student but also undermine academic success for students more broadly.

Data collected by the Department of Education make clear that students with disabilities are disciplined at greater rates than their peers without disabilities, both nationally and even more disproportionately at KCS. During the 2017-2018 school year, the most recent year for which data is available, students who received services under either the IDEA or Section 504 comprised 16% of the student population nationally, but made up 28% of students who incurred one or more suspensions and accounted for 25% of all expulsions.² At KCS, although students served under the IDEA comprised 17.7% of KCS's student body during the 2017-

² U.S. Dep't of Educ., Office of Civil Rights, *2017-18 State and National Estimations*, <https://bit.ly/3ChilQV> (last accessed Mar. 4, 2022).

2018 school year, they accounted for 33% of in-school suspensions, 35% of out-of-school suspensions, and 25% of expulsions.³ As the district court correctly recognized, the disparity in discipline at KCS is consistent with national trends regarding the use of disciplinary removals on students with disabilities. *See* J.A. 1564, 1580.

The detrimental consequences of disciplinary removals are also well documented. Decades of research demonstrates that disciplinary removals contribute to poor student outcomes. Students who are suspended lag behind their peers academically—often by multiple grade levels—and are more likely to repeat a grade.⁴ When a student is suspended, they become less invested in school.⁵

³ U.S. Dep’t of Educ., Office of Civil Rights, *Kanawha County Schools Discipline Report (Survey Year: 2017)*, <https://bit.ly/3MutFOo> (last accessed Mar. 4, 2022).

⁴ *See* Council of State Gov’ts Justice Ctr. & Pub. Pol’y Research Inst., *Breaking Schools’ Rules: A Statewide Study of How School Discipline Relates to Students’ Success and Juvenile Justice Involvement* 54-60 (July 2011) (“*Breaking Schools’ Rules*”) (in six-year longitudinal study, 31% of students who were suspended or expelled repeated at least one grade compared to only 5% of students with no discipline infractions), <https://bit.ly/35xbM0w>; Emily Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large, Multicultural School District*, 38 *Educ. & Urban Soc’y* 359 (May 2006) (in three-year cohort study, the suspended group fell five grade levels in reading behind the non-suspended group), <https://bit.ly/35su7vX>; *see also* Amity L. Noltemeyer et al., *Relationship Between School Suspension and Student Outcomes: A Meta-Analysis*, 44 *Sch. Psych. Rev.* 224 (2015), <https://bit.ly/3pIc3EL>.

⁵ *See* U.S. Comm’n on Civil Rights, *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for*

Perhaps for these reasons, being suspended often exacerbates problematic behavior, resulting in subsequent suspensions.⁶ By the same token, being suspended drastically reduces the likelihood of graduating from high school. One longitudinal study of nearly 200,000 students found that being suspended once in the ninth grade “considerably lowers the odds that a student will graduate from high school” and is “associated with a two-fold increase in the risk for dropping out.”⁷

Disciplinary removals also threaten the academic success of all students, even those who have never been suspended. Schools with high suspension rates score lower on key school climate indicators,⁸ and have lower proficiency rates in

Students of Color with Disabilities 9-10 (July 2019) (“*Beyond Suspensions*”), <https://bit.ly/3MlzcGZ>; Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?* 39 *Educ. Researcher* 59, 60 (2010), <https://bit.ly/3ttCejl>.

⁶ See Mi Youn Yang et al., *Predictors of Early Elementary School Suspension by Gender: A Longitudinal Multilevel Analysis*, 93 *Children & Youth Servs. Rev.* 331 (2018).

⁷ See Robert Balfanz et al., *Sent Home and Put Off-Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the Ninth Grade*, 5 *J. of Applied Research on Children: Informing Pol’y for Children at Risk* 1, 14 (2014), <https://bit.ly/3KfB0iK>; *Breaking Schools’ Rules*, *supra* note 4, at 56 (finding nearly 10% of students with at least one suspension or expulsion dropped out compared to 2% of students with no disciplinary infractions).

⁸ See *Beyond Suspensions*, *supra* note 5, at 33; Am. Psych. Ass’n, Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?* 63 *Am. Psych.* 852, 854 (Dec. 2008), <https://bit.ly/35QGBx5>.

reading and math, even after controlling for other factors, including demographics, school funding, and socioeconomic status.⁹ Researchers have found that high suspension rates are associated with lower reading and math scores among non-suspended students, indicating that disciplinary removals “can have a very negative effect on those so-called ‘good apples,’ or rule-abiding students.”¹⁰

Excluding students from the classroom also imposes broader social costs. Empirical research details how exclusionary disciplinary practices divert students from school to the criminal justice system, creating a “school-to-prison pipeline.”¹¹ The risk of incarceration is particularly acute for students with disabilities who are pushed out of school: nearly two-thirds of youth with emotional disabilities who

⁹ See Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 Am. Soc. Rev. 1067 (2014), <https://bit.ly/3CjOCH5>; M. Karega Rausch & Russell Skiba, Ctr. for Evaluation & Educ. Pol’y, *Unplanned Outcomes: Suspensions and Expulsions in Indiana* (2004), <https://bit.ly/3vFikVG>.

¹⁰ Jane Meredith Adams, *Study: Suspensions Harm ‘Well-Behaved’ Kids*, EdSource (Jan. 8, 2015), <https://bit.ly/3sNpkha>.

¹¹ See Andrew Bacher-Hicks et al., *The School to Prison Pipeline: Long-Run Impacts of School Suspensions on Adult Crime*, Nat’l Bureau of Econ. Research Working Paper No. 26257 (Sept. 2019) (finding association between exclusionary discipline policies, suspensions, and arrest), <https://bit.ly/3HTgsv6>; Kathryn C. Monahan et al., *From the School Yard to the Squad Car: School Discipline, Truancy, and Arrest*, 43 J. of Youth & Adolescence 1110 (2014) (finding students were twice as likely to be arrested during a month when they were suspended or expelled); see also *Beyond Suspensions*, *supra* note 5, at 37-42, 74 (collecting studies).

drop out are arrested within five years.¹² The economic toll of disciplinary removals is also profound. For instance, one study “conservative[ly]” estimated that disciplinary removals are to blame for roughly 67,000 dropouts in California and Florida each year, generating an estimated \$35 billion in social costs over those individuals’ lifetimes.¹³

III. Students with Disabilities Benefit From Behavioral Supports Implemented Pursuant to School-Wide and District-Wide Policies.

Amici’s research and experience confirms that proactive, evidence-based positive behavioral supports and interventions in lieu of suspensions, expulsions, and other informal removals improve both academic and behavioral outcomes.¹⁴

The IDEA requires schools to consider the use of such behavioral supports when a student’s behavior interferes with learning. 20 U.S.C. § 1414(d)(3)(B)(i). And a school *must* provide these services when they are necessary to provide a student

¹² See *Beyond Suspensions*, *supra* note 5, at 37.

¹³ Russell W. Rumberger & Daniel J. Losen, Ctr. for Civil Rights Remedies, *The High Cost of Harsh Discipline and Its Disparate Impact* 2 (June 2, 2016), <https://bit.ly/3vMP3Z9>; see U.S. Gov’t Accountability Office, *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities* 1-2 (Mar. 2018) (discussing financial impact of disciplinary removals), <https://bit.ly/35xFXVu>.

¹⁴ U.S. Dep’t of Educ., Office of Special Educ. & Rehab. Servs., *Dear Colleague Letter* (Aug. 1, 2016) (“*Dear Colleague Letter*”), <https://bit.ly/3Cg8Ql7>.

with the free appropriate public education guaranteed by the IDEA.¹⁵ Consistent with best practice in the field of ensuring that behavioral supports are evidence-based,¹⁶ the IDEA further requires that necessary supports and services be “based on peer-reviewed research to the extent practicable.” *See id.*

§ 1414(d)(1)(A)(i)(IV); *see also* 34 C.F.R. § 300.320(a)(4). As the Department of Education has explained in guidance clarifying schools’ obligations regarding such supports: “providing appropriate behavioral supports helps to ensure that children with disabilities are best able to access and benefit from instruction.”¹⁷

KCS suggests (at 19-20, 23-33) that the IDEA’s focus on the needs of individual students, including the question whether a given set of behavioral supports is adequate, is inconsistent with the requirements for class certification. The adequacy of an individual student’s behavioral supports, however, necessarily depends on the administration of district-wide policies and procedures for identifying students in need of behavioral supports, implementing those supports with fidelity, and monitoring students’ progress.

¹⁵ *Id.* at 1.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 2.

Established research and professional guidance recommend organizing and implementing behavior improvement interventions through a multi-tiered system of supports (“MTSS”)—a set of strategies and techniques proven to improve the academic achievement and behavior of all students, including students with disabilities.¹⁸ A multi-tiered framework rests on a continuum of supports: preventative behavioral instruction provided to all students (Tier 1); more targeted interventions for students who require additional support (Tier 2); and intensive and individualized support for students who demonstrate greatest need (Tier 3).¹⁹

Tier 1 behavioral supports, such as establishing clear, school-wide expectations and systematically tracking student behavior, benefit all students and serve as the foundation of a multi-tiered system.²⁰ At Tier 2, administrators, teachers, and behavioral specialists review school-wide data to identify those

¹⁸ See, e.g., U.S. Dep’t of Educ., *Supporting Child and Student Social, Emotional, Behavioral, and Mental Health Needs 23-24* (2021) (“*Supporting Child and Student*”), <https://bit.ly/3HIyNL3>; Nat’l Council on Disability, *The Segregation of Students with Disabilities* 42 (Feb. 7, 2018) (“*Segregation of Students with Disabilities*”), <https://bit.ly/3pJbXNb>; Council of Chief State Sch. Officers, *Ensuring an Equitable Opportunity: Providing a High-Quality Education for Students with Disabilities* 18-19 (2019) (“*Ensuring an Equitable Opportunity*”), <https://bit.ly/3K14DPP>.

¹⁹ See, e.g., *Supporting Child and Student*, *supra* note 18, at 23-24.

²⁰ Ctr. on Positive Behavioral Interventions & Supports, *What is Tier I Support?* <https://www.pbis.org/pbis/tier-1> (last accessed Mar. 4, 2022).

students with mild to moderate behavioral challenges. Research shows that these students benefit from intensified adult supervision and routine feedback, such as daily check-ins and one-on-one behavior coaching.²¹ Finally, for students with severe behavioral health needs, Tier 3 calls for the school to provide more intensive and individualized services. This may and often does entail performing a functional behavior assessment, a rigorous diagnostic protocol for identifying the root causes of specific challenging behaviors.²² “[S]ubstantial empirical evidence” supports the use and efficacy of functional behavior assessments and related interventions.²³

Organizing behavioral supports in a comprehensive, multi-tiered framework has been shown to improve academic and behavior outcomes for all students—and

²¹ Robert H. Horner et al., *Examining the Evidence Base for School-Wide Positive Behavior Support*, 42 *Focus on Exceptional Children* 1 (Apr. 2010), <https://bit.ly/3pC6NTh>.

²² Heidi von Ravensberg & Allison Blakely, Ctr. on Positive Behavioral Interventions & Supports, *When to Use Functional Behavior Assessment? Best Practice vs. Legal Guidance* (Oct. 2014), <https://bit.ly/3KoGJCP>.

²³ *Id.* at 3; see also Nicholas A. Gage et al., *Functional Behavioral Assessment-Based Interventions for Students with or At Risk for Emotional and/or Behavioral Disorders in School: A Hierarchical Linear Modeling Meta-Analysis*, 37 *Behav. Disorders* 55 (Feb. 2012) (meta-analysis finding “[functional behavior assessment]-based interventions reduced problem behavior by an average of 70.5%”), <https://bit.ly/3pH2ztx>.

for students with disabilities specifically.²⁴ Research relevant to the injury here—disciplinary exclusions—is particularly encouraging. Studies have found, for instance, that sound implementation of Positive Behavioral Interventions and Supports (“PBIS”)—a multi-tiered system of behavioral supports—leads to a reduction in disciplinary exclusions. One study compared 544 schools in California that were implementing Tier 1 of PBIS to 544 California schools that were never trained to implement PBIS.²⁵ Results showed that the schools implementing PBIS had fewer out-of-school suspensions and days missed due to such suspensions across all students, as well as fewer disciplinary removals of students with disabilities to alternative schools.²⁶ Other studies of PBIS found that it yielded similar benefits in Georgia, Florida, and Maryland.²⁷ And an analysis of

²⁴ See *Dear Colleague Letter*, *supra* note at 14, at 5; *Ensuring an Equitable Opportunity*, *supra* note 18, at 42; see also Ctr. on Multi-Tiered Sys. of Supports, *Special Education*, Am. Insts. for Research (noting students with disabilities “benefit from the positive MTSS outcomes found in numerous studies, including sustained academic performance, reduced behavior problems, reduced inappropriate referrals to special education, and improved graduation rates”), <https://bit.ly/34j2uVx> (last accessed Mar. 4, 2022).

²⁵ Nicolette M. Grasley-Boy et al., *Effect of SWPBIS on Disciplinary Exclusions for Students With and Without Disabilities*, 86 *Exceptional Children* 25 (2019).

²⁶ *Id.*

²⁷ See Elise T. Pas et al., *A State-Wide Quasi-Experimental Effectiveness Study of the Scale-up of School-wide Positive Behavioral Interventions and Supports*, 73 *J. of Sch. Psych.* 41 (2019) (Maryland); Nicholas A. Gage et al., *A*

national-level data showed that, among schools reporting that at least one student with a disability experienced either an out-of-school or in-school suspension, a smaller proportion of students with disabilities were suspended at schools implementing PBIS.²⁸

Consistent with this research, U.S. Department of Education guidance “strongly encourage[s],” as “a matter of best practice,” that schools “consider how the implementation of behavioral supports within the IEP could be facilitated through a school-wide, multi-tiered behavioral framework.”²⁹ As the Department has explained, the use of system-wide policies “facilitate[s] the provision of [free appropriate public education] by providing children with disabilities with the

Quasi-Experimental Design Analysis of the Effects of School-wide Positive Behavior Interventions and Supports on Discipline in Florida, 21 J. of Positive Behav. Interventions 50, 61 (2019) (Florida), <https://bit.ly/3sNsZMk>; Nicholas A. Gage et al., *The Impact of School-Wide Positive Behavior Interventions and Supports on School Suspensions: A Statewide Quasi-Experimental Analysis*, 20 J. of Positive Behav. Interventions 1 (2018) (Georgia), <https://bit.ly/3pGxh5Q>; see also Nicolette M. Grasley-Boy et al., *The Additive Effects of Implementing Advanced Tiers of SWPBIS With Fidelity on Disciplinary Exclusions*, J. of Positive Behav. (2021) (finding that schools in California implementing all three tiers with fidelity had lower rates of out-of-schools suspension than schools implementing only Tier 1).

²⁸ Ctr. on Positive Behavioral Intervention Supports, *Are Fewer Students with Disabilities Suspended When Schools Implement PBIS?* (Nov. 2021), <https://bit.ly/3IIKvXo>.

²⁹ See *Dear Colleague Letter*, *supra* note at 14, at 6.

behavioral supports they need to prevent, or bring an end to, disciplinary approaches that may unduly interfere with instruction and the implementation of IEPs.”³⁰

In order to achieve the positive benefits available through a multi-tiered systems of behavioral supports, districts and schools must implement such a framework with fidelity. School-wide monitoring programs help schools ensure that the behavioral supports, functional behavior assessments, and IEPs that they have developed are implemented as intended, so that students achieve the academic and behavioral goals that have been set for them.³¹ District-wide data collection and analysis systems similarly help ensure that schools are identifying students in need of the more individualized behavioral supports provided in a multi-tiered system and providing appropriate evidence-based interventions to

³⁰ *Id.* at 15.

³¹ U.S. Dep’t of Educ., Office of Special Educ. & Rehab. Servs., *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under the Individuals with Disabilities Education Act* 19 (Sept. 30, 2021) (“School personnel and IEP Teams are encouraged to use evidence-based decision-making to select, implement, and closely monitor the effectiveness of behavioral and academic intervention.”), <https://bit.ly/3vK7Zrw>; Ctr. on Positive Behavioral Intervention Supports, *Function-Based Support: An Overview* (Jan. 2022) (“An effective [behavior support] . . . [i]mplementation [p]rocess should include: monitor[ing] implementation fidelity and outcomes, adjust[ing] (e.g., modify, enhance, fade) support based on data.”), <https://bit.ly/3Mqxcgw>.

those students.³² And training teachers and support staff on an MTSS framework helps to ensure that students with disabilities receive the services and support mandated by federal law.³³ Research shows that training teachers on PBIS, for instance, has a “significant impact . . . on school-wide PBIS implementation fidelity,” and that schools trained on PBIS outperform non-trained schools in fidelity of PBIS implementation.³⁴ Through the adoption of a comprehensive data strategy and professional development, districts play an important role in ensuring schools are providing services proven to help students with disabilities thrive behaviorally and to reduce the use of exclusionary discipline practices. By declining to consider evidence-based approaches like these (and defaulting to a system of exclusionary discipline), a school district fails to satisfy its obligations under the IDEA.

³² See U.S. Dep’t of Educ., *supra* note 21, at 32-34; *Ensuring an Equitable Opportunity*, *supra* note 18.

³³ *Ensuring an Equitable Opportunity*, *supra* note 18, at 14.

³⁴ Catherine P. Bradshaw et al., *Implementation of School-Wide Positive Behavioral Interventions and Supports (PBIS) in Elementary Schools: Observations from a Randomized Trial*, 31 *Educ. & Treatment of Children* 1, 19 (2008), <https://bit.ly/3sIhC8e>.

CONCLUSION

This Court should affirm the district court's class certification order.

Respectfully submitted,

/s/ Aaron M. Panner

AARON M. PANNER

GAVAN W. DUFFY GIDEON

MARK P. HIRSCHBOECK

ALEX P. TREIGER

KELLOGG, HANSEN, TODD,

FIGEL & FREDERICK, P.L.L.C.

1615 M Street N.W., Suite 400

Washington, D.C. 20036

(202) 326-7900

apanner@kellogghansen.com

Counsel for Amici Curiae

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